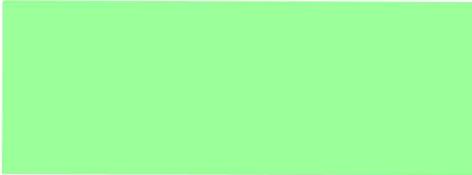


(b)(6)

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

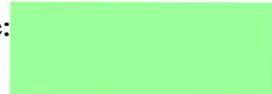


U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 31 2013** OFFICE: TEXAS SERVICE CENTER

File:

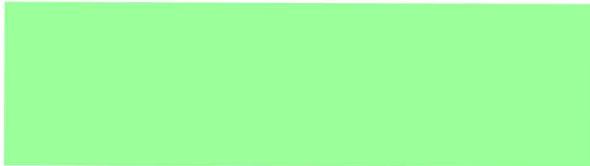


IN RE: Petitioner:  
Beneficiary:



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:



INSTRUCTIONS:

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

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

Thank you,

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

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition and the labor certification was invalidated. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on April 10, 2012, the AAO dismissed the appeal. The petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5(a)(3). The motion will be granted. However, the prior decision of the AAO, dated April 10, 2012, will be affirmed, and the petition will remain denied.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

The petitioner is a pizzeria and Italian food restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner did not reveal that its sole owner and officer had a familial relationship with the beneficiary and that the evidence submitted regarding the beneficiary's experience contained material discrepancies amounting to willful misrepresentation. The director denied the petition and invalidated the labor certification accordingly. Upon appeal the AAO affirmed the director's findings that: 1) the petitioner's job offer was not *bona fide* based on the undisclosed relationship with the beneficiary; 2) the petitioner willfully misrepresented a material fact; and, 3) the beneficiary willfully and knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Immigration and Nationality Act (the Act) and the implementing regulations.

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 of training or experience), not of a temporary nature, for which qualified workers were unavailable in the United States.

Upon motion, the issues counsel asks to be reconsidered are whether the AAO erred in its decision determining that: 1) the job offer to all available qualified American workers was not in fact *bona fide* in accordance with Section 203(b)(3)(A)(i) of the Act; 2) the petitioner willfully misrepresented material facts; and, 3) the beneficiary also knowingly misrepresented a material fact by submitting fraudulent documents regarding his work experience in an effort to procure an immigration benefit under the Act and its implementing regulations.

Regarding the undisclosed familial relationship of the petitioner's sole owner 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:

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<sup>1</sup> Form ETA 750, which was later invalidated by the director on January 17, 2008, lists the name of the petitioner as [REDACTED]. The petitioner has provided documentation indicating it operates under this assumed name.

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>2</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>3</sup> In this case, the director and the AAO found that the petitioner failed to demonstrate that the certified job opportunity was "clearly

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<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>3</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

open to any qualified U.S. worker” as attested on Item 22.h of Part A of the Form ETA 750 because the petitioner sole shareholder is related to the beneficiary by blood. 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 years. . .

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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 9<sup>th</sup> Cir.1983).

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).

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. . .

*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>4</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>5</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

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<sup>4</sup> The current regulation provides: 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>5</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).

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 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 amounts 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, 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 that the DOL should have known that the petitioner's sole owner and the beneficiary were related because they share an unusual family name. However, the burden to demonstrate that there is a *bona fide* employment offer remains with the petitioner in accordance with the section 212(a)(5)(A)(i) of the Act, and its supporting regulations. The failure to disclose the fact that the beneficiary was the sibling of the sole shareholder of the company at the time the labor certification was secured was a material misrepresentation which was willful because the officer, principal and sole owner of the company was presumed to be aware and informed of the organization and staff of the enterprise. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 at 403. Prior to this motion, the petitioner failed to offer sufficiently credible evidence that the job offer was clearly open to any available U.S. workers in accordance with the employer certifications made under section 23.h, on Form ETA 750.<sup>6</sup> The petitioner submits a copy of an advertisement dated April 27, 2001, 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.<sup>7</sup> The sibling relationship between the petitioner's sole owner 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, it is doubtful the petitioner would put forth a true effort to recruit U.S. workers when the petitioner seeks to hire a family member. Counsel also indicates that the DOL should have noted the family relationship based on the petitioner's sole shareholder and beneficiary holding the same family name. However, it is the burden of the petitioner to demonstrate that the job offer is in fact a *bona fide* one. The fact that the beneficiary and petitioner's sole owner hold a familial relationship opens the door for further scrutiny as to whether the job opportunity was ever open for all qualified American workers. Since this information was not offered into evidence until after questions regarding the relationship were raised by the director and after the AAO's prior decision on this ground for denial, there must be a determination made that the intent was to willfully misrepresent the *bona fides* of the job offer to U.S. government officials at the onset. And although this information was later offered by the petitioner, it was only submitted after the issue of the family connection between the beneficiary and petitioner's sole owner was raised by the Texas Service Center Director and the AAO.

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

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<sup>6</sup> The petitioner signed Form ETA 750 dated April 5, 2001 certifying all the information in the application was true and correct.

<sup>7</sup> The petitioner must demonstrate 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 the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed in accordance with Form ETA 750 part 22.

line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's notice of intent to deny, or in its appeal of the director's decision. *Id.* And even if submitted at that time, the evidence does not appear to overcome the doubt cast by failure to disclose this information. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion.

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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner's misrepresentation as to the beneficiary's relationship to the company's sole shareholder 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. Therefore, the AAO will affirm its previous finding that the petitioner willfully misrepresented a material fact.

With regard to the material misrepresentations regarding the beneficiary's employment experience as of the priority date on the Form ETA 750, counsel asserts that it was the mistake of a preparer who placed erroneous information on the Form ETA 750 after the petitioner and beneficiary signed an incomplete document.<sup>8</sup>

However, no reasonable explanation has been offered as to why the experience from [REDACTED] which was allegedly obtained from January 1996 to December 1996, or from [REDACTED] from February 1997 to May 1999 was not entered into the ETA Form 750, or offered during the entire labor certification process, if in fact this experience was obtained prior to the filing of the labor certification. The explanation that the sole employment which was entered during the labor certification process was done mistakenly although the beneficiary allegedly held the required experience from valid employment is not found to be a reasonable one with respect to the

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<sup>8</sup> Counsel indicates that the original Form ETA 750 was completed by a notary. However, there is no remedy for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. *See* 8 C.F.R. § 292.1. The AAO only considers complaints based upon the ineffective assistance of accredited representatives. *Cf. Matter of Lozada*, 19 I&N Dec. 637 (BIA 1986), *aff'd*, 857 F.2d. 10 (1<sup>st</sup> Cir. 1988) (requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel.) Here, the petitioner has not provided any evidence of a claim pursuant to *Lozada*.

petitioner's burden of proof. The petitioner must demonstrate with documentary evidence that, on the priority date, the beneficiary met all of the required education, training experience and special skills set forth on the labor certification, as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House* 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Statements regarding the beneficiary's experience submitted after the process about experience which was not indicated on the ETA Form 750 cannot be accorded the same weight as those submitted during the certification process. 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.

Counsel states that the petitioner's sole owner and beneficiary signed the Form ETA 750 prior to the original preparer filling in the additional information regarding the beneficiaries employment experience and were unaware that the wrong information was placed into the labor certification request. The fact that the petitioner's sole owner and the beneficiary may have signed a blank document in order to gain immigration benefits in no way absolves them from the responsibilities for any material misrepresentations made for this purpose. There has been no evidence presented that the signing of the Form ETA 750 by the petitioner's sole owner and the beneficiary was not done of their own accord, therefore any representations made within that document are also found to be willfully made. The beneficiary's disavowal of participation in willful misrepresentation cannot be sustained in light of his admission of willingly signing a blank document. Specifically, his failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not release him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6<sup>th</sup> Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11<sup>th</sup> Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5<sup>th</sup> Cir. 1993). To allow the beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a blank document would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

Therefore, the AAO will affirm its previous finding that the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in order to receive a benefit under the Act.

In addition, the petitioner has not established that the beneficiary possesses the minimum requirements for the position offered. 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 750, lessens the credibility of the evidence and facts asserted. Counsel

asserts that the AAO erred in relying on *Leung* in its decision on the appeal because they misapplied the holding in *Leung*. It must be stated that the AAO clearly indicated in its appeal dated April 10, 2012, that it considered the dicta in *Leung* as a persuasive argument for the premise that any information a beneficiary submits regarding employment experience allegedly received before the labor certification but offered after that process is completed, without a sufficiently reasonable explanation, must be assessed accordingly as to the facts it seeks to assert. In this case, the explanation as to why the employment information from the beneficiary was not submitted before the priority date was insufficient to overcome the findings of willful misrepresentation of material facts in order to receive immigration benefits.

In addition, the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N, at 591-592 (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)).

Moreover, the petitioner failed to present objective, independent evidence that that the beneficiary held the employment experience required as of the priority date. Employment not listed on the Form ETA 750 must simply be viewed as less credible. The petitioner in this case submitted insufficient objectively, credible evidence of the beneficiary's prior employment experience. The petitioner also failed to satisfactorily explain why this information was not submitted during the labor certification process. Thus, the AAO finds the petitioner has not established that the beneficiary was qualified to perform the job duties of the position in question as of the priority date. For this additional reason, the petition cannot be approved.

The AAO upon motion affirms its prior decision concurring with the director who found that a *bona fide* job offer did not exist, and found the labor certification invalid based on the willful misrepresentation of a material fact. The labor certification remains invalidated based on willful misrepresentation of a material fact. The AAO also affirms its decision that the beneficiary misrepresented a material fact, and that the petitioner has not established that the beneficiary possessed the minimum requirements for the position offered.

In view of the foregoing, the AAO concludes that the director properly invalidated the approval of the petition on this basis.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion is granted, the previous decision of the AAO is affirmed, the petition remains denied, and the labor certification remains invalidated.

**ORDER:** The motion to reopen the previous decision of the AAO is granted. The previous decision of the AAO dated April 1, 2012 will not be disturbed. The petition remains denied and the labor certification remains invalidated.