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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: JUN 03 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), approved the employment-based visa petition, but later issued the petitioner a Notice of Intent to Revoke (NOIR) the petition's approval. In a Notice of Revocation (NOR), the Acting Director, Texas Service Center (acting director), ultimately invalidated the Form ETA 750, Application for Alien Employment Certification (labor certification) and revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked, and the labor certification will remain invalidated.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The acting director's realization that she approved the petition in error may constitute "good and sufficient cause" for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a distributor of hand-knotted, woolen rugs. It seeks to employ the beneficiary permanently in the United States as a product development manager pursuant to section 203(b)(3)(A) of the Act, § 1153(b)(3)(A). As required by statute, the petition was accompanied by a labor certification, approved by the United States Department of Labor (DOL).

In the NOR, the acting director concludes that the petitioner failed to establish that the offered position was clearly open to qualified U.S. workers. Accordingly, on April 4, 2011, she invalidated the labor certification and revoked the approval of the petition. The acting director also found that the beneficiary fraudulently misrepresented her employment experience and invalidated the labor certification on that ground, in addition to the first ground.

On appeal, counsel contends that there exists a *bona fide* job opportunity, that the petitioner acted in good faith during the labor certification proceedings, and that neither the petitioner nor the beneficiary misrepresented any material facts. Specifically, counsel states that the petitioner does intend to employ the beneficiary in the offered position of product development manager, that the beneficiary "only had a 50 percent ownership interest in [the petitioner] at the time the company's labor certification application was filed," that the beneficiary had no control over hiring decisions, and that any incorrect or conflicting "content" in the record was not material and/or the beneficiary otherwise qualified for the offered position regardless of any alleged misrepresentation.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> The burden remains with the petitioner in revocation proceedings to

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-

establish that the beneficiary qualifies for the benefit sought under the immigration laws. *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1987); *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968).

### ***Bona Fide Job Opportunity***

“If the alien or close family members have a substantial ownership interest in the sponsoring employer, the burden is on the employer to establish that employment of the alien is not tantamount to self-employment, and therefore a *per se* bar to labor certification.” *Matter of Modular Container Systems, Inc.*, 89-INA-228, 1991 WL 223955, \*6 (BALCA 1991), citing 20 C.F.R. § 656.50 (1990) (for labor certification purposes, “employment” means “permanent, full-time work by an employee for an employer other than oneself”).<sup>2</sup> Even if self-employment is not at issue, a petitioner must certify on the Form ETA 750A that “the job opportunity has been and is clearly open to any qualified U.S. worker” pursuant to the former regulation at 20 C.F.R. § 656.20(c)(8) (2004).

“[A]n employer seeking labor certification for an alien who has an ownership or other relationship with the employer must not merely engage in a recruitment effort and show that no qualified U.S. worker is available; it must also establish that it has a *bona fide* job opportunity open to qualified U.S. workers.” *Modular Container Systems*, 89-INA-228, at \*7; see also *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000) (a job offer may not be *bona fide* where the beneficiary is related to the petitioner by “blood,” finances, marriage or through friendship).

To determine whether a job is clearly open to U.S. workers, adjudicators must apply a “totality of the circumstances” test. *Modular Container Systems*, 89-INA-228, at \*8. Factors to consider include: whether the beneficiary is in a position to influence hiring decisions regarding the offered position; whether the beneficiary is related to the corporation’s directors, officers, or employees; whether the beneficiary has an ownership interest in the corporation; whether the beneficiary is involved in the corporation’s management; and whether the beneficiary is one of a small number of employees. *Id.*; see also 20 C.F.R. § 656.17(l) (2012) (applying many of the *Modular Container* factors to determine the *bona fides* of job opportunities in PERM applications).

A beneficiary’s ownership interest in the petitioning corporation is a material fact in determining whether the job was truly open to qualified applicants. *Matter of Silver Dragon Chinese Restaurant*,

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290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> Former DOL regulations govern the instant labor certification because the petitioner filed the certification request before the effective date of the current regulations for the Program Electronic Review Management system (popularly known as PERM). See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulations apply to labor certifications filed on or after March 28, 2005. The labor certification in the instant case was filed on June 20, 2003. The citations below are therefore to the DOL’s pre-PERM regulations, which were last published in 2004.

19 I&N Dec. 401, 403 (BIA 1986). The concealment of such a relationship in labor certification proceedings can constitute fraud or willful misrepresentation of a material fact, and serve as grounds for invalidation of the labor certification. *Id.*, at 403; *see also* 20 C.F.R. § 656.30(d) (2004) (U.S. Citizenship and Immigration Services (USCIS) may invalidate a labor certification upon its finding of “fraud or willful misrepresentation of a material fact involving the labor certification application”); section 204(b) of the Act, 8 U.S.C. § 1154(b) (USCIS has the authority to determine whether the facts stated in an employment-based, immigrant visa petition are “true”).

A material misrepresentation means a willful, material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). The term “willfully” means knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be material, the misrepresentation must be one which “tends to shut off a line of inquiry which is relevant to the alien’s eligibility, and which might well have resulted in a proper determination that [she] be excluded.” *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Therefore, in visa petition proceedings, a material misrepresentation requires USCIS to determine that: 1) the petitioner and/or beneficiary made a false representation to an authorized official of the United States government; 2) the misrepresentation was willfully made; and 3) the misrepresented fact was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

In contrast to a material misrepresentation, a finding of fraud requires a determination of a false representation of a material fact with knowledge of its falsity and with the intent to deceive a federal officer. Furthermore, the officer must have believed and acted upon the false representation. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956); *see also Ortiz-Bouchet v. U.S. Att’y. Gen.*, 24 Fla. L. Weekly Fed. C 233, 11<sup>th</sup> Cir., April 23, 2013, 2013 WL 1729412, at \*2 (deferring to the Board of Immigration Appeal’s definitions of the terms “fraud” and “material misrepresentation”).

In the instant case, the NOIR notified the petitioner that copies of its federal tax returns for 2001 and 2002, which it submitted in an H-1B work visa petition for the beneficiary’s sister, state that the beneficiary owned half of the petitioner’s stock in each of those years. The NOIR informed the petitioner that a beneficiary’s interest in a petitioner is a material fact to be considered and that concealment of this ownership interest would prevent the DOL from discharging its statutory duty. *See Matter of Silver Dragon*, 19 I&N Dec. at 403. In addition, the NOIR notified the petitioner that information on the beneficiary’s Form G-325A, Biographic Information, which she submitted with her application for adjustment of status, conflicted with information regarding her employment experience in the petitioner’s letter in support of the petition and on the labor certification.

The AAO finds that the director properly issued the NOIR regarding the *bona fides* of the job opportunity pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N at 450. Both cases hold that a notice of intent to revoke a petition’s approval is properly issued for good and sufficient cause when the evidence of record at the time of issuance, if not explained and

rebutted, would warrant the petition's denial based on the petitioner's failure to meet its burden of proof.

The petitioner's 2001 and 2002 tax returns suggested that the beneficiary owned half of the petitioner's stock when it filed the labor certification for her on June 20, 2003. The H-1B visa petition for the beneficiary's sister, which was approved for the period May 1, 2004 to May 1, 2007, suggested that the beneficiary also had a close relative who worked for the petitioner, a company with a small number of employees. If not explained and rebutted, the beneficiary's ownership interest in the petitioner and close family relationship to an employee made it unlikely that the petitioner would hire a qualified U.S. worker for the offered position and may have warranted invalidation of the labor certification for failure to demonstrate a *bona fide* job opportunity. See *Modular Container*, 89-INA-228, at \*7. Invalidation of the labor certification, in turn, would have warranted denial of the petition. See section 212(a)(5)(A)(i) of the Act; 8 U.S.C. § 1182(a)(5)(A)(i); 8 C.F.R. §§ 204.5(a)(2), (1)(3)(i) (requiring labor certifications to accompany most immigrant visa petitions for professional and skilled workers). The director therefore properly issued the NOIR.

The petitioner's response to the NOIR revealed additional ties of the beneficiary to the petitioner. A copy of a stock certificate, numbered "2," states that the beneficiary owned 500 shares of the petitioner's stock as of April 26, 2000 and transferred the shares to her father on April 26, 2004, after the filing of the labor certification for her on June 20, 2003. A copy of a "Joint Action of Shareholders by Written Consent," which the beneficiary signed on April 1, 1999, identifies her as a "shareholder," indicating that she owned shares in the petitioner even before the issuance of the April 26, 2000 stock certificate. Therefore, at the time of the labor certification's filing, the beneficiary was a shareholder of the petitioner, and had held this ownership interest for several years before the filing.

The record also shows that the beneficiary's father is the petitioner's current sole shareholder and that the beneficiary is its current president or chief executive officer. Additionally, documents in the record show that the petitioner, which indicated that it employs only 10 workers, also employs the beneficiary's sister. The family relationships among the beneficiary, her father and her sister are established by: copies of birth affidavits from the beneficiary's parents in her adjustment application; her identification of her parents on her adjustment application form; and information linked to the petitioner's website. See [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013).<sup>3</sup> According to information and articles on the petitioner's website, the beneficiary's father founded the rug business in India in 1978. The petitioner was established in the U.S. 20 years later. See [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013).

In a January 16, 2011 affidavit, the beneficiary's father states that he acquired half of the petitioner's stock on April 26, 2004. He states that the purported former president of the petitioner owned the

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<sup>3</sup> In the NOR, the acting director refers to the beneficiary as the petitioner's president, her sister as an H-1B beneficiary of it, and her father as its sole shareholder. The petitioner did not address these relationships on appeal, neither confirming nor denying them.

remaining half of the shares, which he claims that he acquired from the purported former president on September 8, 2005.<sup>4</sup> The record contains copies of stock certificates, but lacks copies of certified pages in a stock transfer ledger, proof of consideration exchanged for the shares, or other evidence to confirm the claimed share transfers. Despite these evidentiary deficiencies, the stock certificates in the record suggest that the beneficiary's father acquired sole ownership of the petitioner's shares on September 8, 2005, as the certificates show no shareholders, other than the beneficiary's father, after that date.

A copy of the petitioner's 2010 catalog identifies the beneficiary as the petitioner's president and contains a copy of her signature, which appears identical to her signature on the joint actions and on stock certificate "2." The signature on the petitioner's 2005 Georgia tax return, dated September 7, 2006, also appears identical to the beneficiary's signatures. The Georgia tax return also identifies the signer as the petitioner's president and states the beneficiary's email address. The petitioner's federal tax returns of 2005, 2006 and 2007 and its Georgia tax returns of 2006 and 2007 also contain signatures identical to the beneficiary's.

The beneficiary also appears to have signed the petitioner's December 17, 2010 lease of an office/warehouse building in [REDACTED] Georgia. The lease identifies her as both "President" of the petitioner and "Manager" of the building's owner, [REDACTED]. Online records of the Georgia Secretary of State's office identify the beneficiary as the registered agent of [REDACTED] which was established about three months before the lease's signing. See [http://\[REDACTED\]](http://[REDACTED]) (accessed May 3, 2013). Online records of the Georgia Secretary of State's office identify the beneficiary as the current registered agent, CEO, CFO and corporate secretary of the petitioner. See [http://\[REDACTED\]](http://[REDACTED]) (accessed May 3, 2013). In a May 13, 2010

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<sup>4</sup> A copy of a stock certificate, numbered "1," contradicts the statement of the beneficiary's father. The certificate shows that the purported former president owned 500 shares of the petitioner's stock as of April 22, 1998 and transferred them on September 8, 2005 to the petitioner, not to the beneficiary's father, as the father claims. The record also contains a copy of stock certificate "3," which states that the beneficiary's father owned 500 shares of the petitioner as of May 31, 2004, with no record of any later transfer of the shares. The record does not indicate whether the May 31, 2004 stock certificate refers to the shares that the beneficiary's father acquired from the beneficiary on April 26, 2004, or to an additional 500 outstanding shares. If the certificate represents additional shares, it would also contradict the statement of the beneficiary's father that he acquired the remaining half of the petitioner's shares on September 8, 2005, as he would have already held 1,000 shares when he allegedly acquired 500 shares from the purported former president on that date. See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). The record does not contain any competent evidence documenting the ownership of the petitioner during the relevant period of time, such as a stock ledger or other independently created evidence. *Id.*, at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

petition for the beneficiary in a different preference category, the petitioner identifies both her current and offered position as “President” and states that she worked in the position for the petitioner since January 2005.<sup>5</sup>

In addition, information linked to the petitioner’s website states that the beneficiary has served as chief executive officer of the petitioner since 2001. See [http://www. \[REDACTED\]](http://www. [REDACTED]) and [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013) (“In 2001, [the beneficiary], his eldest daughter, joined the business as CEO [REDACTED] after completing her Bachelor’s from [REDACTED] USA. Where, [the beneficiary’s sister], his second daughter held the seat of COO [REDACTED] in 2004.”)<sup>6</sup> Information on the petitioner’s website also indicates that a brother and two sisters of the beneficiary, including the previously mentioned H-1B beneficiary of the petitioner, serve as managers in the business. See [http://www \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013).

In light of *Modular Container*, the record establishes the beneficiary’s ownership interest in the petitioner at the time of the labor certification filing and her close family relationships with the petitioner’s owner. The record shows that the beneficiary owned half of the petitioner’s shares from April 2000 to April 2004, at the time of the labor certification’s filing, and held shares in the petitioner as early as 1999.<sup>7</sup> The record also shows that the beneficiary may have served as the petitioner’s president since as early as 2001 and now holds multiple officer positions in the corporation. In addition, the record shows that the beneficiary’s father founded the business in India before “opening” the U.S. operations in the form of the petitioner and has been the petitioner’s sole shareholder since September 8, 2005, before the October 19, 2006 filing of the petition. As noted above, public information published by the petitioner indicates that two sisters and a brother of the beneficiary also serve as managers in the business, either for the petitioner or for the petitioner’s parent company in India.

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<sup>5</sup> USCIS records show that the petitioner withdrew the other immigrant petition for the beneficiary after USCIS issued a notice of intent to deny, questioning inconsistencies between that petition and the instant one. “[T]he facts and circumstances surrounding” the withdrawn petition, however, remain “material” to this petition and other benefit requests. 8 C.F.R. § 103.2(b)(15).

<sup>6</sup> Other information on the petitioner’s website, however, suggests that the beneficiary’s sister may have served as the petitioner’s president since only 2005. See [http://www \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013) (“... since 2005, she has wheeled the company’s Atlanta-based U.S. headquarters ...”).

<sup>7</sup> Lines 14, Schedules L of the petitioner’s 2005 and 2006 federal tax returns state the names of the beneficiary and her sister in connection with “[o]ther assets.” The other assets associated with the beneficiary were valued at \$129,292 in 2005 and \$109,966 in 2006, while the other asserts linked to her sister were valued at \$1,000 in both years. In the NOR, the acting director mentions these assets when discussing possible evidence of consideration for the stock share transfers. The petitioner, however, did not address these reported assets on appeal. It is unclear whether they reflect past ownership interests of the beneficiary and her sister in the petitioner.

The record does not contain direct evidence that the beneficiary was in a position to influence hiring decisions for the offered position. However, the beneficiary's undisclosed ownership interest in the petitioner at the time of the labor certification filing, and her close family relationships with the petitioner's founder and sole shareholder, her father, and his three other children who are managers in the business raise substantial doubts about whether the offered position was truly open to qualified U.S. applicants. *See Modular Container*, 89-INA-228, at \*7; *see also Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The Board of Alien Labor Certification Appeals (BALCA) found that a *bona fide* job opportunity did not exist where the beneficiary and his wife together owned 49 percent of an employer's shares, held two of its three director positions, and comprised all of the officers of the corporation. *See Matter of Lignomat USA, Ltd.*, 88-INA-276, 1989 WL 250402 (BALCA 1989) (*en banc*). The beneficiary in the instant case held about the same percentage of shares as the beneficiary and his wife in *Lignomat* and, as in *Lignomat*, now holds all of the corporate officer positions of the petitioner.

Similarly, where a beneficiary's wife served as a director, chief financial officer and corporate secretary of an employer, the BALCA ruled that the job opportunity was not *bona fide*. *Matter of Young Seal of America*, 88-INA-121, 1989 WL 250362 (BALCA 1989). The family ties of the beneficiary to the petitioning corporation in the instant case appear stronger than the ties in *Young Seal*. While there was no evidence in *Young Seal* that the beneficiary's wife had an ownership interest in the employer, the beneficiary's father in the instant case is the sole shareholder of the petitioner and the beneficiary herself owned half of the petitioner's shares at the time of labor certification filing. Moreover, rather than having one close family tie to the employer like the beneficiary in *Young Seal*, the instant beneficiary has four close family ties to the petitioner's business: her father and three of her siblings.

Based on the beneficiary's undisclosed ownership interest in the petitioner at the time of labor certification filing, her close family ties to the petitioner's sole shareholder and three managers in the business, and the business's practice of employing its founder's children in high-level positions, the AAO finds that the petitioner has failed to establish that the job opportunity was truly open to qualified U.S. applicants.

Because the job opportunity in the instant case was not *bona fide*, the petitioner misrepresented a material fact when it certified on the Form ETA 750A that "the job opportunity has been and is clearly open to any qualified U.S. worker." *See* 20 C.F.R. § 656.20(c)(8) (2004).<sup>8</sup> The

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<sup>8</sup> The petitioner might have also committed a material misrepresentation by falsely stating the title of the beneficiary's immediate supervisor on the Form ETA 750A as "President." As previously indicated, information linked to the petitioner's website states that the beneficiary has served as the petitioner's president since 2001. *See* [http://www. \[REDACTED\]](http://www. [REDACTED]) and [http://www. \[REDACTED\]](http://www. [REDACTED]) (accessed May 3, 2013); *see also Silver Dragon*, 19 I&N

misrepresentation is willful because the petitioner is presumed to be aware and informed of the organization and staff of the enterprise. *See Silver Dragon*, 19 I&N Dec. at 404. Thus, when the purported former president of the petitioner signed the Form ETA 750A, he presumably knew that the beneficiary owned half of the petitioner's stock and was the daughter of the business's founder.

The misrepresentation is also material because it cut off a potential line of inquiry regarding the *bona fides* of the job opportunity. *See Matter of S & B-C*, 9 I&N Dec. at 447. Had the DOL known of the beneficiary's ownership interest and close family relationships with the petitioner, it would not likely have certified the labor application without further inquiry. *See Lignomat*, 88-INA-276; *Young Seal*, 88-INA-121.

On appeal, counsel asserts that the beneficiary, despite holding half of the petitioner's stock at the time of the labor certification filing, "did not maintain control over hiring decisions related to the Product Development Manager position and did not unilaterally manage the company." Counsel asserts that the purported former president of the petitioner "maintained exclusive authority with regard to hiring and firing decisions." As evidence, the petitioner submits copies of: shareholder joint actions from 1999 to 2004, authorizing the purported former president to manage the petitioner in those years as its president and chief executive officer; copies of the petitioner's 2003 and 2004 federal tax returns, signed by him; news articles identifying him as president and spokesman for the company; letters from two former employees stating that he was then responsible for all hiring and firing decisions of the petitioner; and a June 14, 2005 separation notice, purportedly showing that he terminated the beneficiary's employment with the petitioner because she was "no longer working in the best interests of [redacted] and "her actions are harmful to [redacted]

Evidence in the record, however, contradicts counsel's assertion that the purported former president of the petitioner controlled hiring decisions for the offered position. Evidence shows that the beneficiary continued working for the petitioner without interruption after her alleged termination on June 14, 2005. The beneficiary's initial Form G-325A of August 7, 2007, the petitioner's August 7, 2007 letter in support of her adjustment application, and information linked to the petitioner's website state that she has continuously worked for the petitioner since 2001. As previously indicated, the information linked to the petitioner's website also states that she has served as the petitioner's president since 2001. *See* [http://www.\[redacted\]](http://www.[redacted]) and [http://www.\[redacted\]](http://www.[redacted]) (accessed May 3, 2013). The beneficiary's amended Form G-325A of January 14, 2011 and the petitioner's letter in support of its (since withdrawn) multinational-executive petition of May 13, 2010 for the beneficiary state that, although the beneficiary worked as a manager at the parent company in India from June 2002 to December 2004, she worked continuously in the U.S. since January 2005. The inconsistencies regarding the alleged termination of the beneficiary casts doubt on whether the purported former president was authorized to make hiring decisions regarding the beneficiary's offered position as

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Dec. at 404 (a representation on the labor certification that the beneficiary is subject to supervision by the petitioner's president is an "obvious misrepresentation" when the beneficiary was in fact the petitioner's president). The AAO, however, does not find sufficient evidence to establish that the beneficiary served as the petitioner's president at the time of the labor certification filing.

counsel asserts. See *Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner has therefore not established that its purported former president, rather than the beneficiary, controlled hiring for the offered position.

Moreover, even assuming that the beneficiary did not make hiring decisions regarding the offered position at the time of the labor certification's filing, the beneficiary's influence over hiring for the job offered is but one factor in *Modular Container's* totality-of-the-circumstances test. Other factors – such as the petitioner's size, the beneficiary's ownership interest in the petitioner, and her familial relationships with the business's founder and managers – weigh heavily towards a finding that the job opportunity was not *bona fide*. See *Young Seal*, 88-INA-121 (job opportunity not *bona fide* where beneficiary's wife served as a director, CFO and corporate secretary of the petitioning corporation); *Lignomat*, 88-INA-276 (a *bona fide* job opportunity did not exist where the beneficiary and his wife together owned 49 percent of the petitioner's shares, held two of its three director positions, and comprised all of the officers of the petitioning corporation).

Counsel also argues that, unlike the current labor application form, ETA Form 9089, the Form ETA 750 that the petitioner filed for the beneficiary did not ask whether the beneficiary had an ownership interest in the petitioner. Because previous counsel did not instruct the beneficiary to declare whether she had an ownership interest in the petitioner, counsel asserts that the beneficiary “had absolutely no way of knowing that her ownership interest in [REDACTED] USA was of any relevance.”

Counsel is correct that Form ETA 750 did not specifically ask whether the beneficiary had an ownership interest in the petitioner. Cf. ETA Form 9089, Part C.9, <http://www.foreignlaborcert.doleta.gov/pdf/9089form.pdf> (accessed May 7, 2013). The AAO, however, finds that the petitioner, not the beneficiary, materially misrepresented the *bona fides* of the job opportunity on the labor certification. As discussed previously, by signing the Form ETA 750A, the petitioner certified, among other things, that “[t]he job opportunity has been and is clearly open to any qualified U.S. worker.” See Form ETA 750A, 23.h.; 20 C.F.R. 656.20(c)(8) (2004); see also *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (where the petitioner is owned by the person applying for a position, the job opportunity was not *bona fide*); *Matter of Silver Dragon*, 19 I&N Dec. at 403 (the concealment of an ownership interest in labor certification proceedings can constitute fraud or willful misrepresentation of a material fact, and serve as grounds for invalidation of the labor certification). Because the petitioner is presumed to know that the beneficiary owned half of its shares and was the daughter of the business's founder, the petitioner willfully misrepresented the *bona fides* of the job opportunity.

As set forth above, and pursuant to the former regulation at 20 C.F.R. § 656.31(d) (2004), the AAO finds that the petitioner misrepresented a material fact on the labor certification by certifying that the job opportunity was clearly open to qualified U.S. applicants. The acting director therefore properly invalidated the labor certification and revoked the petitioner's approval on that ground.

### **The Beneficiary's Qualifications for the Offered Position**

In the NOR, the acting director found that the beneficiary fraudulently misrepresented her employment history with the petitioner on the labor certification.

The petitioner must demonstrate that, as of the June 20, 2003 priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

As the labor certification states, the offered position requires a Bachelor of Science degree in business administration or a foreign degree equivalent, and two years of full-time experience in the job offered or as a product development supervisor.

The beneficiary claimed on the labor certification, which she signed on June 10, 2003, that she worked for the petitioner in "Product Development" beginning in September 2002. On her initial Form G-325A, Biographic Information, dated August 7, 2007, however, she states that she worked as "Vice President Product Development" for the petitioner beginning in August 2001. In addition, the petitioner's October 6, 2006 letter in support of the petition states that she worked for the petitioner since September 2002 in the offered position of "Product Development Manager."

The record clearly contains discrepancies in the beneficiary's employment history with the petitioner, as discussed in the NOIR and NOR. Counsel states, and the record supports, that the petitioner does not rely on the beneficiary's experience with it to demonstrate her qualifications for the offered position. The labor certification states that the beneficiary worked for [REDACTED] in [REDACTED], India as a product development supervisor from June 1995 to June 1997. With its petition, the petitioner provided a 2001 letter from [REDACTED] regarding the beneficiary's experience there. The acting director states in the NOR that she accepted the letter from [REDACTED] as proof of the beneficiary's employment experience for the offered position. In addition, the beneficiary obtained the purported experience with [REDACTED] before her earliest alleged start date with the petitioner in August 2001.

While the AAO finds that the discrepancies in the beneficiary's employment history with the petitioner, as listed by the beneficiary on the labor certification, may not constitute a material fact, the petitioner has not established the beneficiary's qualifications for the offered position.

The petitioner must support the beneficiary's claimed qualifying experience by submitting letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(I)(3)(ii)(A). The record contains a copy of an October 2, 2001 letter on [REDACTED] stationery, stating that the beneficiary worked as a product development supervisor there from June 1995 to June 1997 and describing her duties.

The letter from [REDACTED] does not establish that the beneficiary possessed the requisite employment experience for the offered position. Contrary to the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), the name and title of the person who signed the letter is either not included or illegible. Also, while this letter states her title as “Product Development Supervisor,” the duties stated<sup>10</sup> do not appear to relate to product development. The duties provided are vague, and are not consistent with the claimed experience the beneficiary described on the labor certification.

Moreover, the preponderance of the evidence shows that the beneficiary was born on [REDACTED],<sup>11</sup> indicating that she was 16 years old when she allegedly began working for [REDACTED] in June 1995. The labor certification states that the beneficiary worked 45 hours per week for [REDACTED]. The beneficiary does not identify any employment prior to [REDACTED] on the labor certification, nor is any prior employment discussed elsewhere in the record. The beneficiary’s youth and lack of prior experience cast doubts that the beneficiary began working 45 hours a week in a supervisory position at the age of 16 without prior experience or other documented qualifications for the position. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of its remaining evidence in support of the petition). The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *Id.* at 591-92.

Although the acting director accepted the letter from [REDACTED] as establishing the beneficiary’s qualifications for the offered position, the AAO finds the letter, without competent, objective evidence, insufficient to demonstrate that the beneficiary possessed the required experience set forth on the labor certification by the priority date. *See Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001) (the AAO is not bound to follow the contradictory decision of a service center). The petitioner has therefore failed to establish the beneficiary’s qualifications for the offered position.

The AAO may deny an application or petition that fails to comply with the technical requirements of the law even if the acting director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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<sup>9</sup> The AAO notes that a [REDACTED] operates at the same address as on the letterhead for [REDACTED]. See [http://\[REDACTED\]](http://[REDACTED]) (accessed May 17, 2013). It is unclear whether this is the same company that the beneficiary claims to have been her employer.

<sup>10</sup> The letter identifies the beneficiary’s purported duties as “working with various types of constructions, wool types, dyes and finishing methods, as per buyer’s specification for color, size, knot density, etc.”

<sup>11</sup> The beneficiary states her birth date as [REDACTED] in an amended Form G-325A. All other relevant forms and evidence in the record – including birth affidavits from her parents - state the beneficiary’s birth date as [REDACTED].

### **Intent to Employ the Beneficiary in the Offered Position**

Also beyond the decision of the acting director, the AAO finds that the petitioner failed to establish its intent to employ the beneficiary in the offered position.

An employer may petition for immigrant preference classification if it is “desiring and intending to employ within the United States an alien ...” section 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F). USCIS may deny a petition where the petitioner fails to demonstrate that it desires and intends to employ the beneficiary in accordance with the terms of the offered position set forth in the labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm’r 1966) (affirming denial of a petition where the petitioner failed to establish his intention to employ the beneficiary as a live-in maid as set forth in the labor certification).

In the instant case, the labor certification identifies the offered position as “Product Development Manager,” with the primary job duty of supervising “custom design/construction of antique & classic handmade Persian carpets & rugs to buyers’ specifications ...” The labor certification states that the petitioner’s “President” will serve as the beneficiary’s immediate supervisor and that the beneficiary will not supervise any employees. The DOL classified the offered position as “Industrial Engineer.”

As indicated previously, online Georgia state records, copies of the petitioner’s tax returns, lease, catalog, and information on its website indicate that the beneficiary is the petitioner’s president and holds three of its corporate officer positions. The DOL’s *Occupational Outlook Handbook* classifies presidents and chief executive officers (CEOs) as “Top Executives,” stating that they “provide overall direction for companies and organizations” by directing operations, formulating policies, and ensuring attainment of goals. *See* <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (accessed May 3, 2013). In its withdrawn petition of May 13, 2010, the petitioner stated that the beneficiary’s duties as its president included: planning and implementing sales, marketing, and product development programs; evaluating and developing strategic growth initiatives; and “direct supervision of professionals and other managerial employees.”

The record shows that the beneficiary’s current president or CEO position is a higher-level management position than the offered position of product development manager. Unlike the offered position, which did not involve supervising any employees, the position of president or CEO supervises other executives and managers. Also, rather than directing the activities of a single department or function of the petitioner in the offered position, the record shows that the beneficiary now directs the activities of various departments or functions. Thus, the petitioner’s employment of the beneficiary as president or CEO is a promotion from the offered position of product development manager to a more responsible position. Copies of the beneficiary’s W-2 forms from the petitioner also show that she earned more than double the annual proffered wage of the offered position. Because the record shows that the beneficiary’s current position entails more responsibilities and is a higher-level management position with the petitioner than the offered position, the AAO finds it unlikely that the petitioner intends to employ the beneficiary in the offered position.

Moreover, the labor certification states that the petitioner's "President" will supervise the offered position of product development manager. As the beneficiary now serves as the petitioner's president, she cannot serve in the offered position because she cannot supervise herself. As discussed above, conflicting evidence in the record of proceedings suggests the beneficiary may have served as the petitioner's president as early as 2001 or 2005, and owned 50 percent of the petitioner at the time the labor certification was filed. For the foregoing reasons, the AAO finds that the petitioner has not established that it intended, or now intends, to employ the beneficiary in the offered position as set forth on the labor certification.

### **Ability to Pay the Proffered Wage**

Also beyond the decision of the acting director, the petitioner has failed to establish its continuing ability to pay the proffered wage as of the petition's June 20, 2003 priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>12</sup> If the petitioner's net income or net current assets is insufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner provided copies of its Internal Revenue Service (IRS) Forms W-2 Tax and Wage Statements to the beneficiary from 2003 through 2009. The wage amounts on the W-2 forms equal or exceed the annual proffered wage of \$42,000 for each year, except 2005. The beneficiary's 2005 W-2 shows that the petitioner paid her \$39,250 that year, \$2,750 less than the annual proffered wage.

The petitioner's 2005 federal tax return shows that its net income and net current assets for 2005, when added to the wages paid to the beneficiary that year, were not equal or greater to the annual proffered wage.<sup>13</sup> The petitioner's net income for 2005, as shown on line 28 of its IRS Form 1120 U.S.

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<sup>12</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

<sup>13</sup> In the NOR, the acting director questions the reliability of the petitioner's 2005 federal income tax return, noting that the reported amount of total wages paid on the return is greater than the sum of the wage amounts shown on the petitioner's 2005 W-2 forms of its employees. Even assuming the

Corporation Income Tax Return, was \$(8,920).<sup>14</sup> The petitioner's 2005 tax return also shows a year-end net current asset amount of \$(351,310). Therefore, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage in 2005 based on an examination of the wages it paid the beneficiary, its net income, and its net current assets.

Like the petitioner in *Sonegawa*, the petitioner in the instant case has been in business for more than 10 years and has submitted evidence of its reputation in its industry. According to the petitioner's tax returns, the petitioner's gross revenues more than quadrupled from 2003 to 2007. Despite counsel's assertion on appeal that the petitioner's rapid growth has continued, the petitioner did not submit more recent evidence of its financial condition.

Unlike the petitioner in *Sonegawa*, however, the petitioner in the instant case has not identified any uncharacteristic business expenditures or losses that prevented it from otherwise demonstrating an ability to pay the beneficiary's proffered wage in 2005. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

#### **Area of Intended Employment**

Finally, the AAO notes that the petitioner appears to have changed the offered position's area of intended employment.

A labor certification remains valid only for the particular job opportunity and the "area of intended employment." 20 C.F.R. § 656.30(c)(2) (2004). The term "area of intended employment" means "within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.50 (2004). Worksites within the same Metropolitan Statistical Area are in the same area of intended employment. *Id.*

USCIS may invalidate an approved labor certification where the certification no longer remains valid pursuant to the former regulation at 20 C.F.R. § 656.30(c)(2). *See Matter of Sunoco Energy Development Company*, 17 I&N Dec. 283 (BIA 1979) (upholding the determination of the former Immigration and Naturalization Service that the petitioner's intention to employ the beneficiary at a project site outside the area of intended employment invalidated the labor certification); *see also Shen v. INS*, 749 F.2d 1469, 1473 (10<sup>th</sup> Cir.1984) (affirming determinations of the immigration judge and the Board of Immigration Appeals that the petitioner's relocation invalidated the labor certification).

In the instant case, the DOL approved the petitioner's labor certification for a worksite in Georgia. The evidence of record - including copies of the petitioner's leases - shows that, as of February 2006, the intended worksite of the offered position changed from Georgia to

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petitioner's 2005 tax return to be reliable, its financial information would not demonstrate the petitioner's ability to pay the beneficiary's proffered wage in 2005.

<sup>14</sup> Numbers in parentheses indicate negative amounts.

Georgia. The evidence also shows that the intended worksite further changed in February 2011 from [REDACTED] to [REDACTED], Georgia.

[REDACTED] is not in the same Metropolitan Statistical Area as [REDACTED] is about 75 miles northwest of the petitioner's intended worksite in [REDACTED], a distance that would take more than an hour by motor vehicle. It is unclear whether [REDACTED] is "within normal commuting distance" of [REDACTED]. In any further filings, the petitioner must submit evidence to establish that [REDACTED] is within normal commuting distance of [REDACTED] the area of intended employment that DOL certified.

### **Conclusion**

The AAO finds that the petitioner materially misrepresented the *bona fides* of the job opportunity on the labor certification. The acting director therefore properly invalidated the labor certification and revoked approval of the petition on that ground. Thus, the AAO dismisses the appeal.

In addition, the AAO finds that the petitioner failed to establish: an intent to employ the beneficiary in the offered position set forth on the labor certification; that the beneficiary possessed the required employment experience for the offered position; and its continuing ability to pay the proffered wage from the petition's priority date onward.

The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The petition's approval remains revoked. The labor certification remains invalidated.