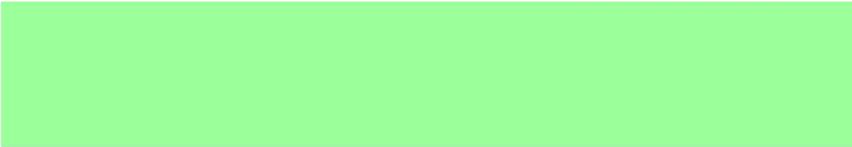




U.S. Citizenship  
and Immigration  
Services

(b)(6)



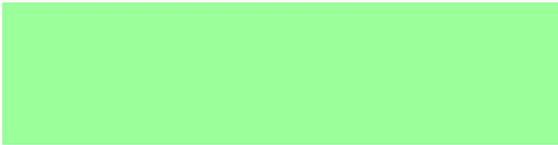
DATE: **OCT 21 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, Nebraska Service Center (the director). The director dismissed a subsequent motion to reopen and motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner<sup>1</sup> describes itself as a production, transportation and storage of industrial gas business. It seeks to permanently employ the beneficiary in the United States as a petroleum engineer. The petitioner requests classification of the beneficiary as a professional worker pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrant who hold baccalaureate degrees and are members of the professions. The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 4, 2011. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner committed material misrepresentation on the ETA Form 9089 because the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the director found that the business which filed the labor certification no longer existed on the priority date and the petitioning business had not established that it is a successor-in-interest to the entity that filed the labor certification. The director determined that the labor certification is invalid because it was filed by an entity that no longer existed at the time the labor certification was filed with the DOL. The director further found that the job offer was not *bona fide* because the job description did not appropriately describe the position available. Moreover, the director determined that the opening was not available to U.S. workers as the petitioner failed to disclose that the beneficiary was a limited partner in the petitioning business.

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

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel submits a brief and a letter regarding the beneficiary's job duties and the offered position of petroleum engineer.

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<sup>1</sup> The petitioner is [REDACTED] filed the the ETA Form 9089, Application for Permanent Employment Certification.

<sup>2</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).

The director issued a notice of intent to deny (NOID) on November 29, 2012, in which he noted, *inter alia*, that the labor certification was filed by [REDACTED], a business which no longer existed at the time of filing due to restructuring of the petitioner's business. The director also noted that the beneficiary had become a limited partner in the petitioning business prior to filing of the labor certification and Form I-140 immigrant petition and that the petitioner had failed to note this relationship at C.9 of the ETA Form 9089. The director noted that, while such a relationship to the petitioner is not an automatic disqualification, if the beneficiary's true relationship to the petitioner is not apparent in the labor certification it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. 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 director afforded the petitioner thirty days to offer additional evidence or argument in opposition to the proposed denial.

In response to the NOID, counsel submitted a letter contending, *inter alia*, that the petitioner did not commit fraud or misrepresentation because it did not conceal a relationship that should have been revealed under section C.9 of the ETA Form 9089 and that the labor certification represents a *bona fide* job offer. Counsel also contended that [REDACTED] is a successor-in-interest to [REDACTED] and that filing the labor certification under [REDACTED] was an unintentional error which occurred in the midst of the restructuring of the petitioner's businesses. In support of these contentions counsel submitted: (1) a letter from [REDACTED] (2) Delaware Department of State Corporation documents; (3) Amended and Restated limited liability company agreement for [REDACTED] (4) Fergus information on the beneficiary; and (5) copies of documentation already in the record.

The director found that, as contended by counsel, the evidence reflected that, effective July 27, 2011, the [REDACTED] converted [REDACTED] to a limited partnership, [REDACTED] and, at the same time amended and restated a partnership agreement with the general partner, [REDACTED] whereby all employees of [REDACTED] became employees of [REDACTED] providing services to [REDACTED]. The director found that the petitioner did not qualify as a successor-in-interest to the entity which filed the labor certification because the transfer of ownership did not occur after the filing of the original labor certification and the entity which filed the labor certification no longer existed after July 27, 2011. The director also found that the petitioner attempted to avoid disclosure that [REDACTED] no longer existed in an effort to conceal from the DOL the beneficiary's true relationship to the petitioner and that the omission was an act of misrepresentation of a material fact. The director also found that the available job opportunity of Vice President of New Markets/Vice President of Business Development was not the same as the proffered position stated on the labor certification of petroleum engineer. The director concluded that the petitioner had fraudulently or willfully misrepresented a material fact in that it failed to establish that a *bona fide* job opportunity was clearly open to U.S. workers and on that basis invalidated the labor certification.

On motion, counsel contended that the petitioner was forthcoming regarding its unintentional mistakes in filing the labor certification and that the inadvertent error on the labor certification did not prejudice U.S. workers and was otherwise harmless. Counsel also contended that the proffered position of petroleum engineer intentionally cast a wide net and that the beneficiary's core duties and knowledge

are those of a petroleum engineer, despite his various titles within the [REDACTED]. Finally, counsel contended that the petitioner had nothing to hide regarding the beneficiary's miniscule interest in the company and that such an omission could not rise to the level of fraud because it was not intentional and material to the benefit sought. In support of these contentions counsel submitted: (1) a letter from [REDACTED] (2) a letter from [REDACTED] (3) correspondence and contracts regarding the [REDACTED] (4) Statement of change or changing information registering [REDACTED] conversion; (5) a letter from [REDACTED] (6) copies of executive board resolutions and a paper regarding the beneficiary's job duties; and (7) a copy of United States Immigration and Citizenship Services (USCIS) memorandum.

On motion, the director found that, while USCIS guidance dictates allowances for succeeding businesses to petition for an alien worker providing the transfer occurred after the labor certification is accepted, the record clearly reflects that the conversion and transfer regarding the petitioner and the entity on the labor certification occurred prior to filing the labor certification in the instant case. The director also found that the proffered position is not the same as the position offered to the beneficiary. The director found that the petitioner's failure to note the beneficiary's interest in the company at section C.9 of the labor certification and his position as a Vice President of the company casts doubt on the legitimacy of the job offer. The evidence on motion did not overcome the director's finding of material misrepresentation or fraud.

On appeal, counsel contends that the director erred in finding fraud or willful misrepresentation in the instant labor certification. Counsel contends that the petitioner submitted substantial evidence that it did not knowingly or intentionally fail to disclose the change in corporate structure. Counsel contends that the petitioner was not required to disclose the beneficiary's *de minimus* interest in [REDACTED] and [REDACTED] and any error was immaterial and unintentional. Counsel contends that the beneficiary's position of petroleum engineer was accurately represented on the labor certification. Counsel contends that, if any misrepresentation occurred, the petitioner made a timely retraction of any inaccurate facts on the initial Form I-140 immigrant petition.

As a threshold issue, the petitioner has not established that it is possible for [REDACTED] to be a successor-in-interest to [REDACTED] regarding the instant labor certification. The record reflects that [REDACTED] was created as a Delaware limited liability company on July 26, 2011 and that [REDACTED] was converted to a limited partnership, [REDACTED] on July 27, 2011. [REDACTED] then became the general partner of [REDACTED] and all employees of [REDACTED] were transferred to [REDACTED] on July 27, 2011. *See* Delaware Certificate of Conversion; Amended and Restated Limited Liability Company Agreement for [REDACTED] and Amended and Restated Limited Partnership Agreement of [REDACTED]. The record reflects that each of these three entities are separate and distinct and have their own Federal Employer Identity Number (FEIN). A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Since [REDACTED] is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop*,

*Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

*Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>3</sup> *Id.* at 1569 (defining "successor"). When considering other business

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<sup>3</sup> Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell"

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.<sup>4</sup>

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>5</sup> *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership

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legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

<sup>4</sup> For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

<sup>5</sup> The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has failed to establish a valid successor relationship for immigration purposes because [REDACTED] the entity which filed the labor certification, no longer existed at the time the labor certification was filed. While the record reflects that the [REDACTED] continued to reference [REDACTED] in correspondence and contracts and did not register the conversions and amended partnerships with states outside of Delaware until after the filing of the labor certification, the fact remains that for all legal intents and purposes [REDACTED] no longer existed and could no longer offer permanent employment to any individual. As such, it is not possible for [REDACTED] to be [REDACTED]'s successor-in-interest because the transfer or ownership/restructuring of the company occurred prior to filing the labor certification.<sup>6</sup> As such, the labor certification did not represent a *bona fide* job offer.

The AAO concurs with the director regarding his conclusion that the petitioner failed to establish that there is a valid successor-in-interest to the entity that filed the labor certification and that a *bona fide* job offer did not exist.

The regulation at 20 C.F.R. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 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

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<sup>6</sup> Counsel submitted a copy of a memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations *Successor-in-interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*, in which it is noted that, for successor-in-interest purposes, the transfer of ownership may occur at any point after the approval of the original labor certification. HQ70/6.2 ADO9-37, August 6, 2009. In the instant case, the transfer of ownership occurred not only before the approval of the labor certification, but before the labor certification was even filed.

notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

In this case, the petitioner has failed to demonstrate that the certified job opportunity was "clearly open to any qualified U.S. worker" as attested to on the ETA Form 9089 because of the beneficiary's relationship to the labor certification entity and the petitioning business.

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner identified that it was an entity with 35 employees, and checked "no" to section C.9. 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.

Counsel contends that any error by the petitioner is purely unintentional and that it was not required to reveal the beneficiary's miniscule interest in the business because he has no control over the day to day operations or hiring and firing of employees. It is noted that the beneficiary did not have any ownership interest in [REDACTED], which filed the labor certification; however, under a Unanimous Written Consent of the Board of Director in Lieu of Meeting, the beneficiary was elected to serve as an officer of [REDACTED] in May 2011, specifically Vice President, Business Organization. While the beneficiary has a "miniscule" percentage of ownership interest in [REDACTED] and is a limited partner, he is one of only ten employees of the petitioner who have such an interest.<sup>7</sup> Further, [REDACTED] is the general partner of [REDACTED] and the beneficiary is one of the same ten employees of the petitioner who have a "miniscule" interest as a member of [REDACTED].<sup>8</sup> The petitioner's answer to Section C.9 of the Form 9089 is not the most pertinent issue in determining whether the petitioner has committed fraud or made a willful misrepresentation of a material fact. The AAO finds that the petitioner made a willful misrepresentation of a material fact regarding whether the job offer was *bona fide*. Specifically, the AAO finds that, despite the beneficiary's small interests in the entities and roles in day to day operations and hiring and firing, the record reflects that the beneficiary has been a part of these entities since [REDACTED]'s first foray into the U.S. market in 2006; he plays a managing role in the U.S. business despite his petroleum engineer core duties; and is so inseparable from the sponsoring employer because of his pervasive presence and personal attributes that the petitioner would be unlikely to continue in operation without the alien. *See Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991) (*en banc*). Certainly, the restructuring of the petitioner reflects that the beneficiary was irrevocably tied to the petitioner and that the beneficiary's position was never really open to qualified U.S. workers.

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>9</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 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*

<sup>7</sup> The beneficiary has a 0.14095% interest in [REDACTED]

<sup>8</sup> The beneficiary has a 0.14101% interest in [REDACTED]

<sup>9</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 and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

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.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has failed to establish through independent, objective evidence that the proffered job is not intrinsically tied to the beneficiary or that the job offer was ever a *bona fide* job offer open to all U.S. workers.

In the circumstances set forth in this case, failure to disclose the beneficiary's relationship to the petitioning company and that the job offer did not represent a *bona fide* offer 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.

The petitioner's misrepresentation as to the beneficiary's relationship with the petitioning entity cut off potential lines 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. As set forth above, and pursuant to 20 C.F.R. § 656.31(d), the AAO finds that the petitioner failed to demonstrate that a *bona*

*fide* job offer existed based on the undisclosed relationship between the beneficiary and the petitioner, which constituted willful misrepresentation of a material fact. The AAO concurs with the director who found the labor certification invalid based on the willful misrepresentation of a material fact and the labor certification remains invalidated based on willful misrepresentation of a material fact.

The director found that the petitioner failed to correctly identify the job opportunity on the labor certification because the job title and description of “petroleum engineer” does not accurately reflect the actual job title and duties associated with the job opportunity, which is an executive position in the company. On appeal, counsel contends that the labor certification required the “common name or payroll title of the job being offered” and that the title of “petroleum engineer” reflects the professional expertise, core duties and responsibilities for the proffered position. Counsel asserts that it is not uncommon to award corporate titles to senior-level employees who have achieved notable experience in their field, but the designation does not necessarily reflect the employee’s main responsibilities.

The labor certification describes the proffered position with the company as a “petroleum engineer” whose duties are:

Design and implement hydraulic stimulation treatments utilizing complex technologies and selective stimulation processes such as Frac-Through Snub/Coil. Provide technical business evaluations for locating and installing industrial gas plants to produce nitrogen and carbon dioxide. Be responsible for safe production, transportation, and storage of industrial gases. Confer with scientific, engineering, and technical personnel by presenting lectures about fracturing, acidizing, nitrogen and carbon dioxide. Less than 50 travel is required.

However, the job titles and duties, as reflected on the beneficiary’s resume and the petitioner’s website, indicate that the proffered position is much more executive in nature. The proffered position has been entitled vice president of business development, vice president of new markets and vice president business origination, as reflected in the various job titles listed for the beneficiary. The duties of the proffered position have been described on the petitioner’s website as maintaining and growing the petitioner’s customer base and exploring growth opportunities in new regional areas. Such a position entails a professional who directs and oversees a sales force for an organization, reporting directly to a top executive (president or chief executive officer) ensuring organizational growth and profitability by developing new strategies to attract new customers. While the beneficiary’s background as a petroleum engineer is helpful in meeting those objectives, the proffered position’s core duties are those of a petroleum engineer and not an executive. The petitioner inaccurately portrayed the job opportunity on the labor certification, as well as the beneficiary’s experience with the petitioner.

Beyond the decision of the director,<sup>10</sup> the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from

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<sup>10</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial

the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. While the record contains Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the beneficiary, those Forms W-2 were issued by entities other than the petitioner (Administaff and Insuperity PEO Services). The petitioner states that these entities provide payroll services on behalf of the petitioner, however, the record does not contain any independent, objective evidence 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 record before the director closed on December 31, 2012 with the receipt by the director of the petitioner’s submissions in response to the director’s NOID. As of that date, the petitioner’s 2011 federal income tax return was the most recent return available. However, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner in 2011. While the petitioner submitted consolidated financial statements for [REDACTED] in 2011, these financials do not reflect that they were audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. There is no accountant’s report that accompanied those financial statements which makes clear whether they were produced pursuant to a compilation or an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The petition will be denied 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

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decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The appeal is dismissed with a finding that the petitioner willfully misrepresented a material fact.

**FURTHER ORDER:** The AAO finds that the petitioner's job offer was not *bona fide* based on the beneficiary's undisclosed relationship with the petitioner, which constituted willful misrepresentation of a material fact underlying eligibility for a benefit sought under the immigration laws of the United States.

**FURTHER ORDER:** The alien employment certification, Form ETA 750, ETA case number A-1114-848, remains invalidated.