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

(b)(6)

U.S. Citizenship and Immigration Services

Date: MAY 2 1 2013 Office: TEXAS 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:

SELF-REPRESENTED

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: The Director, Texas Service Center (the director), revoked the approval of the immigrant petition on March 21, 2012, invalidated the labor certification and certified the decision to the Administrative Appeals Office (AAO). On August 6, 2012, the AAO affirmed the director's decision. After further assessment, the AAO reopened the proceeding on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) on February 15, 2013. Upon review, the approval of the petition will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).[1] As required by statute, a labor certification approved by the U.S. Department of Labor (DOL) accompanied the petition. The director initially approved the petition on September 18, 2003. On March 9, 2009, the director sent a Notice of Intent to Revoke (2009 NOIR) to which the petitioner submitted no response. On May 9, 2009, the director revoked the appeal. On January 10, 2011, the director *sua sponte* reopened the proceedings, withdrew the previous revocation and reinstated the approval of the Form I-140 petition.

On December 6, 2011, the director sent a second Notice of Intent to Revoke (2011 NOIR) to the petitioner. The director specifically indicated in the NOIR his concerns with the certified Form ETA 750, such as (a) the stamped number "[redacted]" at the upper right hand of the Form ETA 750 was covered by correction fluid and the number "[redacted]" was handwritten in its place; (b) the date on which the Form ETA 750 was received by the local office was covered by correction fluid and the date "6-25-01" was handwritten in the block; (c) the occupational title of the proffered job was covered and "cook" was inserted; and (d) the name of [redacted], Owner, on the Form ETA 750 was replaced by [redacted] Chef. The director asked the petitioner to submit evidence to resolve the inconsistencies noted and to establish that [redacted] was authorized to file the labor certification and the petition.

In the 2011 NOIR, the director also noted that the undated letter of employment from [redacted] restaurant where the beneficiary claimed to have obtained the prior experience for the proffered position, did not include a specific description of the experience or training received by the beneficiary in accordance with 8 C.F.R. § 204.5(g)(1) and did not establish the beneficiary's qualifications. The petitioner was instructed to submit, among other things, copies of the beneficiary's pay stubs, payroll records, tax documents, and financial statements to demonstrate that the beneficiary worked as a cook at [redacted] from 1986 to 1992 and a copy of a government issued identification card reflecting where the beneficiary worked and lived between 1986 and 1992.

In addition, the director's 2011 NOIR indicated that the petitioner had not established the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his

[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

lawful permanent residence status. The director noted that the petitioner established the ability to pay the proffered wage in 2001, but not in 2002 or thereafter until the beneficiary obtained his permanent residence. Moreover, the director specifically advised the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date.

The AAO notes that the 2011 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 unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

The petitioner did not respond to the 2011 NOIR. On March 21, 2012, the director revoked the approval of the petition, invalidated the labor certification, and certified the matter to the AAO pursuant to 8 C.F.R. § 103.4(a). In the Notice of Certification (NOC), the director concluded that it did not appear as if was authorized to represent the petitioner in the instant proceeding; that the beneficiary did not have the requisite work experience in the job offered as of the priority date; that the petitioner failed to establish its ability to pay the proffered wage from the priority date; and that the petitioner misrepresented a material fact involving the labor certification.

The AAO issued a decision dated August 6, 2012, noting that the petitioner was provided sufficient notice of good and sufficient cause in the 2011 NOIR of the reasons for revocation of the approval of the petition. Further, the AAO decision affirmed the director's decision to invalidate the labor certification based on willful misrepresentation. The AAO noted that the petitioner did not respond to the 2011 NOIR so that no independent, objective evidence was submitted to demonstrate that the labor certification and Form I-140 petition were signed by an authorized representative of the petitioner, to establish the beneficiary's qualifications for the position, or to resolve the noted inconsistencies in the record, such as correction fluid used on the labor certification. The AAO decision also held that the approval of the Form I-140 petition was revocable due to the petitioner not establishing its ability to pay the proffered wage from the priority date onwards.

On February 15, 2013, the AAO sent the petitioner a *Sua Sponte* Reopening and Request for Evidence (RFE) noting that a discrepancy existed in the dates that the beneficiary claimed to have worked for in Brazil as compared to the date the restaurant opened according to its website. The AAO noted that the statement by the beneficiary implying that was not able to confirm his prior employment there was inconsistent with its website stating that it had multiple locations and seemed to be thriving. The RFE also requested additional evidence concerning the date that the beneficiary ported to another employer pursuant to 204(j) of the Act because the evidence in the record indicated that the beneficiary ported prior to being eligible to do so. The petitioner did not respond to the AAO's RFE.

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As a threshold issue, concerning whether an authorized representative of the petitioner signed and filed the labor certification and Form I-140 petition, the AAO agrees with the director. The director noted that the signature which appears on the Form ETA 750 is for who bears a title of chef. The name and title over which correction fluid was placed on the Form ETA 750 was owner, whom the Commonwealth of Massachusetts Division of Corporations confirms as the owner and sole officer of the corporation in 2001 and onwards. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3[2] states:

> Employer means:
>
> (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

No evidence in the record indicates that was employed in a position or with a legal status that would authorize him to act for the petitioner in labor certification matters. The only officer and owner of the petitioning entity is No correspondence or other evidence was submitted by nor has he filed any authorization with the Massachusetts Secretary of the Commonwealth or any other authority indicating that was authorized to act on behalf of the petitioner. As a result, we are unable to conclude that the Form I-140 petition was filed by an authorized representative of the petitioner and the approval may not be reinstated for this reason.

Even if the signature on the labor certification were from an authorized representative of the petitioner, the labor certification Form ETA 750 contains modifications indicating that fraud or misrepresentations have occurred. As noted above, white correction fluid was applied to certain areas of the labor certification including the name and title of the signatory, as well as the stamped identification number that appears on each page and the priority date.

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[2] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to United States Citizenship and Immigration Services (USCIS) the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to eligibility for the requested immigration benefit, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[3]

A Form ETA 750 is subject to invalidation by USCIS if it is determined that a willful misrepresentation of a material fact was made in the labor certification application. See 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . 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."

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully

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[3] It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date 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). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discovers fraud or a material misrepresentation. In this case, the petitioner is being given notice of the proposed findings and is being presented with opportunity to respond to the same.

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."

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 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).

In this case, the modifications made to the Form ETA 750 labor certification include changing the identification number, the priority date, and the party authorizing the labor certification. It is noted that other places on the labor certification bear a stamp from DOL stating the correction was approved, however, the red stamp on the top of the page and the red ink indicating the received date for the Form ETA 750 are also apparent changes, but they bear no such stamp. As a result, it appears that information on the labor certification was modified without DOL having the opportunity to review the changes. Despite the director's 2011 NOIR requesting evidence concerning these modifications, as well as the previous AAO decision noting the issue and our 2013 RFE, the petitioner has not submitted any evidence demonstrating that DOL had an opportunity to consider the labor certification after the modifications were made. Specifically, the petitioner has not submitted any evidence to establish that DOL reviewed and certified the modifications made on the Form ETA 750 regarding the signature and title of the authorized representative of the petitioner, the stamped identification number that appears on each page, and the priority date, or date of filing of the labor certification. 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).

Moreover, the modifications on the labor certification indicate that the labor certification should be invalidated due to fraud or willful misrepresentation of a material fact. 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. at 447. Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the

(b)(6)

misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, 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.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The AAO finds that the modifications on the labor certification constitute fraud and willful misrepresentation of a material fact. Accordingly, we affirm the director's decision to invalidate the labor certification in this case.

Concerning the beneficiary's qualifications, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the two years of experience in the job offered as of the priority date. 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 beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by DOL on June 25, 2001. The name of the job title or the position for which the petitioner sought to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of dishes," and indicated on section 14 that an applicant must have, at a minimum, two years of experience in the job offered.

The beneficiary signed the Form ETA 750B on December 29, 2000 and represented that he worked 35 hours a week as a cook for a restaurant called in Sao Paulo, Brazil, from September 1986 to January 1992.[4] Along with the petition and the approved Form ETA 750 labor certification, the petitioner submitted a letter of employment verification from co-owner of [5] indicating that the beneficiary worked as a cook from September 1, 1986 to

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[4] We note that the beneficiary failed to note this experience on his Form G-325 that accompanied his Form I-485 Application for Permanent Residence or to Adjust Status despite there being a specific blank on the Form G-325 requesting this information.

[5] The translation of this letter that was provided by the petitioner erroneously states that was the co-owner of The director accordingly found that the evidence was inconsistent with respect to the identification of the beneficiary's Brazilian employer. The AAO notes that the original letter from states that she is the partner-owner of

January 31, 1992. Although the letter stated that the beneficiary worked as a cook, it did not specify the job duties as required by 8 C.F.R. § 204.5(l)(3)(ii)(B). As a result, the letter alone is insufficient to demonstrate that the beneficiary has the two years of experience required by the terms of the labor certification.

In addition, the AAO's RFE noted that the website, which is publicly available, stated that its first restaurant did not open until 1990. 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. at 591-92. The AAO RFE specifically requested additional independent, objective evidence to demonstrate that the beneficiary had the two years of experience required by the terms of the labor certification. The petitioner submitted no response. Because the restaurant did not open until four years after the date that the beneficiary claimed to have begun working there, the evidence submitted does not demonstrate that the beneficiary had the two years of experience required by the terms of the labor certification. The petition's approval will remain revoked on this basis as well.

The petitioner also submitted a July 25, 2005 letter from in Saugus, Massachusetts, stating that the beneficiary began working at that establishment as a fry cook on April 9, 2001. The beneficiary did not represent gaining employment experience at 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. In any event, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). As a result, at most, this letter establishes only two months of experience prior to the priority date and is insufficient to demonstrate that the beneficiary had the required two years of experience required by the labor certification.

Concerning the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *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 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.

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and thus, we withdraw the director's finding and the AAO's previous concerns in this regard.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As indicated above, the Form ETA 750 was accepted by the DOL for processing on June 25, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is $13.01 per hour or $23,678.20 per year (based on the indicated 35-hour work per week).[6] As stated in the director's decision and the previous AAO decision, the petitioner submitted evidence demonstrating its ability to pay the proffered wage in 2001. The petitioner submitted no evidence of its ability to pay the proffered wage from 2002 onwards, despite both the director and AAO specifically requesting annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's continuing ability to pay the proffered wage. No such evidence has been submitted. Therefore, we find that the petitioner has failed to demonstrate by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

As noted in the AAO's RFE, the beneficiary is no longer employed by the petitioner. On the Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, and the Form G-325 filed with the Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary indicated that he began working for [redacted] in March 2001. The Forms EOIR-42B and G-325 also indicated that the beneficiary continued working for the petitioner until 2007. We note that the IRS Form W-2 submitted verified that the beneficiary worked for the petitioner in a full-time capacity in 2001. The March 20, 2009 letter from [redacted], General Manager of [redacted] states that the beneficiary works as a full-time employee for that establishment although it did not state a commencement date for the beneficiary's employment. It is unclear how the beneficiary would have been able to be employed full-time simultaneously with two different restaurants as a cook. 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

[6] The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DoL Field Memo No. 48-94 (May 16, 1994).

unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Moreover, the evidence presented above is in conflict with the letter submitted from [redacted],[7] the petitioner's previous counsel, dated August 17, 2005, which states that the beneficiary ported to a new employer. With the letter, [redacted] submitted a letter dated July 25, 2005 from [redacted] General Manager of [redacted] which stated that the beneficiary began working in a full-time capacity for that restaurant on April 9, 2001. To the extent that the beneficiary claims to have ported to [redacted] in March 2001, according to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), an application for adjustment of status may 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.

If the beneficiary began his employment on April 9, 2001 with [redacted] he would have begun working for that restaurant almost three months prior to the filing of the Form ETA 750 on June 25, 2001, more than two years prior to the original approval of the Form I-140 on September 13, 2003, and almost two years prior to filing the Form I-485 application to adjust status. Thus, if the beneficiary ported or began new employment on April 9, 2001, prior even to the filing of the Form ETA 750, then he did not do so lawfully in accordance with AC21 and section 204(j) of the Act.

Furthermore, 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 the same or similar.[8] Section 106(c) states that the

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[7] The AAO notes that [redacted] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

[8] Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. The AAO 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. In a case pertaining to the revocation of an I-140 petition, 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. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). 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

underlying I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's application for adjustment of status took 180 days or more to process. Thus, 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 AAO concludes that is not the case here, as the underlying petition's approval has been revoked. *Herrera v. USCIS*, 571 F.3d at 881.

As stated in the AAO's 2013 RFE, 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 did not submit any evidence in response to the AAO's specific requests for evidence and/or information to resolve the issues stated above. As a result, the approval will remain revoked for this reason as well.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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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.