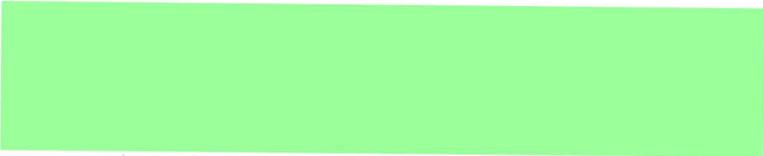
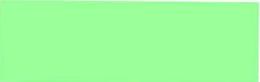


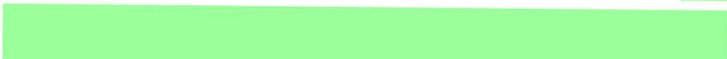


U.S. Citizenship  
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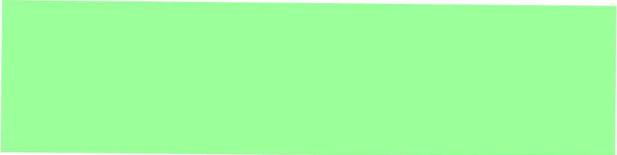
(b)(6)



DATE: JUN 26 2013 OFFICE: NEBRASKA 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,  


Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On July 27, 2007, United States Citizenship and Immigration Service (USCIS), Nebraska Service Center received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (director), on February 4, 2009. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status, Form I-485, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a notice of revocation (NOR), the director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 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).

The petitioner describes itself as a retailer of coffee, donuts and pastries. It seeks to permanently employ the beneficiary in the United States as a baker. The petition is accompanied by ETA Form 9089, Application for Permanent 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 24, 2006. *See* 8 C.F.R. § 204.5(d). 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).<sup>1</sup> As stated earlier, this petition was approved on July 27, 2007, by the Nebraska Service Center, but that approval was revoked on July 17, 2012. The director determined that the petitioner had not demonstrated that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed 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>2</sup> The burden remains with the petitioner in revocation proceedings

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

to 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).

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. See section 205 of the Ac; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

a) General. Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. 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, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR, dated October 28, 2011, the director wrote:

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which are incorporated into the regulations by 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).

On June 29, 2011, The USCIS conducted site visits and interviews concerning the petitioner. During the course of interviewing the beneficiary of this petition, the beneficiary stated that she worked at a [REDACTED] since July 2000. She also stated that she was the owner of the store and had been since July of 2000.

In addition, public records indicate that the beneficiary and the petitioner's owner, Surabh Patel, are co-owners of the beneficiary's residence. Further, USCIS records indicate that the petitioner's manager is the beneficiary's father.

The director's NOIR also notified the petitioner that the terms of the labor certification require two years of experience in the job offered, which must have been obtained before the priority date, April 24, 2006. The director notified the petitioner that the experience letter from [REDACTED] stated that the beneficiary had been employed with them from March 2000 through November 2003, and that this letter directly contradicted the statements made by the beneficiary to the USCIS' representative on June 29, 2011.

The director's NOIR notified the petitioner that the information in the record of proceeding raised questions as to whether the petition is based on a *bona fide* job offer, and whether a pre-existing relationship may have affected the labor certification process. The director notified the petitioner that pursuant to 20 C.F.R. §§ 656.20(c)(8), 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, and that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Further, 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).

The director specifically asked the petitioner to submit additional evidence to support the petition and in opposition to the intended revocation of the petition's approval.

The director's NOIR advised the petitioner that, in light of the above, it was hereby requested to submit verifiable documentary evidence that a *bona fide* job opportunity existed, and was open to qualified U.S. workers. The following information was requested:

1. Any and all Notice of Finding, as well as any other correspondence, issue to the petitioner by the DOL concerning the labor certification, and the familial relationship between the petitioner and the beneficiary.
2. Copies of the petitioner's recruitment documentation or evidence that no U.S. applicants for the position who possessed the same or similar qualifications as the beneficiary were disqualified from selection. Documentary evidence of the number of workers you had at the time of filing the labor certification, as well as the number of workers you currently employ. This evidence must include copies of your Employers Quarterly Federal Tax Form (Form-941) and State Unemployment Compensation Report Form (or comparable form for

your state) for each quarter from 2001 through 2005. These documents must be accompanied by the quarterly wage and withholding supplements which identifies all employees by name and social security number.

3. A complete description of the beneficiary's connections, financial or otherwise, to the petitioner, the petitioner's officers, directors, managers, incorporators, and any other business entity that may be connected to the petitioner in any form.
4. Copies of the petitioner's documents of incorporation, including the names of all incorporators, officers, and directors.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR, and gave the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director advised the petitioner that the record in this case raises questions as to whether the petition is based on a *bona fide* job offer, or whether a pre-existing financial or familial relationship may have affected the labor certification process. As noted above, the director also advised the petitioner that the record in this case raises questions as to whether the beneficiary possessed two years of experience in the job offered as of the priority date. The director's NOIR sufficiently detailed the evidence of the record, pointing out deficiencies in the petitioner's labor certification that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause. Specifically, in the NOIR, the director indicated that the petitioner did not demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity was available to U. S. workers, or that the beneficiary possessed the minimum experience required by the terms of the labor certification as of the priority date. Thus, the AAO finds that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet its burden of proof.

In the July 17, 2012, Notice of Revocation (NOR), the director found that the petitioner had not established that the beneficiary met the minimum requirements for the job offered at the time the request for certification was filed. The AAO agrees and finds that the record does not support the petitioner's contention that the beneficiary possessed the minimum experience required for the job opportunity as of the priority date. Further, while not addressed in the director's decision revoking the approval of the petition, the AAO will also review the record regarding whether the petitioner demonstrated that a valid employment relationship exists, and whether a pre-existing relationship with the beneficiary affected the job offer, and the labor certification process.

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

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. 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) (emphasis added). 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 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires 24 months of experience. The labor certification also states that the beneficiary qualifies for the offered position based on full-time experience as a baker with [REDACTED] from March 15, 2000 until November 30, 2003. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

At the time of the director’s NOIR, the record contained a notarized letter from the president<sup>3</sup> of Purohit Brothers, Inc., on company letterhead, notarized July 26, 2007. The letter states that the beneficiary was employed full-time by this company from March 2000 to November 2003 as a baker. The letter briefly describes the beneficiary’s job duties. However, as the director discussed in the NOIR and NOR, the beneficiary appears to have been employed by her own business during this time period, which casts doubt on her claimed full-time experience with [REDACTED]. In addition, transcripts in the record indicate that the beneficiary was enrolled at [REDACTED].

<sup>3</sup> While the letter bears a signature, it does not list the signatory’s name; the letter does identify the signatory by title, “president.” Therefore, this letter does not meet a requirement of 8 C.F.R. § 204.5(l)(3)(ii)(A).

beginning the Spring 1999 semester, and continuing to at least the Spring 2001 semester. It is unclear from the record whether she was enrolled as a full-time student for each semester, however, the transcript appears to indicate that the beneficiary was a full-time student for the majority of the semesters listed. Further, the record contains an affidavit from the beneficiary, dated November 26, 2011, stating that she worked “part time for my family business, subway store, as a part time administrator and book keeper between 2000 and 2003.” In another affidavit, dated August 31, 2012, the beneficiary asserts that she has owned the Subway brand business since 2000. The beneficiary’s purported part-time employment from 2000 to 2003, in addition to her full-time undergraduate studies from 1999 to 2001, cast doubt on her claimed full-time employment with Purohit Brothers, Inc. during that time period. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

The record also contains a notarized letter, dated July 15, 2007, from the president<sup>4</sup> of [REDACTED]. The letter states that the beneficiary was employed by this company full-time as a baker from January 1998 to September 1998. The letter briefly describes the beneficiary’s job duties. However, this purported experience is not listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B, lessens the credibility of the evidence and facts asserted. Further, the AAO notes that the labor certification indicates that the beneficiary was born in September 1980, and was attending high school in the United States until sometime in 1998. This casts doubt on whether the beneficiary was employed full-time as stated in this letter while she was less a minor, under 18 years of age, and purportedly attending high school. *Matter of Ho*, 19 I&N at 591. The record does include a 1998 Form W-2, Wage and Tax Statement, issued by [REDACTED] to the beneficiary, indicating wages paid in the amount of \$3,279.57; this wage amount does not appear to reflect full-time employment for an approximate nine-month period of employment, as asserted by the writer of the letter. Therefore, this casts additional doubt on the beneficiary’s claimed full-time employment. *Id.*

The record also contains a notarized letter, notarized July 26, 2007, from the president of [REDACTED] No 2. The letter states that the beneficiary was employed as a baker by this company full-time from October 1, 1998 to May 15, 1999. The letter briefly describes the beneficiary’s job duties. This experience also was not listed on the labor certification, casting doubt on the credibility of this claimed experience. *See Matter of Leung*, 16 I&N Dec. 2530. Further, according to transcripts in the record, the beneficiary was enrolled at [REDACTED] during the Spring and Summer semesters of 1999. The record does include a 1998 Form W-2, Wage and Tax Statement, issued by

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<sup>4</sup> While the letter bears a signature, it does not list the signatory’s name; the letter does identify the signatory by title, “president.” Therefore, this letter does not meet a requirement of 8 C.F.R. § 204.5(l)(3)(ii)(A).

No 2 to the beneficiary, indicating wages paid in the amount of \$1,763.25; this wage amount does not appear to reflect full-time employment for an approximate three-month period of employment, as asserted by the writer of the letter. This casts additional doubt on the beneficiary's claimed full-time employment. *Matter of Ho*, 19 I&N at 591.

As the director discussed in the NOIR, during the course of a site visit by a USCIS official on June 29, 2011, the beneficiary indicated that she has worked as a manager in her own establishment, a Subway store since January of 2000. Upon being asked to clarify employment information she indicated on the labor certification, the beneficiary then indicated that she worked at "approximately four or five years before."

A Form G-325A, signed by the beneficiary on July 24, 2007, under penalty of perjury, lists employment with the petitioner from April 2005 onward, and with [redacted] [sic] from March 2000 to November 2003. This form requests the beneficiary's employment for the "last five years." The form does not indicate the beneficiary's employment with her family [redacted] store.

The petitioner must provide objective evidence that overcomes the inconsistencies in the record. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, the petitioner submits an affidavit from the beneficiary dated August 31, 2012, indicating that she worked for Purohit Brothers, Inc. from March 2000 until November 2003, and also that she owned a "family" business since July 2000. As noted above, the beneficiary's previous affidavit indicated that she worked for her "family" business between 2000 and 2003 part-time as an administrator and bookkeeper. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. *See Matter of Ho*, 19 I&N at 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the beneficiary's statements are internally inconsistent, and these inconsistencies have not been adequately addressed with objective, independent evidence.

The petitioner submits several [redacted] training course certificates to address the inconsistencies stated. However, these certificates do not demonstrate that the beneficiary possessed the minimum 24 months of experience required under the terms of the job offer on the labor

certification, or confirm her employment; these certificates would only document that she may have received an undisclosed amount of training by the [REDACTED] Corporation.

Counsel for the petitioner explains that payroll evidence for the beneficiary's purported employment with [REDACTED] does not exist, and that the beneficiary was not registered as an employee with [REDACTED], because she "did not have any work authorization during said period." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as noted above, the beneficiary purportedly received Forms W-2 from two other franchise corporations operating under the Dunkin Donuts brand name in 1998 and 1999.

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 at 591-92.

The evidence in the record does not resolve the inconsistencies identified by the director in the NOIR and NOR. Therefore, the petitioner failed to demonstrate that the beneficiary qualifies for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The AAO affirms the director's decision to revoke the approval of the petition on the grounds that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

### ***Bona Fide Job Offer***

While not a stated basis for the revocation of the petition's approval, the director's NOIR set forth additional issues in this case, including: whether or not the petitioner obtained the approval of the petition through willful misrepresentation of material facts; and, whether or not there was a *bona fide* job offer.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the job offer was in fact *bona fide* as stated on the Form ETA 9089, and as certified by the DOL and submitted with the petition. Regarding the undisclosed relationship of the petitioner and the beneficiary, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the

time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>5</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>6</sup> In this case, the director and the AAO found that the petitioner failed to demonstrate that the certified job opportunity was "clearly

<sup>5</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>6</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

open to any qualified U.S. worker” as attested on Item 9 of Part C of the Form ETA 9089 because the petitioner is in a relationship with the beneficiary. Under 20 C.F.R. §§ 626.20(c)(8) 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 1987).

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Fundamentally, the job offer must be “clearly open to any qualified U.S. worker.” It is noted that 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).

Under 20 C.F.R. §§ 626.20(c)(8) 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 1987). Where the petitioner is owned by the person applying for the position, or a family member of the beneficiary, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, “the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” See 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the *bona fide* job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year. . .

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

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The INS, [now USCIS] therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

*Bulk Farms, Inc., v. Martin*, 963 F.2d 1286-1289 (1992).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS 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 a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.<sup>7</sup>

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a 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 intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.<sup>8</sup> The term "willfully" means knowing 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 considered 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 he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a

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<sup>7</sup> The current regulation provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

<sup>8</sup> In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented 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.

An occupational preference petition may be filed on behalf of a prospective employee who is the family member of a shareholder in the corporation. The prospective employee's relationship to the owner of the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. The concealment, in labor certification proceedings, of a familial relationship with the sole owner of the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the sole owner of the petitioning company may amount to the willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988) (materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect the official decision.") In the context of a visa petition, a misrepresented fact is material if the misrepresentation cuts off a line of inquiry which is relevant to the eligibility criteria and that inquiry might well have resulted in the denial of a visa petition. *See Matter of Ng*, 17 I&N Dec. at 537.

A misrepresentation is an assertion or manifestation that is not in accord with the true facts. A misrepresentation of a material fact may include but not be limited to such consequences as a denial of a visa petition, a decision rendering an alien inadmissible to the United States, and possible criminal prosecution. It is noted that section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182 provides that any "alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." An alien may be found inadmissible when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245((a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation 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 he be excluded. *Matter of S & B-C*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, in determining admissibility, the materiality test has three parts. First, if the record shows the alien is inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the relevant line of inquiry has been shut off, and then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Counsel indicates upon appeal, that the USCIS “accepted” the petitioner’s argument that the job offer was *bona fide* and was not influenced by any other factor because in the decision to revoke the approval of the petition the possible relationship between the petitioner’s officer and the beneficiary was not stated as a specific ground, although it was indicated in the NOIR. As previously stated 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>9</sup>

USCIS in its NOIR indicated that there was a question as to whether a familial or financial relationship existed between the petitioner and the beneficiary, which, therefore, required further evidence to demonstrate that a *bona fide* job opportunity existed for all available U.S. workers. Specifically, it was determined after site visits on June 29, 2011 by USCIS officials,<sup>10</sup> and a check of public records, that: the beneficiary and the petitioner owned a residential property together; the beneficiary worked at a [REDACTED] store, which she has owned since July of 2000; the beneficiary’s father may have managed the petitioner’s business entity where the job offer involved in the labor certification was located; and the address used in the petitioner’s business registration was the same residential address as that of the beneficiary.

The petitioner’s owner indicates in his response to the NOIR dated November 25, 2011, that he did not have an ownership interest in the petitioning entity until 2009, and therefore, could not misrepresent any relationship he had with the beneficiary at the time that the labor certification was filed. The petitioner submits a Stock Option Agreement, dated February 4, 2009, as evidence of this assertion. However, this Agreement under Section 15, Miscellaneous, states that “upon the full execution of this agreement the parties and [the beneficiary] of [REDACTED] shall execute a Mutual Release and Indemnification, a copy of which is attached hereto and made a part hereof as Exhibit A.” Exhibit A was not provided by the petitioner. It is unclear from the record why the beneficiary would be a party to a Stock Option Agreement, necessitating her releasing or indemnifying the petitioner’s shareholders; this suggests that the beneficiary may have an ownership interest or other interest providing influence or control over the petitioner.

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<sup>9</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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>10</sup> The USCIS official also visited the petitioner’s establishment for which the labor certification was filed. The official spoke with the petitioner’s controlling owner who indicated that the beneficiary currently worked full-time at the location, and has worked there for many years. This statement also contradicted all of the statements made to the USCIS official by the beneficiary on the same date regarding her employment history, during which she indicated she was not currently employed by the petitioner.

Further, the record contains a Bill of Sale, dated February 6, 2009, stating that three persons with the last name [REDACTED] 'do hereby sell, assign, transfer and set over unto [the beneficiary] of [REDACTED] all of the undersigned's right, title and interest in and to all assets, properties and other interests comprising that [REDACTED], and all capital stock of [REDACTED] owned + held by the undersigned.' The AAO notes that three individuals selling their assets in the business to the beneficiary appear to be the same individuals who owned the [REDACTED] location operated by [REDACTED] at which the beneficiary claims to have obtained her work experience. Two of the persons with the last name Purohit are also listed in various franchise agreements and corporate documents relating to the petitioner, indicating that they had ownership interests in the petitioner's [REDACTED]. This casts doubt on the petitioner's claim that there was no relationship between the beneficiary and the petitioner's shareholders and officers, as it appears that the beneficiary and the owners of the petitioner had various business dealings together. *See Matter of Ho*, 19 I&N at 591. This is supported by payroll information in the record, which indicates that while the beneficiary was not employed by the petitioner during the first three quarters of 2005, in the final quarter of 2005 she received \$40,000.00. No other individual employee listed on the Illinois wage report received similar compensation; the next highest amount of compensation listed is less than \$6,300. The large sum received by the beneficiary is not consistent with her purported employment as a baker at an hourly rate of \$11.00; rather, this sum suggests some financial or other relationship between the beneficiary and the petitioner. The AAO notes that the labor certification indicates that recruitment for the job opportunity began on October 30, 2005, which would have been during the final quarter of the calendar year, which ended December 31, 2005.

In addition, the petitioner's controlling owner was also listed as an employee of the petitioning entity, and possibly its highest ranking official, during the years prior to the labor certification on its Contribution and Wage Reports. The labor certification, filed April 24, 2006, lists the same individual as the petitioner's president as is listed on Form I-140; as this individual is the same person listed on the beneficiary's mortgage, it appears that this individual was the petitioner's highest officer as early as April 24, 2006. It therefore appears that even if the petitioner's original shareholders and officers were not directly related to the beneficiary, the individual who later purchased ownership of the entity had a relationship with the beneficiary, at the time of its purchase, and prior to filing the petition. 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). While the evidence in the record indicates that stock ownership and franchise control may have been changed in February 2009, the evidence in the record does not demonstrate that the petitioner's president did not hold the position of president prior to that time, and the evidence does not document when the petitioner's president acquired his stock. The petitioner did not provide copies of its stock certificates, or its stock ledger, or its corporate minutes indicating the dates of officers' appointments, to support its claims that its president did not previously hold an ownership interest.

In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228

(BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) and states in pertinent part:

(l) 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, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

- (1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;
- (2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;
- (3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and
- (4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.
- (5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

The petitioner has the burden of establishing that a bona fide job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361.

The AAO notes that the beneficiary is one of ten or fewer employees. Further, the AAO notes that the petitioner's highest ranking officer, its president, appears to have had at least a financial relationship with the beneficiary, as they hold a residential mortgage together, and appear to reside together. As discussed above, information pursuant to 20 C.F.R. § 656.17(l) was requested by the director in the NOIR.

The petitioner also submits a statement from the beneficiary's father indicating that he is working for the petitioner as a maintenance manager, but has no influence over hiring and firing of employees. However, no independent, objective evidence was submitted to support this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner further submits a statement from the beneficiary indicating that she asked the petitioner to be a co-signer on a mortgage because she did not have legal status, and they have no other connections to each other. However, public records maintained by the ( [REDACTED] ), Record of Deeds indicate that the beneficiary obtained three prior mortgages to the one held with the petitioner. See [REDACTED] (accessed June 10, 2013). Moreover, as earlier stated the petitioner's business registration lists the beneficiary's residence as its address of record. See [REDACTED] (accessed 06/10/2013). Therefore, the full nature of the relationship between the petitioner's prior shareholders, and the petitioner's current controlling owner, and the beneficiary cannot be determined based on the evidence provided in the record.

The petitioner was requested in the NOIR to offer detailed evidence regarding the relationship between petitioner and the beneficiary including the beneficiary's connections to the petitioner's officers, directors, managers, incorporators and any other business entity that may be connected to the petitioner in any form. The petitioner failed to submit sufficient evidence in accordance with this request. On appeal, the petitioner failed to document the nature of the relationship between the petitioner's controlling owner and the beneficiary. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). The petitioner submits a copy of an advertisement dated October 30, 2005, indicating that this was the recruitment effort conducted during the required period. However, in accordance with 20 C.F.R. § 656.1(a) in order to receive a properly certified labor certification the petitioner must engage in a legitimate certification process. The undisclosed relationship between the petitioner's controlling owner, and its prior shareholders, and the beneficiary calls into question the legitimacy of the efforts made by the petitioner during that process in demonstrating that there are no available American workers for the job offer. Further, the undisclosed relationship casts doubt on whether the petitioner put forth a good faith effort to recruit U.S. workers when the petitioner seeks to hire someone with whom they have a relationship. It is the burden of the petitioner to demonstrate that the job offer is in fact *bona fide*. The fact that the beneficiary and petitioner's owners held undisclosed relationships opens the door for further scrutiny as to whether the job opportunity was ever open for all qualified American workers.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The evidence submitted upon appeal does not overcome the doubt cast by the petitioner's failure to disclose this information.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N at 591-592.

The petitioner's misrepresentation as to the beneficiary's relationship to the petitioner's shareholders cut off a potential line of inquiry regarding the *bona fide* nature of the offer of employment. This is directly material as to whether the petitioner is an "employer" which "intends to employ" the beneficiary as required by section 204(a)(1)(F) of the Act, and is therefore material to whether the beneficiary is eligible for the benefit sought. *See Matter of S & B-C*, 9 I&N Dec. at 447.

### ***Applicability of AC21***

The petitioner also indicates in its response to the NOIR that the beneficiary could change her employer or work for her own business after 180 days that her Form I-485 Application to Register Permanent Residence was pending. However, the petitioner has not established that a *bona fide* job opportunity existed at the time of filing or as of the approval date. Counsel asserts on appeal that the petition is still approvable due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*<sup>11</sup> to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 shall remain valid with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a same or similar job. A plain reading of the phrase will remain valid suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain

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<sup>11</sup> The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer in a same or similar job position, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined approvable, then the adjustment application may be adjudicated under the terms of AC21. *See Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term remains valid was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification shall remain valid with respect to a new job if the individual changes jobs or employers. The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition must be valid to begin with if it is to “*remain valid with respect to a new job.*” Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, we are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).<sup>12</sup>

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Therefore, to be considered valid in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.<sup>13</sup>

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<sup>12</sup> We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

<sup>13</sup> Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at 1 (emphasis added). *Accord*

The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status. In *Herrera v. USCIS*, 571 F.3d 881 (9<sup>th</sup> Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

The petitioner has not established that there was a *bona fide* job opportunity at the time of filing. As the petitioner did not sufficiently demonstrate that a *bona fide* job offer existed, the Form I-140 petition would not be valid as of the date of its filing. Therefore, no AC21 issue exists in the instant case.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.

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*Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.