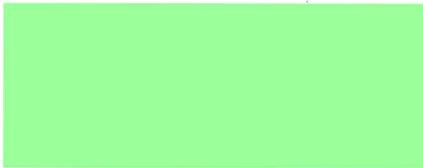


(b)(6)

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



DATE: JUN 05 2013

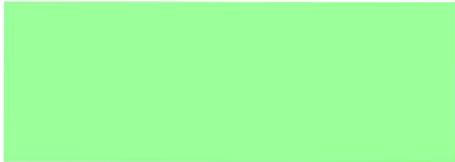
OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:



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 employment-based immigrant visa petition was approved by the Director, Vermont Service Center. The director subsequently revoked the approval of the petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal, found that the beneficiary and the petitioner made willful misrepresentations of material facts, and invalidated the Form ETA 750, Application for Alien Employment Certification. The petitioner filed the instant motion to reconsider the AAO's decision. The motion will be dismissed.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 26, 2001. See 8 C.F.R. § 204.5(d). The labor certification was originally filed on behalf of [REDACTED]. The petition, which was filed on November 4, 2002, requests the substitution of the beneficiary, [REDACTED] for Mr. [REDACTED].

The director initially approved the petition on November 4, 2003. On October 30, 2007, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. The facts supporting the issuance of the NOIR are as follows:

- The petitioner's owner is the brother of the beneficiary and owns [REDACTED] which sponsored the beneficiary for an E-2 visa. The petitioner's owner also owns [REDACTED] which sponsored two of his other brothers for lawful permanent residence. Therefore, the director concluded that a *bona fide* job offer did not appear to exist as the job opportunity was not open to U.S. workers.
- The labor certification was filed on April 26, 2001, but the petitioner was not incorporated until 2004. Therefore, the director stated that the labor certification "may have been obtained under false pretenses."
- The Federal Employer Identification Number (EIN) provided on the petition and 2001 federal tax return could not be found in a search for public records, raising questions about the validity of the tax return. Therefore, the director concluded that the evidence in the record is not sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date.

¹ The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (to be codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since the original beneficiary has not been issued lawful permanent residence based on the instant labor certification, the requested substitution was permitted by the director.

- The labor certification states that the offered position requires two years of experience as a cook. The record contains an employment experience letter dated July 24, 2000, stating that the beneficiary was employed as a head cook by [REDACTED] Pakistan from February 1992 until September 1998. The letter is on [REDACTED] letterhead and is signed by [REDACTED]. The director noted that the letter does not state the title of Mr. [REDACTED] and does not meet the regulatory requirements for an experience letter. In addition, the beneficiary's I-485, Application for Adjustment of Status, contains a letter pertaining to the beneficiary's claimed U.S. employment also signed by a [REDACTED]. This letter, dated June 28, 2006, states that the beneficiary has been employed as a cook by [REDACTED] in [REDACTED] Connecticut. The letter is on [REDACTED] Inc. letterhead. As is noted above, the owner of the petitioner also owns [REDACTED] Inc. Therefore, the employment experience letter signed by Mr. [REDACTED] attesting to the beneficiary's experience as a cook for [REDACTED] Pakistan was not considered sufficiently reliable evidence to establish the beneficiary's prior experience.

In light of these issues, the NOIR instructed the petitioner to submit the following evidence:

- Original records of the incorporation of the petitioner.
- IRS transcripts of the petitioner's tax returns for 2001, 2002, 2003, 2004, 2005, and 2006.
- IRS transcripts for the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for 2001, 2002, 2003, 2004, 2005, and 2006.
- Audited or reviewed financial statements for 2007.
- Bank statements for the petitioner for April 2001, December 2001, December 2002, December 2003, December 2004, December 2005, December 2006, and September 2007.
- IRS transcripts of the beneficiary's tax returns for 2001, 2002, 2003, 2004, 2005, and 2006.
- IRS transcripts for the beneficiary's Forms W-2 for 2001, 2002, 2003, 2004, 2005, and 2006.
- The beneficiary's original earnings statements for the most recent four pay periods.
- Evidence establishing that the beneficiary possessed two years of experience as a cook prior to the priority date.
- Evidence issued by the appropriate tax authority in Pakistan to corroborate the beneficiary's claimed employment.

The petitioner's response to the NOIR contained the following documents:

- A statement of the petitioner's owner, which is described in detail below.
- A copy of the petitioner's Articles of Organization.
- IRS transcripts of the petitioner's tax returns for 2001, 2002, 2003, 2004, 2005 and 2006.
- IRS transcripts for the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for 2001, 2002, 2003, 2004, 2005 and 2006.
- Compiled financial statement as of September 30, 2007, prepared by [REDACTED]
- Bank statements for the petitioner for April 2001, December 2001, December 2002, December 2003, December 2004, December 2005, December 2006, and September 2007.

- A copy of the petitioner's 2001 tax return dated February 26, 2002.
- A copy of the petitioner's amended 2001 tax return dated September 11, 2002. The cover letter to the NOIR response states that the amended return was prepared in response to an IRS audit.
- IRS transcripts for the beneficiary's tax returns with data for his Forms W-2 or Forms 1099-MISC for 2001, 2002, 2003, 2004, 2005 and 2006
- The beneficiary's original earnings statements for his last four pay periods. The cover letter to the NOIR response states that the beneficiary was not currently working for the petitioner.
- Employment experience letter by [REDACTED] Director, Human Resources of [REDACTED] India, dated January 12, 1996, stating that the company employed the beneficiary as a head cook from February 1992 to September 1995.
- Letter of [REDACTED] CPA, to the IRS, dated August 8, 2003, explaining the reason for the petitioner's revised 2002 tax return.
- Copies of Articles of Organization the petitioner claims was prepared by its previous accountant in 1997, but never filed with the Massachusetts Secretary of State.
- Letter of [REDACTED] dated April 28, 2004. The letter contains the Articles of Organization for a company unrelated to the petitioner, named [REDACTED]
- Recruitment conducted for the labor certification submitted with the instant petition.
- Original letter of [REDACTED] Taxation Officer, [REDACTED] stating that the requested payroll records for the beneficiary are "too old and we do not have any record for such document."

As is noted above, the NOIR stated that the petitioner was not organized as a corporation until 2004, which is after the filing of the labor certification and the instant petition. The petitioner's owner's statement submitted with the NOIR response states that he hired an accountant named [REDACTED] to prepare and file Articles of Organization, and the accountant faxed him a copy of the documents on October 2, 1997. A copy of the fax was submitted with the NOIR response. The petitioner's owner also states that the accountant obtained the company's EIN at that time, which the petitioner still uses today. Therefore, the petitioner's owner claims that he believed that the petitioner was properly organized in 1997. He also states that when he applied for another [REDACTED] franchise in 2004, the [REDACTED] franchise office requested a Certificate of Good Standing for the petitioner. It was during this process that the petitioner's owner claimed to have learned that his prior accountant did not file the Articles of Organization. The petitioner's owner claims that he then hired attorney [REDACTED] to file Articles of Organization for the petitioner, which was completed on August 27, 2004.

The petitioner's owner's statement also states that he sponsored the original beneficiary of the labor certification, Mr. [REDACTED] in good faith, and that he did not substitute his brother as a beneficiary until after Mr. [REDACTED] notified him "that he would pursue obtaining permanent residence through other means" as he was "no longer interested in the position."

In the Notice of Revocation (NOR), dated July 28, 2010, the director concluded that the petitioner established that it is an active business with an ability to pay the proffered wage since the priority date. In revoking the approval of the petition, however, the director concluded that there appears to be a pattern of the petitioner's owner favoring his family members with employment in his companies. The NOR further states that:

[U.S. Citizenship and Immigration Services (USCIS)] records do not establish that [the original beneficiary of the labor certification] ever entered the United States. For that reason it remains a possibility that the labor certification was never meant to be used by [the original beneficiary]. Rather, [his] name may have been used so that the Department of Labor wouldn't be able to examine the family relationship between you and the current beneficiary.

Even if there was no conscious attempt to circumvent review by the Department of Labor, the eventual substitution of [your brother as the beneficiary] appears to go against the spirit of the decisions made in Matter of Amger Corp. and Matter of Sunmart.

The director also concluded that the additional experience letter submitted in response to the NOIR was not sufficient to establish the beneficiary's prior employment experience as a cook. The director noted that the experience letter originally submitted with the petition was dated after the experience letter submitted in response to the NOIR, and concluded that, if the second experience letter existed when the petition was filed, it would have been submitted with the petition instead of the later letter. In addition, the director stated that the experience letter originally submitted with the petition appears to have been forged, and that the petitioner did not submit any other evidence other than the two experience letters to corroborate the beneficiary's claimed employment at the [redacted] in [redacted] Pakistan.

The petitioner appealed the director's revocation of the approval of the petition on August 11, 2010. The brief submitted in support of the appeal claimed that the evidence in the record establishes that there exists a *bona fide* job opportunity, and that the director's allegations to the contrary constitute "unsupported speculation and conjecture without a factual or legal basis." The brief also asserted that the Board of Alien Labor Certification Appeals (BALCA) cases cited by the director are not relevant to the instant case and do not provide a basis to revoke the approval of the petition. Counsel also asserted that the evidence in the record establishes that the beneficiary possessed the required two years of experience as a cook. Counsel stated that the director did not state why the original experience letter did not appear genuine or "appears to have been forged." Finally, counsel cited to *Matter of Estime*, 19 I&N Dec. 450 (BIA, 1987), *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990) as standing for the proposition that a NOR cannot be sustained if it is based on unsupported statements or unstated presumptions. Counsel concludes that the director did not have good and sufficient cause to revoke the approval of the petition.

In support of the appeal, counsel submitted:

- A copy of [REDACTED] passport with a B-2 visa stamp issued October 2, 1990 in [REDACTED] Pakistan, and a November 30, 1990 entry stamp as evidence of his admission into the U.S. in B-2 status.
- A copy of a check from [REDACTED] to attorney [REDACTED] on April 18, 2001 to retain the attorney for services relating to a labor certification filed by [REDACTED]
- Evidence of the recruitment performed during the labor certification process.
- Resubmitted letter of [REDACTED] Taxation Officer, [REDACTED] stating that the requested payroll records for the beneficiary are “too old and we do not have any record for such document.”

Therefore, the issues on appeal were whether there existed a *bona fide* job opportunity, and whether or not the beneficiary possessed the experience required to perform the proffered position. The AAO also considered whether the petitioner possessed the ability to pay the proffered wage from the priority date, and whether the petitioner and the beneficiary made willful misrepresentations of material facts relating to the petition and the labor certification.²

Section 205 of 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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On January 6, 2011, the AAO issued a Request for Evidence (RFE) instructing the petitioner to submit the following:

- Affidavit of the original beneficiary, [REDACTED] testifying that he pursued permanent residence through other means and explaining why he was no longer interested in the offered permanent position with the petitioner. The affidavit should specifically state the dates Mr. [REDACTED] was employed by the petitioner, the date he terminated his employment with the petitioner, and the date he communicated that he was no longer interested in the offered position. The affidavit should explain the other permanent residence means Mr. [REDACTED] pursued when he declined the position with the petitioner.
- Copies of the labor certifications and I-140 petitions the petitioner’s owner’s other companies filed on behalf of his two other brothers as well as a statement about whether any of the other two brothers were also substituted as beneficiaries on the labor certifications submitted with their petitions.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the 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), *aff’d*, 345 F.3d 683 (9th Cir. 2003).

- Statement of whether the relationship between the petitioner's owner and his other two brothers was disclosed to the DOL.
- Statement explaining when the beneficiary was employed by the petitioner, why the beneficiary is not currently employed by the petitioner, and confirming whether the petitioner intends to employ the beneficiary as a cook on a permanent basis at the petitioner's restaurant in ██████████ Massachusetts.
- Original versions of the letters prepared by Mr. ██████████
- Explanation of whether the Mr. ██████████ who prepared the experience letter for the petition, is the same Mr. ██████████ as the person who prepared the experience letter for the beneficiary's I-485 adjustment application. If so, explain how Mr. ██████████ could be the author of both experience letters with different employers. The explanation should provide a detailed description of Mr. ██████████ employment history from 1992 to the present.
- Explanation for why the earlier letter from ██████████ was not originally submitted with the petition.
- Documentary evidence establishing that Mr. ██████████ was employed by ██████████ in ██████████ Pakistan from February 1992 until September 1998.
- Any additional evidence corroborating the beneficiary's experience as a cook at the ██████████ ██████████ Pakistan from February 1992 until September 1998, including a letter from a current Human Resources manager confirming that the hotel's records indicate that the beneficiary and Mr. ██████████ were employed there during the specified period.
- If the petitioner's owner claims that he should *not* be treated as a sole proprietorship for 2001, 2002 and 2003, he should provide documentary evidence establishing why. Otherwise, the AAO's RFE instructed the petitioner's owner to provide the following additional evidence of his ability to pay the proffered wage:
 - Personal tax returns for 2001, 2002 and 2003.
 - A detailed list of monthly personal expenses (groceries, utilities, clothing, etc.) for 2001, 2002 and 2003, including payment for any personal debts (credit cards, car loans, mortgages, student loans, etc.).

The AAO's RFE provided 45 days to respond, and stated that failure to submit requested evidence that precludes a material line of inquiry would be grounds for dismissing the appeal.

The petitioner's RFE response included W-2 statements issued to the beneficiary by the petitioner for 2010, a letter from the petitioner's accountant stating that the petitioner is not a sole proprietorship, a statement from the petitioner's owner that Mr. ██████████ refused to submit the requested affidavit, a letter dated January 31, 2011 purportedly from ██████████ Director of Human Resources of the ██████████ Pakistan, and a letter from ██████████ ██████████ Pakistan, stating that the beneficiary was employed as a head cook from December 1989 to January 1992.³

³ It is noted that this claimed experience is not listed on the beneficiary's labor certification. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible). An experience letter from an employer not listed on the labor

Following the receipt of the RFE response, the AAO received the result of a USCIS investigation of the beneficiary's alleged former employers. The investigation makes the following findings:

- [REDACTED] now retired, has no recollection of the beneficiary being an employee of the Holiday Inn Lahore and stated that he did not sign an employment letter on behalf of the beneficiary.
- Two other individuals currently employed in the Human Resources Department were not aware of the beneficiary's claimed employment at [REDACTED]
- The current Manager of the Human Resources Department stated that there is no record of the beneficiary's employment at [REDACTED]
- Mr. [REDACTED] the treasurer and director of the petitioner, has been continuously residing in the United States since 1988. Therefore, he would not be in a position to sign an employment experience letter on [REDACTED] letterhead dated July 24, 2000 pertaining to the beneficiary's employment at the [REDACTED] beginning in 1992.
- The Acting Human Resources Manager of the [REDACTED] states that there is no record of the beneficiary's employment there as head cook from December 1989 to January 1992 as claimed on the experience letter submitted in response to the AAO RFE.

Accordingly, on August 9, 2011, the AAO issued a notice informing the petitioner of the derogatory information (NDI) pursuant to 8 C.F.R. § 103.2(b)(16).⁴

Based on this investigation and the other findings discussed above, the NDI stated that the petitioner and the beneficiary appeared to have knowingly and intentionally submitted false letters pertaining to the beneficiary's claimed employment in Pakistan at both the [REDACTED] and the [REDACTED] including the letter dated January 31, 2011 purportedly signed by [REDACTED]

The NDI stated that, unless the petitioner resolved these inconsistencies, the AAO intended to dismiss the appeal and make a finding of fraud or willful misrepresentation. The NDI explained that willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. In addition, the NDI stated that the AAO cannot conclude that the beneficiary possesses the required experience for the offered position if the letters submitted to

certification is not only less credible pursuant to *Matter of Leung*, but it also creates an inconsistency. The petitioner must resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁴ The regulation states, in part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered[.]

establish the claimed experience are fraudulent. The NDI gave the petitioner 30 days to respond to the derogatory information. The AAO also issued an NDI to the beneficiary.

The petitioner's response to the NDI contained:

- Affidavit of [REDACTED] dated September 9, 2011. The affidavit confirms his previous claimed dates of employment at the [REDACTED] and the [REDACTED] Pakistan. The affidavit also states that the author contacted [REDACTED] and they told him that no one from the U.S. government had contacted them about his employment with those companies.
- Affidavit of [REDACTED] dated August 30, 2011. The affidavit confirms the beneficiary's employment with [REDACTED] and testifies that the author had not been contacted by any U.S. government agency or any other person requesting information about the beneficiary's employment, and that the statements in the USCIS report are false.
- Affidavit of [REDACTED] Managing Director of the [REDACTED] dated August 29, 2011. The affidavit is on [REDACTED] letterhead and states that the beneficiary was employed by the hotel as a head cook from December 1989 to January 1992.

Bona Fide Job Opportunity

Under 20 C.F.R. §§ 656.10(c)(8), 656.17(l), and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for the position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (labor certification application denied for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

Since the instant petition involved the substitution of the original labor certification beneficiary, the petitioner did not disclose the relationship between the beneficiary and the petitioner to the DOL. The burden rests on the employer to provide evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Matter of Amger Corp.*, 87-INA-545.

The DOL applies a totality of circumstances test to ascertain a *bona fide* job offer with respect to the alien's inappropriate control over a job offer. The DOL considers multiple factors including whether the alien: (a) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual

job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. *See Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991)(*en banc*).⁵

The DOL's regulatory criteria and interpretive case law are informative about the circumstances under which the DOL denies or revokes approval of labor certification applications based on familial, social, or financial relationships. Critically, however, the regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by [USCIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Thus, USCIS properly examines the issue as well when documentation submitted for immigration benefits reveals familial, social, or financial relationships that may have impacted the *bona fide* nature of the job offer.

The petitioner failed to submit documents requested by the AAO in its RFE and NDI relating to the relationship between the beneficiary and the petitioner's owner. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for dismissing an appeal. *See* 8 C.F.R. § 103.2(b)(14). The AAO also concurred with the director that the petitioner failed to establish that the petition is supported by a *bona fide* job offer because the beneficiary is the brother of the owner of the petitioner, and based on the petitioner's owner's history of sponsoring his brothers for lawful permanent residence using employment-based visa petitions.

Ability to Pay the Proffered Wage

The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

⁵ The DOL later adopted the holding in *Modular Container's* through the regulation at 20 C.F.R. § 656.17(l), which states, in part:

Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a *bona fide* job opportunity.

to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

As is documented in the record, the petitioner was not incorporated until August 17, 2004. Therefore, it operated as a sole proprietorship from the April 26, 2001 priority date until the date of incorporation as a C corporation.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors must also show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner also failed to submit many documents requested by the AAO in its RFE relating to its ability to pay the proffered wage. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for dismissing an appeal. See 8 C.F.R. § 103.2(b)(14). Accordingly, the AAO concluded that the petitioner failed to establish its continuing ability to pay the proffered wage since the 2001 priority date.

Experience in the Job Offered and Misrepresentation of a Material Fact

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834. Even though the labor certification may be prepared with the alien in

mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION: None

TRAINING: None

EXPERIENCE: Two years in the job offered or in the related occupation of catering cook.

OTHER SPECIAL REQUIREMENTS: None

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B).

As is detailed above, the petitioner failed to submit documents requested by the AAO in its RFE and NDI. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. *See* 8 C.F.R. § 103.2(b)(14). Further, the AAO affirmed the director's conclusion that the experience letters pertaining to the beneficiary are not sufficient to establish that he possessed the required experience for the offered position as set forth on the labor certification.

Specifically, the petitioner submitted an employment experience letter dated July 24, 2000, stating that the beneficiary was employed as a head cook by [REDACTED] Pakistan from February 1992 until September 1998. The letter is on [REDACTED] letterhead and is signed by [REDACTED]. The beneficiary's I-485, Application for Adjustment of Status, also contains an employment experience letter signed by a [REDACTED]. This letter, dated June 28, 2006, states that the beneficiary has been employed as a cook by [REDACTED] in [REDACTED] Connecticut. The letter is on [REDACTED] letterhead. As is noted above, the owner of the petitioner also owns [REDACTED]. The USCIS investigation of the beneficiary's alleged former employers found Mr. [REDACTED] is the treasurer and director of the petitioner and has been continuously residing in the United States since 1988. Therefore, he would not be in a position to sign an employment experience letter on [REDACTED] letterhead dated July 24, 2000 pertaining to the beneficiary's employment at the [REDACTED] beginning in 1992. As is detailed above, the AAO RFE instructed the petitioner to provide information pertaining to Mr. [REDACTED]. The petitioner failed to provide the requested evidence. Accordingly, based on the evidence in the record, the AAO concluded that the experience letter provided by Mr. [REDACTED] was fraudulent.

The record also contains an employment experience letter from [REDACTED] Director, Human Resources of [REDACTED] India, dated January 12, 1996, stating that the company

employed the beneficiary as a head cook from February 1992 to September 1995. The AAO requested an explanation for why the earlier letter from [REDACTED] was not originally submitted with the petition since it predated the letter from Mr. [REDACTED]. No explanation was provided. The USCIS investigation of the beneficiary's alleged former employers states that [REDACTED] is retired and reports that he had no recollection of the beneficiary being an employee of the [REDACTED] and he did not sign an employment letter on behalf of the beneficiary. The petitioner's attempted rebuttal was an affidavit by an individual who claimed to be [REDACTED]. The response did not contain any independent, objective evidence of the beneficiary's claimed employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Therefore, considering the evidence in the record, the AAO also concluded that the letter of [REDACTED] was fraudulent.

The record also contains an employment experience letter from [REDACTED] of the [REDACTED] Pakistan, stating that the beneficiary was employed as a head cook from December 1989 to January 1992. This claimed experience is not listed on the beneficiary's labor certification. The USCIS report stated that the Acting Human Resources Manager of the [REDACTED] states that there is no record of the beneficiary's employment there as Head Cook from December 1989 to January 1992 as claimed on the experience letter submitted in response to the AAO RFE. The petitioner's attempted rebuttal of this finding was an affidavit by an individual who claimed to be Mr. [REDACTED] but did not contain any independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. Considering all of the evidence in the record, the AAO concluded that the letter of Mr. Ali was fraudulent.

Therefore, the AAO concluded that the petitioner failed to establish that the beneficiary possessed the required experience for the offered position because there were unresolved inconsistencies in the record and the letters submitted to establish the claimed experience were fraudulent.

In addition, an alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).⁶ If USCIS determines

⁶ The term "willfully" in the statute has been interpreted to mean "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) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary").

Materiality is determined based on the substantive law under which the purported misrepresentation

that there was fraud or willful misrepresentation involving a labor certification application, the application shall also be invalidated. *See* 20 C.F.R. § 656.31(d).⁷

Applying the materiality test of *Matter of S-- and B--C--*, 9 I&N Dec. at 447 to the facts of this case, on the true facts, the AAO concluded that the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the DOL issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. *See* 8 C.F.R. § 204.5(g) and

is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.17(i), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

⁷ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

(1)(3)(ii)(B). The AAO concluded that the beneficiary did not establish that he possessed the necessary experience in this case. On the true facts, the beneficiary was not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, the beneficiary's use of forged or falsified work experience documents shut off a line of relevant inquiry in these proceedings. Before the DOL, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(f). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). An employer may not require more experience or education of U.S. workers than the alien actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

The AAO determined that the DOL was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the AAO concluded that the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C*.

In summary, the AAO concluded that the petitioner and the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations. The beneficiary provided the documentation, and the petitioning company transmitted these documents to USCIS in support of its I-140 petition. As a result, the petitioner and the beneficiary are both culpable. These letters were submitted with the knowledge of their falsity, and the letters were material to the beneficiary's immigration proceedings as they were necessary to establish that he possessed the required experience for the offered position set forth on the labor certification.

In addition to making a determination that the petitioner and the beneficiary made a willful misrepresentation of a material fact involving the petition and the labor certification, the AAO also invalidated the labor certification pursuant to 20 C.F.R. § 656.30(d).

On July 17, 2012, the petitioner filed a motion to reconsider the AAO's decision. Counsel's brief in support of the motion makes the following claims:

- The petitioner was not required to notify the DOL that the substituted beneficiary on the labor certification was his brother, therefore the failure to advise the DOL of this fact does not constitute the willful misrepresentation of a material fact.
- The record contains sufficient evidence of the beneficiary's employment experience abroad to rebut the findings of the investigation report, and the failure to provide independent, objective evidence of the employment (such as payroll or tax records) should not lead to a conclusion that the beneficiary misrepresented his prior employment.

The record also contains an affidavit of the petitioner's owner, [REDACTED] dated July 11, 2012. Mr. [REDACTED] testifies that he was advised by prior counsel that he was not required to disclose to the DOL the fact that the substituted beneficiary was his brother. He also testifies that the company bears no responsibility for the experience letters submitted by the beneficiary.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In the instant case, the motion is not accompanied by any *pertinent* precedent decisions to establish that the decision was based on an incorrect application of law or policy. Since the motion to reconsider does not meet the requirements set forth at 8 C.F.R. § 103.5(a)(3), it must be dismissed.⁸

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider is dismissed and the prior decisions of the AAO and the director remain undisturbed.

⁸ Even if the AAO granted the motion, it would have affirmed its initial decision. The petitioner's claims on motion do not resolve the multiple inconsistencies in the record discussed in detail above that led to the finding that the petitioner and the beneficiary engaged in multiple willful misrepresentations of material facts. The AAO also rejects the petitioner's claim that it bears no responsibility for falsely representing its owner's brother's employment experience to the DOL and USCIS.