



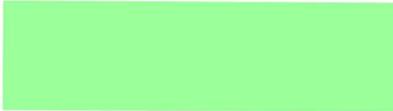
U.S. Citizenship
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Services

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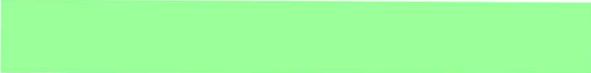


DATE: **JAN 03 2014**

OFFICE: NEBRASKA SERVICE CENTER

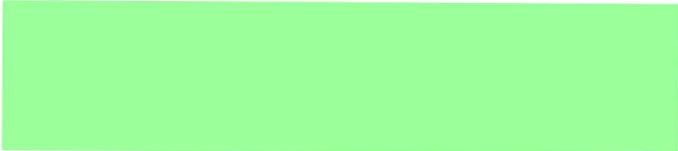


IN RE: Petitioner:
 Beneficiary:



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

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

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DISCUSSION: The Director, Nebraska Service Center (director), revoked the approval of the employment-based, immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and invalidated the accompanying labor certification. The matter is now before the AAO on the petitioner's motion to reopen and reconsider.¹ The motion will be granted, the appeal's dismissal will be affirmed, and the petition's approval will remain revoked.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]." The director's realization that a petition was approved in error may constitute good and sufficient cause to revoke the petition's approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner operates a travel agency. It seeks to permanently employ the beneficiary in the United States as a budget analyst. The petition requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).²

A Form ETA 750, Application for Permanent Labor Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date that an office in the DOL's employment service system accepted the labor certification for processing, is April 16, 2001. *See* 8 C.F.R. § 204.5(d).

The Immigration and Naturalization Service (the Service), the precursor agency to U.S. Citizenship and Immigration Services (USCIS), initially approved the petition on January 31, 2002. However, the director revoked the petition's approval on December 28, 2009, finding that the petitioner failed to demonstrate its ability to pay the beneficiary's proffered wage in 2001 and 2002.

On August 15, 2013, the AAO dismissed the petitioner's appeal, affirming the director's finding that the petitioner failed to demonstrate its ability to pay the proffered wage in 2001 and 2002. The AAO also found that the petitioner failed to establish the beneficiary's qualifying experience for the

¹ In Part 2 of the Form I-290B, Notice of Appeal or Motion, the petitioner states that it is filing a motion to reconsider. However, the filing includes documentary evidence of new facts, the submission of which is beyond the scope of a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3). Because the petitioner's filing contains both documentary evidence of new facts and alleges that the AAO misapplied law or policy, the AAO will treat the filing as a motion to reopen and reconsider. *See* 8 C.F.R. §§ 103.5(a)(2),(3).

² Section 203(b)(3)(A)(i) of the Act authorizes the granting of preference classification to qualified immigrants who are capable, at the time of petitioning, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act allows the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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offered position and invalidated the accompanying labor certification based on a finding that it contained a willful misrepresentation of a material fact.³

On motion, the petitioner asserts that the AAO erred in finding that it failed to demonstrate its ability to pay the proffered wage and submits additional evidence of its purported ability. The petitioner also submits new documentary evidence of the beneficiary's qualifying experience, asserting that the labor certification does not misrepresent the beneficiary's experience as the AAO found.

The AAO grants the petitioner's motion as a motion to reopen and reconsider because it contains both documentary evidence of new facts and alleges that the AAO misapplied law or policy. *See* 8 C.F.R. §§ 103.5(a)(2),(3).

The record documents the procedural history of this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary. The AAO reviews cases anew, without deferring to previous legal conclusions. *See Soltane*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.⁴

Ability to Pay the Proffered Wage

A petitioner must establish its ability to pay the beneficiary's proffered wage as of the petition's priority date and continuing until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay the proffered wage, USCIS first considers wages the petitioner actually paid the beneficiary in the relevant years. If a petitioner did not pay the beneficiary the full proffered wage in the relevant years, USCIS then considers whether the petitioner generated sufficient net income to pay the proffered wage, or the difference between the proffered wage and the amount the petitioner actually paid the beneficiary. If a petitioner did not generate sufficient net income in the relevant years, USCIS considers whether the petitioner's net current assets equal or exceed the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary.

³ The AAO may deny an application or petition that fails to comply with technical requirements of the law, even if the director did not identify all of the grounds of denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁴ The instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

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Where a petitioner has multiple beneficiaries of Forms I-140, Petitions for Alien Workers, it must demonstrate that all of the job offers are realistic. 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977). Therefore, a petitioner must establish that it has the ability to pay the combined proffered wages of the petition's beneficiary and the beneficiaries of its other petitions that were pending from the petition's priority date onward.

In the instant case, the labor certification states the proffered wage of the offered position as \$28.68 an hour for a 40-hour work week, or \$59,654.40 per year. USCIS records show that the petitioner has filed at least 19 I-140 petitions for other beneficiaries since 1997, including 13 that appear to have been pending from the instant petition's priority date onward.

In his Notice of Revocation (NOR), the director combined the proffered wages of the instant beneficiary and the beneficiaries of four other petitions with 2001 priority dates. The director calculated the total annual proffered wages of the five beneficiaries at \$346,465 for 2001 and 2002. After considering the wage amounts the petitioner paid the beneficiaries, its net income, and its net current assets in the relevant years, the director concluded that the petitioner had not demonstrated its ability to pay the combined proffered wages in 2001 and 2002.

On motion, counsel asserts that USCIS erred in requiring the petitioner to demonstrate its ability to pay the proffered wage of a beneficiary of one of the four other petitions. Counsel argues that USCIS should subtract the \$59,654 annual proffered wage of that beneficiary from the total amount of proffered wages in 2001 and 2002 because the petitioner withdrew that beneficiary's petition.

USCIS records show that the petitioner submitted its withdrawal of the petition on November 30, 2009, with USCIS issuing a notice acknowledging the withdrawal on January 12, 2010. Because the petitioner did not withdraw the petition until 2009, the petition remained pending in 2001 and 2002. Therefore, even though the petitioner later withdrew the petition, the petitioner must demonstrate its ability to pay that beneficiary's proffered wage in 2001 and 2002 while the petition remained pending.

Reconsideration of the record, however, indicates that USCIS erred in combining the proffered wages of the beneficiaries of the five petitions. USCIS should have combined the proffered wages of beneficiaries whose petitions were pending in 2001 and 2002 after the instant petition's priority date of April 16, 2001. Instead, USCIS combined the proffered wages of beneficiaries whose petitions had priority dates in the same year as the instant petition. As a result, USCIS improperly included the proffered wage of a beneficiary whose petition was not filed until 2006 in its total proffered wage amounts for 2001 and 2002. USCIS also included the proffered wage of a beneficiary whose petition was not filed until 2002 in the total amount of 2001 proffered wages.

Thus, based on the five petitions considered in the NOR, the petitioner would need to demonstrate its ability to pay total proffered wages of only \$190,631 in 2001 and \$277,928 in 2002. But combining the petitioner's annual net income of \$114,635 with the \$57,650 amount it paid to the five beneficiaries in 2001 yields \$172,285, less than the 2001 total proffered wages of \$190,631 of the beneficiaries. Similarly, combining the petitioner's net current assets of \$102,952 with the \$70,708 amount it paid the

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beneficiaries in 2002 yields \$173,660, less than the 2002 total proffered wages of \$277,928. Thus, the record does not establish the petitioner's ability to pay the combined proffered wages of the instant beneficiary and the four other beneficiaries in 2001 and 2002.

Moreover, as discussed above, the petitioner filed several additional I-140 petitions that USCIS records indicate were pending from the instant petition's priority date onward. As the AAO stated in its decision, the petitioner has failed to provide information about these additional petitions, including: their receipt numbers; the names of their beneficiaries; the proffered wages of their beneficiaries; the amount of wages the petitioner actually paid to the beneficiaries; whether any of the petitions have been withdrawn or denied without appeal; and whether any of the beneficiaries have obtained lawful permanent residence. Without information about the additional petitions, the AAO cannot determine the combined proffered wages of all of the relevant beneficiaries in 2001 and 2002 and the petitioner's ability to pay them.

Counsel also asserts that the AAO failed to properly consider the petitioner's ability to pay under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel argues that the number of years the petitioner has conducted business, the historical growth of its business, the uncharacteristic business losses it sustained during the relevant period, and its reputation in its industry demonstrate its ability to pay the proffered wage.

Under *Sonogawa*, USCIS may consider the overall magnitude of a petitioner's business activities in determining its ability to pay the proffered wage. In *Sonogawa*, the petitioner had conducted business for more than 11 years and routinely earned a substantial gross annual income. The year it filed its petition, however, the petitioner relocated and paid rent on both its old and new facilities for 5 months. The petitioner also incurred large moving expenses and could not conduct its regular business for a time. Despite these deficiencies in the petitioner's ability to pay, the Regional Commissioner determined that the petitioner established the likely resumption of its successful business operations. The petitioner was a fashion designer whose work had been featured in national magazines. Her clients included a former Miss Universe, movie actresses, and society matrons. Lists of best-dressed California women included the petitioner's clients. She also lectured on fashion design at design and fashion shows throughout the United States, and at California colleges and universities.

As in *Sonogawa*, USCIS may, in its discretion, consider evidence of a petitioner's financial ability to pay a proffered wage beyond its net income, net current assets, and the amounts it paid the beneficiary. USCIS may also credit such factors as: the number of years a petitioner has been doing business; the established historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the beneficiary is replacing a former employee or an outsourced service of a petitioner; or any other evidence that USCIS deems relevant to a petitioner's ability to pay the proffered wage.

In the instant case, the record shows that the petitioner established itself in 1995 and has remained active since. While the petitioner's number of years in business constitutes a favorable factor in

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determining its ability to pay the beneficiary's proffered wage, the petitioner has not demonstrated the historical growth of its business.

Counsel argues that the petitioner's business has grown because USCIS implicitly recognizes its ability to pay the beneficiary's proffered wage from 2003 onward. However, copies of the petitioner's federal tax returns show that both its annual revenues and its annual wage and salary expenses decreased by more than 50 percent from 2001 to 2003. Also, the petition, which was filed in 2001, stated that the petitioner employed 20 employees. However, copies of the petitioner's California quarterly wage reports for 2004 show only 12 employees. The record therefore does not establish the petitioner's claimed business growth.

Counsel also argues that the hijackings of U.S. airplanes by terrorists on September 11, 2001 caused uncharacteristic business losses for the petitioner, which operates in the airline travel industry. The petitioner submits a copy of an Internet article about the effects of the hijackings on the industry. Counsel asserts that, since 2002, the petitioner's business has recovered from the effects of the events of September 11, 2001.

The record, however, does not support counsel's arguments. The annual revenue amounts reported on both the petitioner's 2001 and 2002 tax returns exceed the annual revenue amount on its 1999 return.⁵ Because the petitioner appears to have generated more revenue immediately after the events of September 11, 2001 than before them, the record does not establish that the events hurt the petitioner's business.

Counsel asserts that the petitioner's annual net current asset amounts from 2003 through 2006 demonstrate the recovery of its business since 2002. But the petitioner's tax returns show a drop in annual revenues of about 44 percent from 2002 to 2003. The record also lacks documentary evidence to support the post-2003, annual net current asset amounts cited by counsel. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel do not constitute evidence); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)) (going on record without supporting documentary evidence is insufficient to meet the standard of proof in these proceedings). Therefore, the record does not support counsel's assertion that the petitioner's business has recovered since 2002.

The petitioner submits a copy of an unpublished, 2009 decision, in which the AAO found that a New York City hotel demonstrated its ability to pay the proffered wage under *Sonegawa*, despite enduring losses in 2001, 2002, and 2003 after the events of September 11, 2001. Counsel argues that the AAO should similarly find that the instant petitioner has the ability to pay because, unlike the hotel in the 2009 case, the instant petitioner generated profits in 2001 and 2002 despite the purported negative effects of the events of September 11, 2001 on its business.

⁵ The record does not contain a copy of the petitioner's 2000 federal income tax returns.

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Only precedent decisions of USCIS bind the AAO. 8 C.F.R. § 103.3(c). Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The petitioner has not demonstrated that the 2009 decision cited by counsel was designated and published as a precedent decision. The decision therefore does not bind the AAO in this case.

Moreover, the facts of the 2009 case distinguish it from the instant matter. The hotel in the 2009 case had conducted business for almost twice as long as the instant petitioner. Also, copies of its tax returns showed losses in 2001, 2002 and 2003, with a rebound in annual gross revenues in 2004 and 2005 to pre-2001 levels and beyond. As indicated previously, the instant petitioner's tax returns show that it generated more revenues in 2001 and 2002 than in 1999. The petitioner also has not submitted any documentary evidence to support its assertion that its business has grown since 2002. The petitioner's tax returns show a drop in annual revenues of about 44 percent from 2002 to 2003.

In addition, the hotel's tax returns showed that it consistently paid annual wage and salary amounts of more than \$2 million from 1998 through 2005. The tax returns of the instant petitioner show a 67-percent drop in the amount of annual wages and salaries it paid from 2002 to 2003. The instant petitioner's 2003 tax return reports that it paid wages and salaries totaling \$209,586, an amount that barely exceeds the total proffered wages of the instant beneficiary and the four other beneficiaries mentioned in the NOR. The amount would not appear to cover the combined proffered wages of all the petitioner's relevant beneficiaries, including the beneficiaries of the several additional petitions that also appear to have been pending during that time.

The record also contains copies and photographs of various awards that the petitioner received from airline companies for outstanding sales. Counsel argues that these materials demonstrate the petitioner's outstanding reputation in the travel industry. However, as the AAO noted in its decision, the petitioner has not provided the criteria for these awards, the number of companies that received the same or similar awards, or how prestigious industry members consider the awards. Without additional information about the awards, the record does not establish that the petitioner enjoys an outstanding reputation in its industry.

Thus, assessing the totality of the circumstances in this individual case, the AAO concludes that the petitioner has not established its ability to pay the beneficiary's proffered wage in 2001 and 2002.

The Beneficiary's Qualifications for the Offered Position

A petitioner must also establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications for the offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-*

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Red Commissary of Mass., Inc. v. Coomey, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of budget analyst requires a 4-year bachelor's degree in management or finance, plus 2 years of experience in the job offered or in a "[m]anagement position in [the] travel industry."

The beneficiary states on the labor certification that he worked full-time as an information coordinator/station controller for [REDACTED] in the Philippines from September 1997 to April 2000, and for the same employer as a full-time international ground steward from September 1992 to April 2000.

A petitioner must support the claimed experience of a skilled worker or professional with letters from former employers giving the name, address, and title of the employers, and a description of the beneficiary's experience. 8 C.F.R. § 204.5(I)(3)(ii)(A). The AAO found that the September 3, 2001 experience letter that the petitioner submitted on the stationery of [REDACTED] the Philippines, failed to establish the beneficiary's qualifying experience. In its Notice of Derogatory Information and Request for Evidence of May 31, 2013, the AAO informed the petitioner that a [REDACTED] official informed USCIS in 2005 that the signature on the letter had been "forged."

In response to the AAO's notice, the petitioner submitted a June 25, 2013 experience letter from a different official at [REDACTED] the Philippines. The AAO found that this letter did not establish the beneficiary's qualifying experience for the offered position because the letter did not describe his purported experience at [REDACTED]. Also, the beneficiary's start date of employment stated in the letter conflicted with his stated start date in the previous letter of September 3, 2001. The AAO also found that the petitioner failed to establish that the beneficiary possessed experience in the job offered or in a management position as specified on the labor certification by the petition's priority date.

On motion, the petitioner submits an August 30, 2013 letter from the same purported [REDACTED] who signed the June 25, 2013 letter. Attached to the letter are job descriptions of the beneficiary's purported positions at the airlines. Like the June 25, 2013 letter, the August 30, 2013 letter states that [REDACTED] employed the beneficiary: as an international ground steward I from September 10, 1992 to September 15, 1995; as an international ground steward II from September 16, 1995 to August 31, 1997; and as a station controller/info coordinator from September 1, 1997 to April 11, 2000.

The August 30, 2013 letter does not state whether [REDACTED] employed the beneficiary on a full-time or part-time basis. If the beneficiary worked part-time, depending on his number of hours, he might not have obtained 2 years of full-time employment experience as specified on the labor certification. The letter therefore does not establish the beneficiary's qualifications for the offered position.

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Also, the petitioner's previous submission of an apparent forged letter from [REDACTED] casts doubt on the validity of the August 30, 2013 letter from same employer. *See Matter of Ho*, 19 I&N Dec. at 591 ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.") The record is unclear whether the petitioner concedes or disputes that the previous letter of September 3, 2001 was forged. Counsel maintains that the beneficiary truly worked for [REDACTED] as stated on the labor certification. But, if the beneficiary truly worked for [REDACTED] as stated on the labor certification, neither counsel nor the petitioner explain how it came to submit an apparent forged letter in support of his claimed experience. The petitioner also provides no independent and objective evidence of the validity of the letters of June 25, 2013 and August 30, 2013.

In addition, although job descriptions of the beneficiary's purported positions at [REDACTED] are attached to the August 30, 2013 letter, the job descriptions are on pages that are separate from the letter and that are not signed or initialed by any purported official of [REDACTED]. The record therefore does not establish that the attached job descriptions are valid. *See Matter of Ho*, 19 I&N Dec. at 591 ("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.")

Also, the attached job descriptions do not establish the beneficiary's qualifying experience in the job offered or in a management position as specified on the labor certification. The job description for the positions of international ground steward I and II does not substantially match the job description of the offered position on the labor certification, nor does it contain managerial job duties. The job description for the position of station controller/info coordinator also does not match the job description of the offered position. The job description attached to the letter indicates that the position of station controller/info coordinator entails more responsible duties than that of international ground steward. But the job description does not establish that the position of station controller/info coordinator is managerial in nature. The job description indicates that most of the position's duties involve gathering information for the duty station manager, who then decides final courses of action.

Further, the petitioner does not address the AAO's previous finding that the experience letters from [REDACTED] contain conflicting start dates for the beneficiary. The September 3, 2001 letter states that the beneficiary began employment at the company in April 1992. The labor certification and the two most recent letters state that the beneficiary began work at [REDACTED] in September 1992. *See Matter of Ho*, 19 I&N Dec. 591-92 (a petitioner must resolve inconsistencies in the record with independent and objective evidence).

For the foregoing reasons, the AAO finds that the record does not establish the beneficiary's qualifying experience for the offered position as specified on the labor certification by the petition's priority date.

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The Invalidation of the Labor Certification

On motion, counsel also asserts that the AAO erred in invalidating the labor certification that accompanied the instant petition. He argues that the August 30, 2013 letter from [REDACTED] confirms the beneficiary's experience stated on the labor certification. Because the labor certification purportedly contains no false information, counsel asserts that the record lacks evidence of a willful misrepresentation of a material fact to support the AAO's invalidation.

The Service may invalidate a labor certification "upon a determination ... of fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d) (2004).⁶

Fraud "consists of a false representation of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). Willful misrepresentation of a material fact involves the same elements as fraud, but without the requirement of an intent to deceive. *Matter of Hui*, 15 I&N Dec. 288, 189-90 (BIA 1975).

The record does not support counsel's assertion that the labor certification lacks any misrepresentation. As previously discussed, the August 30, 2013 letter from [REDACTED] does not establish the beneficiary's experience stated on the labor certification. The letter does not confirm that the beneficiary worked full-time for the company as stated on the labor certification. The August 30, 2013 letter also states a start date of employment that conflicts with a statement in a previous letter from [REDACTED]

Moreover, the petitioner's previous submission of an apparent forged letter from [REDACTED] casts doubt on the validity of the August 30, 2013 letter from the same employer. *See Matter of Ho*, 19 I&N Dec. at 591 ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.") The petitioner has neither denied that the September 3, 2001 letter from [REDACTED] was forged, nor explained the circumstances of the letter's submission. The AAO therefore finds that the record establishes that the letter was forged. The forgery does not necessarily render the contents of the letter false. But the AAO finds that the letter was likely forged because it contained false statements, as the petitioner has not offered any other explanation for the submission of the forged experience letter. Therefore, the AAO finds that the forged letter establishes a misrepresentation of the beneficiary's employment history on the labor certification.

Further, the misrepresentation on the labor certification involves a material fact as the regulation at 20 C.F.R. § 656.30(d) (2004) requires for invalidation of a labor certification. A misrepresentation is

⁶ Prior DOL regulations govern the labor certification that accompanies the instant petition. The DOL's current regulations apply to labor certification applications filed on or after March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The instant labor certification was filed on April 16, 2001.

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material if it had “a natural tendency to influence the decisions” of the agency. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (citing *Kungys v. U.S.*, 485 U.S. 759 (1988)). The government must “produce evidence to raise a fair inference that a statutory disqualifying fact actually existed.” *Id.*, at 443.

As indicated previously, the labor certification states that the offered position requires 2 years of experience in the offered position of budget analyst or 2 years of experience in a management position in the travel industry. Without any explanation as to why a forged letter was submitted, the AAO cannot determine whether any of the beneficiary’s claims of employment with [REDACTED] are true.

Because the misrepresentation of the beneficiary’s employment experience on the labor certification establishes his qualifications for the offered position, the misrepresentation has “a natural tendency” to influence the labor certification decision and therefore was material. Thus, the labor certification will remain invalidated.

Due Process

In reviewing the instant matter, the AAO realizes that it did not address one of the petitioner’s arguments on appeal. Counsel asserted that USCIS failed to properly notify the petitioner and counsel of its intention to revoke the petition. By failing to issue its Notice of Intent to Revoke (NOIR) to counsel and to the petitioner at its current address, counsel argues that USCIS violated the petitioner’s rights under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The regulations at 8 C.F.R. §§ 205.2(a),(b) require USCIS to provide “notice” to a petitioner of the grounds on which the agency intends to revoke a petition. To prevail in allegations that an agency violated its own procedural regulations, a claimant must show that the agency’s mistake prejudiced it. *Kohli v. Gonzalez*, 473 F.3d 1061, 1066-67 (9th Cir. 2007) (citing *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980)). Prejudice “means that the outcome of the proceeding may have been affected by the alleged violation.” *Gutierrez v. Holder*, 730 F.3d 900, 903 (9th Cir. 2013).

Assuming *arguendo* that USCIS failed to properly notify the petitioner of the agency’s intent to revoke the petition, the petitioner and counsel have not demonstrated that the mistake prejudiced the petitioner. The director’s NOIR of October 27, 2009 was grounded on the petitioner’s failure to demonstrate its ability to pay the proffered wage in 2001 and 2002. As discussed above, despite later opportunities to submit additional evidence and arguments on appeal and motion, the petitioner has not established its ability to pay the proffered wage in those years. Therefore, the petitioner has failed to show that its alleged inability to respond to the NOIR prejudiced it and that its due process rights were violated.

Conclusion

In summary, the AAO will treat the petitioner’s filing as a motion to reopen and reconsider, and

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grant the motion. After careful review of the record and the petitioner's evidence and arguments on motion, the AAO finds that the petitioner has not established: its continuing ability to pay the beneficiary's proffered wage; the beneficiary's qualifying experience for the offered position; or that USCIS violated its due process rights by failing to properly notify it of its intention to revoke the petition. The AAO also finds that the record supports the determination of a material misrepresentation on the labor certification.

The petition's approval will be revoked for the reasons stated above, with each considered an independent and alternative basis for revocation. In revocation 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; *Matter of Cheung*, 12 I&N Dec. 715, 719 (BIA 1968). Here, the petitioner has not met that burden.

ORDER:

The motion is granted, the AAO's decision of August 15, 2013 dismissing the petitioner's appeal is affirmed, and the petition's approval remains revoked.