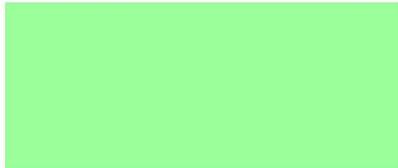




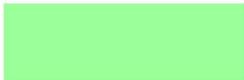
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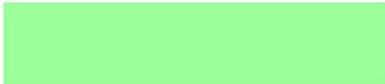


DATE: **JUL 25 2014**

OFFICE: TEXAS SERVICE CENTER

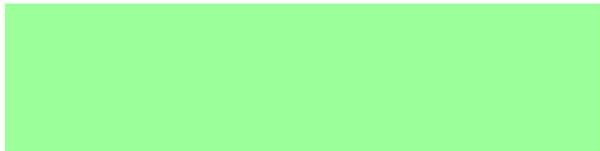
FILE: 

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 (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 Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition and invalidated the accompanying labor certification. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before us again on a motion to reopen and reconsider. The motion to reconsider will be granted, our previous decision will be affirmed, the petition will remain revoked, and the labor certification will remain invalidated.

The petitioner describes itself as a distributor of imported rugs. It seeks to permanently employ the beneficiary in the United States as a Quality Control Manager. The petitioner seeks classification of the beneficiary as a professional or skilled worker. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The revocation of the approval of the petition involved three issues. First, whether the petitioner is able to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. Second, whether the petitioner is able to demonstrate the beneficiary's qualifying employment experience for the offered position by the petition's priority date. Third, whether the petitioner and the beneficiary willfully provided fraudulent or false documents of the beneficiary's employment experience.

## I. PROCEDURAL HISTORY

The Director, Nebraska Service Center, initially approved the employment-based Form I-140, Immigrant Petition for Alien Worker (petition). The Director, Texas Service Center (director), issued the petitioner a Notice of Intent to Revoke (NOIR) the petition's approval. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the petition,<sup>1</sup> and invalidated the labor certification.<sup>2</sup> The director determined that the petitioner failed to establish: (1) its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward; and (2) the

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<sup>1</sup> Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The acting director's realization that the petition was approved in error may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

<sup>2</sup> See 20 C.F.R. § 656.30(d) (2004) (authorizing U.S. Citizenship and Immigration Services (USCIS) to invalidate a labor certification "upon a determination ... of fraud or willful misrepresentation of a material fact involving the labor certification application"). The petitioner filed the labor certification application on March 24, 2005, before new regulations came into effect on March 28, 2005; therefore, the DOL regulations in effect at that time govern this matter. See 69 Fed. Reg. 77325 (Dec. 27, 2004).

beneficiary's qualifying employment experience for the offered position by the petition's priority date. The director also found that the petitioner and the beneficiary provided false documents of the beneficiary's employment experience, including experience letters and the assertions on Form ETA 750B. Accordingly, on April 4, 2011, the director revoked the petition's approval and invalidated the labor certification.

In our appellate decision of June 3, 2013, we affirmed the revocation of the petition's approval, finding that the petitioner failed to establish its continuing ability to pay the proffered wage. We also found that the petitioner failed to establish that the beneficiary had the experience she claimed to possess on the labor certification, and failed to establish that the beneficiary possessed the required one-year of experience before the priority date. We dismissed the petitioner's appeal; therefore, the director's decision revoking the petition's approval, and invalidating the labor certification, remained intact. The matter is now before us on motion to reopen and reconsider.

On motion, counsel states:

Although the Petitioner disagrees with all three findings, this Motion is specifically limited to the Decision's third finding; namely, the fraudulent misrepresentation of the Beneficiary. ... Based on the following discussion, we request that USCIS rescind its finding of fraudulent misrepresentation of the Beneficiary.

The petitioner limits its motion to the director's fraud finding, which relates to the beneficiary's claimed experience and certain supporting documentation. In support of its motion, counsel asserts that: (1) USCIS violated procedural due process; (2) USCIS did not satisfy the standard of proof for fraud; (3) USCIS did not satisfy the legal definition of fraud; and (4) USCIS did not explain the petitioner's negating evidence.

The record shows that the motion is properly filed, 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.

## II. LAW AND ANALYSIS

### A. The Petitioner's Motion to Reopen

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. Counsel for the petitioner does not suggest that any of the evidence provided

on motion is new, or explain how the facts or evidence could be considered new. The evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

### **B. The Petitioner's Motion to Reconsider**

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 our office made an erroneous decision through misapplication of law or policy.

### **C. The Petitioner's Ability to Pay the Beneficiary's Proffered Wage**

The director found that the petitioner failed to establish its ability to pay the beneficiary's proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$42,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$5.5 million, and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the Form ETA 750B, signed by the beneficiary on March 23, 2005, the beneficiary claimed to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.<sup>3</sup> If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets.<sup>4</sup>

The record contains the beneficiary's 2005 Wage and Tax Statement, Form W-2, which shows that the petitioner paid her \$20,992.33. There is a difference of \$21,007.67 between the amount the petitioner paid the beneficiary in 2005 and the \$42,000.00 annual proffered wage.

The beneficiary's W-2 statements for the years 2006 through 2009 indicate that the petitioner paid the beneficiary in excess of the proffered wage for the position offered: \$51,716.68 in 2006; \$60,000.00 in 2007; \$70,000.08 in 2008; and \$72,000.06 in 2009. However, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the priority date year, 2005.

The record contains the petitioner's 2005 income tax return.<sup>5</sup> The record shows that the petitioner's net income<sup>6</sup> for 2005, when added to the wages paid to the beneficiary that year, were not equal to or

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<sup>3</sup> *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

<sup>4</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18.

<sup>5</sup> The director's decision noted that the combined wages on the petitioner's 2005 W-2 forms to its employees totaled \$415,005.44, which was less than the total wage amount of \$444,191 it reported on its 2005 federal tax return. The director also noted that the petitioner did not provide USCIS with a copy of a 2005 W-2 form for its former president. The former president had signed the beneficiary's H-1B petition and labor certification, and the director previously requested the

greater than the annual proffered wage of \$42,000. The petitioner's net income for 2005, as shown on line 28 of its IRS Form 1120 U.S. Corporation Income Tax Return, was \$(8,920).<sup>7</sup> Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage.

If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2005 tax return shows a year-end net current asset amount of \$(351,310). Therefore, the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage in 2005 based on an examination of the wages it paid the beneficiary, its net income, or its net current assets.

In addition, USCIS records indicate that the petitioner has filed multiple petitions since the petitioner's establishment, including I-129 petitions, and at least two other I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

Based on the foregoing analysis, we previously found that from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). We previously found that the petitioner had not established that factors similar to *Sonogawa* existed in this case.

On motion, the petitioner has not addressed these findings, and stated that its motion is limited to the fraud finding alone. Therefore, the petitioner has not overcome our previous finding that the petitioner failed to establish its continuing ability to pay the proffered wage.

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petitioner's 2005 W-2 forms for all employees. The petitioner has not explained the discrepancies in the total wage amounts on its 2005 tax return and on its 2005 W-2s, nor has it explained the missing 2005 W-2 form of its former president, on appeal or motion. The inconsistencies continue to cast doubt on the validity of the petitioner's 2005 financial information, and the petitioner did not provide sufficient evidence to overcome those doubts. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (the petitioner must resolve any inconsistencies in the record by independent, objective evidence).

<sup>6</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>7</sup> Numbers in parentheses indicate negative amounts.

#### D. The Beneficiary's Qualifications for the Position Offered

The director found that the petitioner failed to establish that the beneficiary possessed the minimum requirements for the position offered, Quality Control Manager, as defined by the terms of the labor certification.

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12); *see 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). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must examine the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

#### EDUCATION

Grade School: "X"

High School: "X"

College: "X"

College Degree Required: "bachelor degree or equivalent"

Major Field of Study: "textile engineering or related"

TRAINING: "N/A"

#### EXPERIENCE:

Experience the Job Offered: "1 Yrs. 0 Mos."<sup>8</sup>

Experience in a Related Occupation: "1 Yrs. 0 Mos."

Related Occupation: "textile engineering or quality assurance in the employer's industry"

OTHER SPECIAL REQUIREMENTS: "One (1) year of experience must include experience with hand-knotted imported textiles."

The record includes the beneficiary's Bachelor of Science degree in Textile Chemistry, from [REDACTED] issued in May 2003. The petitioner has established that the beneficiary possesses the minimum education required for the position offered, prior to the priority date.

The petitioner must also demonstrate that the beneficiary possessed a minimum of one year of experience in the position offered, or the related occupations of textile engineering or quality assurance, as of the priority date. The labor certification states that the beneficiary qualifies for the offered position based on experience as a Quality Control Technician with the petitioner from August 2003 until August 2004. The labor certification also indicates that the beneficiary was promoted to

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<sup>8</sup> Form ETA 750 provides separate spaces for an employer to specify both the number of years and/or months of experience required for each the position offered and any related occupations.

the position of Quality Assurance Manager<sup>9</sup> with the petitioner in August 2004.<sup>10</sup> No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

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

Prior to the petition's approval, the record contained a letter from the petitioner's chief financial officer (CFO), dated June 14, 2007. This letter indicates it is in regards to the "I-140, Petition" and describes the petitioner, the position offered, the permanent nature of the offer, and also provides four paragraphs describing the "foreign national." This letter indicates that the beneficiary was promoted to Quality Control Manager with the petitioner in August 2004, and prior to that promotion the beneficiary "worked as a quality [sic] Control Technician at [REDACTED] from August 2003 to August 2004." The letter provides a brief description of the beneficiary's "principal responsibilities." The letter appears to meet the requirements for an experience letter, as it states the position in which the beneficiary was employed, provides a description of the beneficiary's experience, and the name, address and title of the employer. *Id.* However, the terms of the labor certification require one year of experience in the position offered or a related occupation, and the letter does not indicate the actual dates the beneficiary began or ended employment with the petitioner as its Quality Control Technician. As the position offered requires a minimum of one year of full-time experience, and the beneficiary's experience as a Quality Control Technician began on an unknown day in August 2003 and ended on an unknown day in August 2004, the letter does not document whether the beneficiary possessed one year of full-time experience, or a lesser amount of experience. Therefore, this letter, alone, is insufficient to document whether or not the beneficiary possessed one year of experience in the related occupation of Quality Control Technician.<sup>11</sup>

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<sup>9</sup> While the title of the position offered, Quality Control Manager, varies slightly from the beneficiary's position with the petitioner in August 2004, Quality Assurance Manager, the description of both positions are identical.

<sup>10</sup> A beneficiary may rely on employment experience with the petitioner only if the position offered differs from the position in which she gained the experience. *See Matter of Delitzer Corp. of Newton*, 88-INA-482 (BALCA 1990) (*en banc*). The beneficiary's employment with the petitioner as its Quality Assurance Manager appears to be in the position offered, despite the variance in the job title.

<sup>11</sup> As noted above, the Form ETA 750 provides the employer with the opportunity to indicate the years, and/or months, of experience required for the position offered. *See n.89*. The terms of the labor certification require one year of experience in the position offered, or a related occupation, rather than a lesser term of experience, such as 11 months.

The record also contained another letter from the petitioner's CFO, also dated June 14, 2007. This letter indicates it is in regards to the beneficiary, and provides a detailed description of the beneficiary's qualifications. The letter states that the beneficiary began working for the petitioner as a Quality Control Technician in August 2003, and in August 2004 was promoted to the position offered. The letter provided a description of the beneficiary's duties and responsibilities with the petitioner. As with the letter discussed above, this letter appears to meet the requirements for an experience letter, as it states the position in which the beneficiary was employed, provides a description of the beneficiary's experience, and the name, address and title of the employer. *Id.* However, this letter also fails to state the actual dates of the beneficiary's employment as a Quality Control Technician. As the position offered requires a minimum of one year of full-time experience, and the beneficiary's experience as a Quality Control Technician began on an unknown day in August 2003 and ended on an unknown day in August 2004, the letter does not document whether the beneficiary possessed one year of full-time experience, or a lesser amount of experience. Therefore, this letter is also insufficient to document that the beneficiary possessed one year of experience in the related occupation of Quality Control Technician.

In addition, the letter appears to lack a description of the beneficiary's employment experience as a Quality Control Technician. The third paragraph of the letter provides a description of the beneficiary's duties and responsibilities; however, the description provided appears to relate to the duties of the position offered, as it encompasses developing quality assurance programs, reviewing and analyzing production and quality control, and setting policies, procedures and goals for production with higher-level executives. The description of the beneficiary's experience as a Quality Control Technician, as provided on the labor certification, is more limited and included evaluating economic and technical factors related to production, reviewing plans but not developing plans, launching products, or setting policies, procedures, or goals. Therefore, this letter is insufficient to document the beneficiary's experience with the petitioner as a Quality Control Technician, because it lacks a description of the beneficiary's employment experience in that position. 8 C.F.R. § 204.5(l)(3)(ii)(A).

Further, the letter itself is internally inconsistent and inconsistent with the other letter described above, bearing the same date and signed by the same individual. The fourth paragraph of the letter states: "[f]or more than 3.5 years, [the beneficiary] engaged in the duties mentioned above and coordinated with our suppliers overseas to ensure only the highest quality product is delivered to the end use customer." As the letter is dated June 14, 2007, this suggests the beneficiary was promoted to and had performed the duties and responsibilities of the position offered, Quality Control Manager, prior to August 2004.<sup>12</sup> These inconsistencies cast doubt on whether the beneficiary possessed one year of experience as a Quality Control Technician as claimed on the labor certification. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the

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<sup>12</sup> Three years and six months prior to the letter's writing would have indicated a date in mid-December 2003, presuming that the statement of "3.5 years" was a precise amount of time. *See e.g.*, Time and Date AS, "Date calculator: Add to or Subtract from a Date," at <http://www.timeanddate.com/date/dateadd.html> (accessed June 16, 2014).

petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Therefore, this letter is insufficient to document the beneficiary's experience without competent, objective evidence of the beneficiary's actual employment experience with the petitioner. *Id.* at 591-592 (it is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence).

At the time of the petition's approval, the record contained two letters from the petitioner, both written by the petitioner's CFO on the same date. These letters conflicted with one another. The letter in reference to the beneficiary indicated the beneficiary had only been employed "3.5 years" as of June 2007, but also states she was employed beginning August 2003, and the duties described did not demonstrate her experience as Quality Control Technician. The letter in reference to the I-140 petition, describes a different set of responsibilities and duties performed by the beneficiary than those in the letter referencing the beneficiary.

Subsequent to the petition's approval, the beneficiary submitted a signed Form G-325A, Biographic Information, and a letter from the petitioner, signed by its CFO, dated July 18, 2007, in support of her application for adjustment of status based on the petition's approval. Contrary to the labor certification and the petitioner's initial letter, both of which indicated an August 2003 start date with the petitioner, the Form G-325A and this July 2007 letter state that the beneficiary commenced employment for the petitioner in January 2004 as its Quality Control Manager. The Form G-325A affirmatively states that the beneficiary was "unemployed" from "June 2003" to "December 2003." It also states that her only employment experience when she assumed the position offered, Quality Control Manager, with the petitioner was as a Research Assistant with [REDACTED] from January 2003 to May 2003. While the July 18, 2007, letter does not identify the beneficiary's job title, the Form G-325A states that she joined the petitioner in the offered position in January 2004 and worked as a Quality Control Manager until June 2005.<sup>13</sup> The form does not list any prior employment with the petitioner as a Quality Control Technician.

The director properly advised the petitioner in the NOIR that the Form G-325A and the former CFO's letter conflicted with evidence in the record, and cast doubt on the beneficiary's purported employment experience, which was the basis for the petition's approval. The director requested that the petitioner submit evidence to corroborate the beneficiary's claimed experience, including a complete copy of her 2003 tax return and Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for 2003.

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<sup>13</sup> While the petitioner's June 2007 and July 2007 letters state that the beneficiary was employed by the petitioner from August 2003, or January 2004, respectively, to the date of the letter's writing, the letters fail to indicate the period of time that the beneficiary was not employed by the petitioner between those dates. The Form G-325A states that the beneficiary ceased employment with the petitioner in June 2005, began employment with [REDACTED] Atlanta, Georgia, in July 2005, and did not resume employment with the petitioner in a new position, Director of Quality Assurance, until December 2006.

In response to the director's NOIR, the petitioner provided the beneficiary's 2003 personal federal income tax return, 2003 personal state (North Carolina) income tax return, and 2003 Form W-2 Wage and Tax Statements.<sup>14</sup>

The 2003 W-2 statement issued by the petitioner to the beneficiary appears to be competent, independent evidence, and it supports the petitioner's assertion that it employed the beneficiary in 2003. The petitioner has established that it employed the beneficiary and paid wages to the beneficiary in the year 2003. However, as we discussed in our initial decision, rather than confirming the beneficiary's continuous and full-time employment by the petitioner from August 2003 through December 2003, the beneficiary's 2003 W-2 statement suggests that the beneficiary was employed part-time by the petitioner, or was employed for a period of time less than the asserted August to December time frame.<sup>15</sup> The beneficiary earned relatively low wages in 2003, of only \$1,751, during a period of purported full-time employment spanning five months, from August 2003 through December 2003. Therefore, the 2003 W-2 form issued by the petitioner to the beneficiary fails to establish that the beneficiary was employed for the period of time alleged on the labor certification. As the labor certification requires one year of experience, and the beneficiary claimed to have qualifying experience only from August 2003 to August 2004, the petitioner has not established that the beneficiary possessed the minimum qualifications for the position offered as of the priority date.

In addition, the beneficiary's self-prepared 2003 federal income taxes show that she listed her occupation as a "Quality Control Manager" as of March 9, 2004. As the director discussed in the NOR, this inconsistency casts further doubt on whether the beneficiary was employed on a continuous, full-time basis by the petitioner in the Quality Control Technician position from August 2003 through August 2004 as asserted on the labor certification. We further note that the beneficiary's self-prepared individual tax return for the state of North Carolina states that the beneficiary was a part-year resident of that state, from January 1, 2003, through September 30, 2003. This also casts doubt on whether the beneficiary was employed on a full-time and continuous basis at the petitioner's [REDACTED] Georgia location from August 2003 onward.

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<sup>14</sup> In addition to the 2003 W-2 statement issued by the petitioner to the beneficiary, the petitioner also submitted a W-2 statement issued by the [REDACTED] to the beneficiary.

<sup>15</sup> As discussed in the director's NOR, the petitioner paid the beneficiary wages of only \$1,751 in 2003. Those wages appear insufficient to document the approximately five (5) months of employment the beneficiary claimed with the petitioner from August 2003 through December 31, 2003. For example, the federal minimum wage in effect at the time was \$5.15 for all covered, nonexempt workers; and the subminimum wage in effect at the time was \$4.25 for workers under 20 years of age during their first 90 consecutive calendar days of employment. See U.S. Department of Labor, Wage and Hour Division, *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009*, <http://www.dol.gov/whd/minwage/chart.htm> (accessed June 16, 2014). As the beneficiary was born in the year 1981, she was over the age of 20 in the year 2003. At the minimum wage rate, the beneficiary's salary would suggest she was employed at most for 42.5 days in 2003 ( $\$1,751 / \$5.15 = 340$  hours, or 42.5 8-hour workdays).

The record contains an affidavit from the beneficiary, dated January 14, 2011, submitted in response to the NOIR. The beneficiary states that she worked for the petitioner as a Quality Control Technician from August 2003 to August 2004. The beneficiary indicates that the Form G-325A was erroneous, and that she failed to "thoroughly review" the form such that she failed to notice that her position titles and dates of employment were incorrect. The beneficiary states that her "oversight in this regard was inadvertent," and that she "did not intend to mislead the USCIS or commit a fraud." The beneficiary asserts that she "was employed on a continuous and full-time basis at Jaipur Rugs USA as a Quality Control Technician from August 2003 to August 2004." As the director stated in the NOR, and as discussed in our previous decision, the beneficiary's affidavit is self-serving and is not independent, objective evidence of her prior work experience sufficient to overcome the issues raised. *See Matter of Ho*, 19 I&N Dec. at 591-592. We note that the affidavit does not provide information that would inform as to the complete dates of her purported employment as a Quality Control Technician, nor does it provide information on the terms of that employment or the effective date of her promotion to the position offered.

The beneficiary provided a newly prepared Form G-325A, dated January 14, 2011, with her affidavit.<sup>16</sup> The revised affidavit includes the address of one additional residence; the beneficiary began residing at that address in September 2007, which would have occurred after the first G-325A was completed in July 2007. The second Form G-325A also provides a different employment history for the beneficiary. This G-325A indicates the beneficiary's employment history to be as follows:

- Employed by the petitioner as its Quality Control Manager / Director of Quality Assurance from December 2005 to November 2010;
- Employed by Trans Anatolia Rug Corporation as its Quality Control Manager from July 2005 to December 2005;
- Employed by the petitioner as its Quality Control Manager from August 2004 to June 2005; and
- Employed by the petitioner as its Quality Control Technician from August 2003 to August 2004.

This G-325A indicates that the beneficiary had "none" employment after November 2010.<sup>17</sup> In comparing the two Forms G-325A, there does appear to be errors with at least the version dated July 18, 2007. We note that the 2007 Form G-325A does appear to contain at least one obvious and apparent error; it indicates that the beneficiary ceased employment with [REDACTED] on December 2005 and that she did not begin employment with the petitioner again until December 2006, leaving a gap in her employment history from December 2005 to December

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<sup>16</sup> The beneficiary dated the second Form G-325A as "January 14, 2010," but the record establishes that she signed the form on January 14, 2011, as the petitioner submitted the amended form in response to the director's December 15, 2010, NOIR.

<sup>17</sup> It is unclear from the record whether the petitioner continued to employ the beneficiary after November 2010.

2006. Because the 2007 Form G-325A does list a period of unemployment, from June 2003 to December 2003, but does not list another period of unemployment from December 2005 to December 2006, the start date of December 2006 does appear to be a typographic error. While this error (the mistake of typing "2006" instead of "2005") cannot alone demonstrate the erroneous addition of an entire line (documenting the beneficiary was "unemployed" from June 2003 to December 2003), it does lend credibility to the beneficiary's assertion that the form contained drafting errors. However, even if we were to accept this later version of Form G-325A as entirely accurate, and discount the other inconsistencies between the two versions, this single document does not outweigh the other conflicting evidence, including: (1) the beneficiary's statement of her occupation on her federal income tax return; (2) the beneficiary's statement of her residence in North Carolina through September 30, 2003; (3) the low wages paid to the beneficiary for purportedly full-time and continuous employment from August 2003 to August 2004; or (4) the petitioner's conflicting support letters, some of which indicate the beneficiary commenced employment in January 2004.

The record also contains an amended affidavit<sup>18</sup> of a paralegal who worked at the office of previous counsel, dated April 20, 2011, which states that the paralegal prepared the beneficiary's adjustment application and that the law office submitted about four times as many adjustment applications as usual in July and August of 2007, the same period during which the beneficiary's application was prepared and filed. The affidavit does not indicate what information was used to prepare the Form G-325A, whether the paralegal drafted the initial form or whether the beneficiary provided the initial draft. The affidavit does not state whether the paralegal or law firm made any errors in drafting the form. The affidavit also does not indicate the amount of time between the drafting of the Form G-325A and its signing, whether the beneficiary thoroughly reviewed the application, or the amount of time the beneficiary held the form for review. This affidavit documents that the law firm selected by the beneficiary prepared more "Applications for Lawful Permanent Residence" than it would normally prepare during the time that the beneficiary's Form G-325A was filed; it does not state that this impacted the quality or accuracy of the beneficiary's or any other clients' applications. The paralegal's affidavit provides no competent evidence documenting that the information on the initial Form G-325A was inaccurate.

The petitioner's CFO<sup>19</sup> also provided an affidavit, dated January 14, 2011, indicating that the CFO has "personal knowledge of all facts contained in this affidavit,"<sup>20</sup> and that the beneficiary worked

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<sup>18</sup> An affidavit from this individual was previously submitted. While the averments of the two affidavits are identical, the first affidavit indicated that it was made January 12, 2011, the affiant's handwritten date beside her signature noted the date as January 13, 2011, and the notary's date stated the affidavit was sworn to on January 12, 2011.

<sup>19</sup> The petitioner's CFO in 2011 was a different individual from the CFO who had written support letters for the petitioner and beneficiary in 2007.

<sup>20</sup> This CFO does not indicate the basis of that personal knowledge; as noted, the petitioner's CFO in 2011 was a different individual than in 2007. There is no evidence or information in the record to establish that this individual was employed by the petitioner, and in a position to be personally aware of the terms of the beneficiary's employment, from August 2003 to August 2004.

for the petitioner as a Quality Control Technician from August 2003 to August 2004. The CFO stated that the beneficiary "obtained over one year of textile engineering experience, including one year of experience with hand-knotted imported textiles." However, the affidavit was not accompanied by any independent, objective evidence to support the CFO's statements. Further, this affidavit likewise lacks specificity regarding the beneficiary's dates and terms of employment. A letter from the CFO, also dated January 14, 2011, likewise states his confirmation of the beneficiary's employment as a Quality Control Technician from August 2003 to August 2004 on a "continuous and full-time basis." As with the CFO's affidavit, this letter lacks specificity on the beneficiary's dates or terms of employment. Thus, even if the affidavit and letter were sufficient, on their own, to overcome the doubt caused by the petitioner's previously submitted, conflicting experience letters and the beneficiary's Form G-325A, they are insufficient to document whether or not the beneficiary possessed the minimum experience for the position offered. As discussed above, the 2003 W-2 statement conflicts with the beneficiary's claimed continuous, full-time employment with the petitioner from August 2003 through December 2003.

On appeal, the petitioner submitted an affidavit, dated May 18, 2011, from the former CFO who signed the June and July 2007 letters containing the inconsistent dates of the beneficiary's employment with the petitioner. The former CFO states that the beneficiary worked for the petitioner as a Quality Control Technician from August 2003 to August 2004. The former CFO states that he did not carefully review the July 18, 2007, letter before signing it because he trusted that previous counsel correctly prepared the letter. While the former CFO's affidavit provides an explanation for the conflict between the June and July 2007 letters signed by the CFO, we previously found this affidavit insufficient to overcome the doubt as to whether the beneficiary was employed as a Quality Control Technician on a full-time basis from August 2003 to August 2004. As noted above, there is conflicting evidence in the record as to whether that employment was full-time, whether the beneficiary began employment as a Quality Control Technician beginning in August 2003, whether that employment was continuous and full-time from that time onward, and whether the beneficiary remained in the Quality Control Technician position through August 2004.

On appeal, the petitioner also submitted a copy of a letter, dated December 1, 2003, from the petitioner's former president, requesting a change of status from the beneficiary's F-1 nonimmigrant visa status to H-1B nonimmigrant visa status. The letter states that the petitioner had employed the beneficiary as a Quality Control Technician since August 2003. However, the letter does not indicate whether the beneficiary's employment was full-time, and it does not provide the specific date on which she began employment.<sup>21</sup> However, a copy of the Form I-797A, Notice of Action,

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<sup>21</sup> The record also contains a copy of the beneficiary's Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, which indicates Optional Practical Training (OPT) was certified by the beneficiary's university as of March 30, 2003, with an employment date anticipated to be May 17, 2003. The record also contains a copy of the beneficiary's Employment Authorization Card, documenting that the beneficiary was authorized for employment as a student under OPT beginning August 14, 2003, and valid to July 16, 2004. See 8 C.F.R. 214.2(f)(11)(i)(D) (indicating that a student may not begin employment prior to the approved starting date on her employment authorization, and employment authorization will begin on the date requested or the date the

notified the petitioner the change of status was approved and that the beneficiary's status would change to H-1B nonimmigrant status effective May 1, 2004, as requested by the petitioner. This casts additional doubt as to when the beneficiary commenced employment with the petitioner, and when the beneficiary was promoted to the position offered. The petitioner's request for H-1B status for the beneficiary's employment in the position offered, Quality Control Manager, and the approval of that status effective on May 1, 2004, the date requested by the petitioner, suggests that the beneficiary was promoted prior to the August 2004 date indicated on the labor certification.

While the former CFO's affidavit and letters lend support to the petitioner's assertion that it employed the beneficiary in 2003, we previously found them insufficient to overcome the doubt as to whether the beneficiary was employed as a Quality Control Technician on a full-time basis from August 2003 to August 2004. There is still unresolved, conflicting evidence in the record as to whether that employment was full-time, whether the beneficiary began employment as a Quality Control Technician beginning in August 2003, whether that employment was continuous and full-time from that time onward, and whether the beneficiary remained employed as a Quality Control Technician position through August 2004.

On appeal, prior counsel asserted that the beneficiary earned the low amount of wages while purportedly working for the petitioner from August 2003 through December 2003 because the beneficiary's position was actually an internship, and the petitioner's president provided her free room and board at his home as part of her compensation. We noted that, because the petitioner did not submit evidence to support counsel's assertion, we cannot consider this explanation. *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).

With the current motion, the petitioner submitted a June 20, 2013, letter from its former president. The letter states that from 1998 to 2005 he "was personally involved in all hiring and personnel decisions" for the petitioner. The letter indicates that the petitioner hired the beneficiary in August 2003 as a temporary but full-time Quality Control Technician. The petitioner's former president also states that "because [the beneficiary] did not have prior experience in the rug industry, we treated her position at [redacted] as similar to an internship." The letter explains that the beneficiary's low salary in 2003 was based on an agreement between the petitioner and the beneficiary, that her "compensation" for her full-time employment as a Quality Control Technician with the petitioner included room and board at the former president's house, where she lived "until about January 2004." He indicates that she remained employed in the Quality Control Technician position until August 2004. As with the other experience letters in the record, this letter fails to state the complete dates of the beneficiary's hire and promotion, and does not provide specific details of the terms of the beneficiary's "internship" or the details of the compensation agreement.

On motion, the petitioner also submitted a letter from its former vice president of sales, which states that the petitioner hired the beneficiary as a Quality Control Technician in August 2003 and that she

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employment authorization is adjudicated, whichever is later). This document suggests that the beneficiary began employment no earlier than August 14, 2003.

remained in the full-time position until August 2004, when she was promoted to the offered position. The letter states that the former vice president specifically recalls that the beneficiary lived with the petitioner's former president when she began working. Based on the former vice president's conversations with the former president and the beneficiary at that time, the letter states that the former president provided the beneficiary with room and board "in lieu of a portion of her normal compensation." The letter does not state when the beneficiary first resided at the petitioner's former president's residence, or how long that arrangement lasted. The letter indicates the beneficiary was "hired in August 2003," but does not state what day the beneficiary began employment, or the date that the beneficiary was promoted. The letter also does not state what the beneficiary's normal compensation was, or what portion was foregone under the purported "internship" agreement. The former vice president indicates that he was an independent contractor for the petitioner, and he does not indicate that his role as a vice president of sales would put him in the position to know the terms of the beneficiary's employment agreement with the petitioner. Further, the letter provided is vague; while the writer claims to "specifically recall" the beneficiary's initial period of employment, he does not provide any specific details necessary to corroborate the petitioner's claim that the beneficiary's low wages during 2003 were the result of an agreed upon room and board arrangement, rather than the result of working for the petitioner less than full-time or for a shorter duration than alleged. The writer simply states that he "can confirm that in lieu of a portion of her normal compensation, [the petitioner's president] provided [the beneficiary] with room, board and meals." The letter does not state what the normal compensation was, or what portion was replaced with room, board, and meals.

The petitioner also provided a letter from its former office manager, dated June 21, 2013.<sup>22</sup> This letter states that the petitioner hired the beneficiary in August 2003 as a Quality Control Technician, and that she worked full-time in that position until August 2004, when she assumed the offered position. The letter states that the former office manager and the beneficiary "were friendly" and that, at the time of the beneficiary's hiring, the beneficiary "was trying to determine the direction of her career." The letter states that the beneficiary initially lived with the petitioner's former president "[t]o relieve the pressure of a long-term commitment." The letter is vague; while it states that the writer can "specifically recall" the beneficiary's hiring, it does not provide any details to corroborate the petitioner's claim that the beneficiary's low wages during 2003 were the result of an agreed upon room and board arrangement, rather than the result of working for the petitioner less than full-time or for a shorter duration than alleged. The letter provided is also vague because it states the

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<sup>22</sup> This individual states that she was employed as the petitioner's office manager in both a June 2013 letter and a March 2014 affidavit. However, the report entitled "Job Duties of [REDACTED] Employees – Year 2005," provided by the petitioner, indicates that in 2005 this employee was its customer service representative, and not its office manager. The petitioner's 2005 "Employee Earnings Summary" indicates that it paid this individual only \$7,054.76 in that year, and the 2006 versions of both reports indicate that this individual was not employed by the petitioner in 2006, confirming the employee's statement that she left the petitioner's employment in March 2005. Nothing in the record indicates that she was employed by the petitioner as its office manager prior to becoming its customer service representative. This casts doubt on the credibility of this letter, as the individual appears to have misrepresented her position with the petitioner.

beneficiary's job titles and dates of employment, but provides no details to corroborate that the beneficiary was employed in the functions of a Quality Control Technician from August 2003 to August 2004, rather than in the offered position. While the writer of the letter indicates that she was the petitioner's former office manager, she does not explain whether that role provided her with knowledge of the beneficiary's employment agreement, and she does not provide the details of that agreement.

The evidence on motion did not overcome the inconsistencies in the record, or the doubt cast on the evidence, about the beneficiary's claimed full-time employment with the petitioner as a full-time Quality Control Technician from August 2003 to August 2004. On February 21, 2014, we notified the petitioner that the evidence in the record was insufficient to overcome the doubt cast on the beneficiary's purported qualifying employment experience, and that public records cast additional doubts on the petitioner's explanation for the low wages paid to the beneficiary for her purported five months of employment in 2003.

For the first time on appeal, former counsel for the petitioner had alleged the low wages paid in 2003 were the result of the beneficiary receiving room and board from the petitioner's president. On motion after our decision on appeal, the petitioner provided the letters discussed above from the petitioner's former president, and former employees, stating the beneficiary received compensation in the form of room and board during 2003 from the petitioner's president. While the petitioner has offered an explanation for the low wages paid to the beneficiary in 2003, and on motion has provided letters and affidavits to support the explanation, it has not provided the details regarding the beneficiary's purported compensation agreement that might overcome the inconsistencies in the record. To date, the petitioner has not stated on what specific date the beneficiary commenced employment, or on what specific date the beneficiary was promoted to the offered position. The petitioner has not indicated what the beneficiary's agreed upon salary was in 2003, or what the reasonable cost or fair value of the board, lodging, or other facilities customarily furnished by the petitioner for the beneficiary's benefit were considered part of her wages during that period. The details provided by this evidence corroborates that the beneficiary was employed in 2003, but because they provided no details on that employment they do not corroborate that she was employed full-time or in the position offered for the time period asserted on the labor certification. The lack of detail casts doubt on the petitioner's claim that it employed the beneficiary continuously as a full-time Quality Control Technician from August 2003 to August 2004. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

The beneficiary indicated on both the initial Form G-325A and the second Form G-325A that she resided at one residence in [REDACTED] Georgia, from June 2003 to August 2003, and at a second residence in [REDACTED] Georgia, from September 2003 to August 2006. The beneficiary's Forms G-325A, including the second form that the beneficiary provided to correct the earlier form that she

had not thoroughly reviewed, therefore indicate that the beneficiary changed her residence between August 2003 and September 2003.

We notified the petitioner of derogatory information, to wit: publically available real property records indicate that the address in ██████████ County, Georgia, belonged to the petitioner's former president; and that the address in ██████████ County, Georgia, was jointly owned by the beneficiary and the beneficiary's sister. Our notice of derogatory information provided the petitioner with copies of those public records. We also requested that the petitioner explain the inconsistency between the assertions of its CFO, its former president, and former employees, who stated that the beneficiary resided with and received room and board from the petitioner's former president from August 2003 to at least January 2004, while the beneficiary's two Forms G-325A indicated she resided at a residence she owned beginning September 2003.

In response to the notice of derogatory information, counsel states that the beneficiary maintained "multiple residences at the time." Counsel's assertion in response to our notice of derogatory information is noted. We also note that while counsel states, "the Beneficiary confirms that she spent weekends at the ██████████ Residence in addition to living at the ██████████ Residence during the week," such a statement by the beneficiary is not a part of the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Evidence in the record, which is discussed below, from the petitioner's former president, former vice president, and former office manager, each contend that the beneficiary was employed full-time beginning August 2003 and that her monetary compensation was reduced from its "normal compensation" to account for her room and board, provided by the petitioner's former president. The petitioner's former president also notes that the beneficiary used her "sister's house in ██████████ Georgia" as her permanent address, and spent weekends there, beginning in September 2003.

In response to our notice, the petitioner provided an affidavit, dated March 18, 2014, from the petitioner's former president. This affidavit states that the beneficiary was hired and commenced employment "in August 2003" as a Quality Control Technician for the petitioner; that she remained in that position "until August 2004;" that the petitioner's former president provided the beneficiary room and board at his personal residence as part of her compensation agreement with the petitioner; and that the beneficiary lived in his home "until about January 2004." The former president further indicates that there was no formal written lease agreement. He also indicates that "[s]tarting in September 2003, [the beneficiary] spent the weekends staying at her sister's house in ██████████ Georgia." The affidavit does not state the date that the beneficiary began residing at the former president's residence. The affidavit also does not state what the beneficiary's monetary compensation was, although it does indicate that there was an agreed upon compensation agreement with the petitioner. The affidavit does not indicate if that agreement was altered after the beneficiary purportedly ceased residing with the petitioner's former president in September 2003. The details provided by the affidavit corroborates that the beneficiary was employed in 2003, but due to the lack of detail regarding that employment, it cannot corroborate that she was employed full-time or in the position offered for the time period asserted on the labor certification. The lack of detail casts doubt

on the petitioner's claim that it employed the beneficiary continuously as a full-time Quality Control Technician from August 2003 to August 2004. *Matter of Ho*, 19 I&N at 591.

The petitioner also provides an additional affidavit from the petitioner's purported former Officer Manager, dated March 19, 2014. This affidavit also states that the beneficiary "initially lived with ... the company's president." However, this affidavit does not indicate the date that the beneficiary commenced living with the petitioner's former president, or the date that she ceased that arrangement. The affidavit is silent as to the beneficiary's residence after her initial residence with the petitioner's former president. While this affidavit corroborates that the beneficiary was employed in 2003, the lack of detail regarding that employment arrangement cannot corroborate that she was employed full-time or in the position offered for the time period asserted on the labor certification. The lack of detail casts doubt on the petitioner's claim that it employed the beneficiary continuously as a full-time Quality Control Technician from August 2003 to August 2004. *Matter of Ho*, 19 I&N at 591.

The petitioner also provides an additional affidavit from the petitioner's former Vice President, dated March 17, 2014. This former Vice President states, "during the initial several months of [the beneficiary's] employment with the company, she lived with our President." He also states that he can confirm that "in lieu of a portion of her normal compensation, [the petitioner's former president] provided [the beneficiary] with room, board and meals." The affidavit does not provide any details of that normal compensation, or if the agreement was altered after the beneficiary ceased living with the petitioner's former president full-time. The details provided by the Vice President's affidavit also corroborates that the beneficiary was employed in 2003; however, the absence of any details regarding that employment fails to corroborate that she was employed full-time or in the position offered for the time period asserted on the labor certification. The lack of detail casts doubt on the petitioner's claim that it employed the beneficiary continuously as a full-time Quality Control Technician from August 2003 to August 2004. *Matter of Ho*, 19 I&N at 591.

The petitioner also provides an additional affidavit from its CFO, who indicates that he has been employed by the petitioner since November 2010 as its CFO. He indicates that the petitioner maintains its employment tax records for four years, pursuant to Internal Revenue Service recommendations, and that the petitioner does not "presently possess any additional federal records documenting [the beneficiary's] prior employment." He further states:

Similarly, [redacted] has not maintained internal documents regarding [the beneficiary's] employment such as executed employment agreements, addendums, employee handbooks, pay stubs, or other relevant material other than what has already been provided.

The petitioner included several printed pages from the Internal Revenue Service's website regarding records retention, as referenced by the CFO.

The petitioner also provided a copy of the beneficiary's 2004 W-2 statement, confirming that the beneficiary was employed by the petitioner in 2004 and that the beneficiary received wages totaling

\$34,393.71 during that year. This W-2 statement lists the beneficiary's address in [REDACTED] Georgia.<sup>23</sup> This document does confirm the beneficiary's employment by the petitioner. However, this document cannot, alone, confirm the date that the beneficiary was promoted to the offered position; therefore, it does not overcome the evidence in the record which casts doubt on the beneficiary's assertion that she was employed as a Quality Control Technician from August 2003 to August 2004.

The petitioner also provided records of seven orders paid through the payment portal at Paypal.com, documenting the following purchases and shipping addresses:

- On September 24, 2003, an order shipped to the petitioner's address, [REDACTED] Georgia [REDACTED]
- On October 2, 2003, an order shipped to the same address;
- On October 3, 2003, an order shipped to the same address;
- On October 6, 2003, an order shipped to the same address;
- On October 23, 2003, an order shipped to the same address;
- On October 30, 2003, an order shipped to the same address; and
- On November 18, 2003, an order shipped to the same address.

Counsel asserts that these receipts are among the evidence it provides that "affirmatively verifies the Beneficiary's attestations regarding her employment and residence." The receipts above, including one for the purchase of a Halloween mask, were all sent to the petitioner's address. None of the receipts lists the address of the petitioner's president's house, where the beneficiary purportedly resided. As such, they do not confirm the beneficiary's residence during those relevant months. Further, at issue is not whether the beneficiary was employed by the petitioner during 2003, but rather when the beneficiary commenced employment, whether that employment was full-time and continuous, and in what position the beneficiary was employed. These receipts indicate the beneficiary ordered and paid for items through a personal account, and had those items shipped to the petitioner's address.

The petitioner also provided letters from [REDACTED] and [REDACTED] confirming they do not maintain records from 2003 or 2004. Counsel explains that these documents indicate that the beneficiary is unable to provide confirmation of her income from the petitioner, on a regular and continuous basis, from August 2003 to August 2004 because the beneficiary's banks do not maintain these records.

The petitioner also provided a vehicle registration card issued to the beneficiary by the state of North Carolina. Counsel asserts that this document demonstrates "the Beneficiary registered her vehicle using the [REDACTED] Residence valid until June 15, 2004." The registration card from the state of North

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<sup>23</sup> As the 2004 W-2 statement was issued sometime in 2005, the residence indicated on that statement has little bearing on the beneficiary's residence during January 2004, when the petitioner's former president asserted she resided at his residence in [REDACTED] Georgia.

Carolina does display the petitioner's former president's address in [REDACTED] Georgia, and does indicate it is valid through June 15, 2004. However, the card does not indicate its date of issue, or if the registration was reissued with an updated address. While this registration card does support counsel's assertion that the beneficiary resided at the petitioner's former president's residence in 2003, and confirms that the beneficiary utilized that address as of June 2003, as stated on her two Forms G-325A, it does not confirm whether the beneficiary resided there from June 2003 to August 2003, as the beneficiary swore to on two separate Forms G-325A, or if the beneficiary resided there beyond August 2003, as the petitioner has asserted on appeal. The record does not contain the beneficiary's vehicle registration, or registrations, from the state of Georgia,<sup>24</sup> which may have indicated the time that the beneficiary registered her vehicle in that state after her move to Georgia.

The petitioner has established that it paid wages to the beneficiary in 2003 and 2004, in the amounts of \$1,751 and \$34,393.71, respectively. This documents that the beneficiary was employed by the petitioner in 2003 and in 2004. However, there is conflicting evidence in the record regarding whether the beneficiary was employed full-time as a Quality Control Technician by the petitioner from August 2003 to August 2004. That evidence includes:

- the petitioner's two conflicting letters, dated June 14, 2007, cast doubt on when the beneficiary commenced employment with the petitioner, in what position the beneficiary was employed, and at what time she was promoted to the offered position;
- the petitioner's employment verification letter, dated July 18, 2007, casts doubt on when the beneficiary commenced employment with the petitioner, in what position the beneficiary was employed, and at what time she was promoted to the offered position;
- the beneficiary's Forms G-325A contain conflicting statements, signed under penalty of perjury, regarding the dates and position in which the beneficiary was employed by the petitioner, casting doubt on when the beneficiary commenced employment with the petitioner, in what position the beneficiary was employed, and at what time she was promoted to the offered position;
- the wages paid to the beneficiary in 2003 do not support the conclusion that she was employed full-time from August through December in that year as claimed on the labor certification;
- the beneficiary's self-prepared 2003 individual federal income tax return casts doubt on what position she held with the petitioner, and whether she remained in the Quality Control Technician role through August 2004, as it indicates her belief that she was the petitioner's Quality Control Manager as of March 9, 2004;
- the beneficiary's self-prepared North Carolina 2003 individual income tax return casts doubt on when her residency in that state ended, as the beneficiary stated on that return that she resided in North Carolina through September 30, 2003;

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<sup>24</sup> New residents of Georgia are required to register their motor vehicles with that state within thirty days of establishing residency. See Georgia Department of Revenue, "When Must I Register My Vehicles," [http://motor.etax.dor.ga.gov/motor/RegistrationSection/rs\\_WhenRegister.aspx](http://motor.etax.dor.ga.gov/motor/RegistrationSection/rs_WhenRegister.aspx) (accessed June 16, 2014).

- the petitioner's December 2003 request for H-1B status on behalf of the beneficiary requested that she be granted a change of status to begin employment as its Quality Control Manager, effective May 1, 2004, which supports the beneficiary's claim that she was first employed by the petitioner as its Quality Control Technician beginning in August 2003, but casts doubt on the beneficiary's claim that she continued in that role until August 2004.

The record also contains documents that tend to confirm or corroborate the petitioner's assertions, including:

- 2003 and 2004 W-2 statements confirming the beneficiary's employment by the petitioner during those years;
- affidavits from the petitioner's former employees attesting that the beneficiary was employed by the petitioner from August 2003 to August 2004 as its Quality Control Technician;
- affidavits from the petitioner's former employees attesting that the beneficiary's remuneration for her full-time and continuous employment by the petitioner included room and board at the petitioner's former president's house;
- the beneficiary's North Carolina vehicle registration suggests the beneficiary updated that registration to reflect an address in [REDACTED] Georgia, as of June 2003, as the registration expired in June 2004, which is consistent with and tends to confirm the validity of her residence information as provided Forms G-325A;
- objective property records maintained by [REDACTED] County, Georgia, indicate that the beneficiary purchased a residential property in that county in September 2003, which is consistent with and tends to confirm the validity of her residence information as provided on the Forms G-325A; and
- the beneficiary's Employment Authorization Card bears an authorization date of August 14, 2003, which supports the beneficiary's claim that she commenced employment sometime in August 2003.

We acknowledge the petitioner's contention, first provided on appeal, that it provided a package of compensation to the beneficiary, and that in 2003 that remuneration included a combination of wages, room, and board. However, the petitioner asserts that it maintains no records of that agreement, and the petitioner provides no description of that agreement, other than to state that such an agreement existed. The petitioner does not describe how the agreement may have changed in January 2004, when the beneficiary purportedly ceased residing with its former president. The petitioner also does not describe how the arrangement qualified as remuneration from the petitioner to the beneficiary, when the benefit of free room and board appears to have derived from the petitioner's former president individually, rather than the petitioner. As described above, it was the petitioner's former president who personally provided the room and board to the beneficiary; to date, the petitioner has not described the scheme by which it compensated its former president for this outlay, or otherwise provided evidence or a description of how the former president's provision of his home, and meals, to the beneficiary, would qualify as remuneration that flowed from the petitioner to the beneficiary. There is no evidence, or allegation, that the petitioner paid all or a portion of its former president's mortgage, utility, or food costs, as a part of a plan of compensation

for the beneficiary. 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)).

As this summary notes, documentation prepared for this petition, as well as documents prepared independently and prior to the petition's filing, casts doubt on whether the beneficiary resided at the petitioner's former president's residence from August 2003 to January 2004, and whether the beneficiary was employed full-time and on a continuous basis from August 2003 to August 2004 as a Quality Control Technician with the petitioner. The evidence in the record, including the petitioner's response to our notice of derogatory information, has not overcome these doubts.

In response to our notice of derogatory evidence, the petitioner for the first time asserts that the beneficiary is also qualified for the position based on experience with another employer in 2002, while she was completing her Bachelor of Science degree. Counsel for the petitioner states, "the Beneficiary possessed six (6) months of applicable job experience with [REDACTED] (July 2002 – December 2002), in addition to the eight (8) months of experience with the Petitioner (January 2004 – August 2004)."<sup>25</sup> In support, the petitioner provides two "co-op" job offer letters from persons at a [REDACTED] in Hopewell, Virginia. The letters are supported by pay records, a 2002 W-2 statement issued by [REDACTED] to the beneficiary, a "Co-Op and/or Intern Position" description of the job duties, and letters and forms from the beneficiary's university confirming her recommendation and authorization to participate in the co-op opportunity.

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

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

At the outset, we note that these offer letters were both written prior to the beneficiary commencing the purported employment; therefore, they are not letters from an employer describing the "training received" or "experience of" the beneficiary, as these letters were written prior to that experience occurring. *Id.* As such, they are not considered to document the beneficiary's training or experience. *Id.*

While the supporting documents do suggest that the beneficiary was employed by [REDACTED] as a Co-Op/Intern, they do not clearly define the beneficiary's dates of employment. One offer letter, dated March 19, 2002, has a handwritten "start date" of May 20,

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<sup>25</sup> As noted above, the labor certification as submitted to the DOL lists only the beneficiary's experience with the petitioner. 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.

2002, which is signed by a Human Resources Generalist at the [REDACTED]. Another offer letter, dated July 19, 2002, indicates the beneficiary will have a start date of August 16, 2002, and continue through December 15, 2002. An employment verification, dated October 26, 2003, indicates the beneficiary's hire date was June 3, 2002, and her termination date was December 3, 2002. A letter from the beneficiary's university, dated July 25, 2002, states that her application for Curricular Practical Training (CPT) was approved and that she was authorized for full-time training in Textile Chemistry with [REDACTED] beginning on August 16, 2002. Additional evidence in the record, including Forms I-20 prepared by the beneficiary's university, suggests an earlier period of CPT was authorized as of May 2002. Given that the offer letters were issued prior to the beneficiary's start date, and the employment verification was prepared after the beneficiary's employment ended, the dates on the employment verification appear to be more credible. Were we to accept this amalgam of documentation regarding the beneficiary's co-op/internship, the petitioner establishes: (1) that the beneficiary was in the human resources system of [REDACTED] as a Co-Op/Intern with a hire date of June 3, 2002, to December 3, 2002; and (2) she commenced employment with [REDACTED], on August 16, 2002. This indicates the beneficiary was employed full-time by [REDACTED] for approximately six months.

The job duties provided on the Co-Op/Internship description, dated May 1, 2002, include:

Co Op/Intern will assist with managing Customer Complaint System for the [REDACTED] produced by [REDACTED] for the [REDACTED] Industry. Responsibilities include managing the System Database and assisting Technician with Laboratory Testing Requests at our nearby Technical Center. Data from Microscopy, Chemical, Physical, X-Ray and Thermal Testing will be tabulated for review and analysis. Participation with the data analysis is encouraged as the Co Op progresses into an understanding of the use of these results. Co Op may also be assigned Projects dealing with Test Improvements as well as support efforts on special problems within the manufacturing operation.

While these duties do not appear to be similar to those of the position offered, Quality Control Manager, they appear to fall within the related occupations of "textile engineering or quality assurance in the employer's industry," as permitted by the terms of the labor certification.

As discussed above, prior to considering the beneficiary's experience with [REDACTED] the petitioner has not established when the beneficiary was promoted to the position offered, Quality Control Manager, or that the beneficiary possessed the one year of experience required by the terms of the labor certification prior to commencing employment with the petitioner in the position offered. Counsel asserts, "[e]ven when dismissing ... the Beneficiary's 2003 employment with the Petitioner due to the alleged inconsistency between the labor certification and G-325A, the Beneficiary can still demonstrate previous experience which meets the requirements of the labor certification." However, even if we accept counsel's assertion, the petitioner must provide an experience letter that comports with the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A), as well as clarifying evidence from the beneficiary's university regarding the nature of the beneficiary's internship. The beneficiary's employment with [REDACTED] was gained between June and December 2002, during the

time that the beneficiary was enrolled in her Bachelor of Science program, which she completed in May 2003; and the position is described as a Co-Op or internship. It is unclear from the record whether this position was considered employment, or whether the position was an internship for which the beneficiary received degree credit, or was otherwise a requirement of the degree she received.<sup>26</sup> Without evidence documenting whether the beneficiary received academic credit for her co-op/internship, we are unable to determine if this experience was already accounted for as a part of her degree.

Even if the petitioner were to provide a letter that meets the regulatory requirements, and the petitioner demonstrated that the beneficiary's experience in her co-op/internship qualified as employment experience and not training or academic education, this experience with [REDACTED] does not appear to be qualifying experience. While counsel contends that this is qualifying experience, the petitioner included as a requirement on the labor certification that "one (1) year of experience must include experience with hand-knotted imported textiles." The evidence in the record does not establish that the textiles produced at [REDACTED] are imported, or hand-knotted.<sup>27</sup> While the beneficiary's experience might otherwise be creditable towards the year of experience in a related occupation, it does not appear to meet the additional term required by the petitioner. Further, the "Co Op and/or Intern Position" description indicates that the position is with the "Customer Excellence" division, for the purpose of assisting with managing the "Customer Complaint System." It is unclear if these duties would fall within the related occupations. The beneficiary has not otherwise demonstrated a year of experience with hand-knotted, imported textiles, prior to purportedly being promoted by the petitioner to the position offered at an unconfirmed date in 2004. Therefore, while the petitioner may be able to document that the beneficiary possessed additional experience in the petitioner's industry, it has not evidenced that the beneficiary possessed one year of experience in the position offered, or a related occupation, which included a year of experience with hand-knotted, imported textiles, as was stated on the labor certification to be the petitioner's minimum requirements for the position offered.

The petitioner has not overcome the doubt cast on the petitioner's evidence by the inconsistencies in the record. As the petitioner failed to demonstrate that the beneficiary possessed one year of experience in the position offered, or a related occupation, which includes a year of experience with hand-knotted, imported textiles, the petitioner has not demonstrated the beneficiary to be qualified for the position offered. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

<sup>26</sup> The record contains the beneficiary's transcripts from the [REDACTED], which she attended prior to the [REDACTED]. The record also contains an unofficial, partial transcript from [REDACTED], printed January 24, 2002; accordingly, that transcript does not document any courses, internships, or credits the beneficiary earned after that date.

<sup>27</sup> [REDACTED] See [REDACTED], "[REDACTED]," [http://\[REDACTED\]](http://[REDACTED]) (accessed June 16, 2014) (describing the [REDACTED]).

### **E. Fraud or Willful Misrepresentation of the Beneficiary's Qualifications**

In the NOR, the director found that the petitioner and the beneficiary, by fraud or willful misrepresentation, provided incorrect dates of the beneficiary's employment with the petitioner on the labor certification and in the petition. Based on this determination, the director invalidated the approved labor certification. The regulations at 20 C.F.R. § 656.31(d) pertain to labor certification applications involving fraud or willful misrepresentation:

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

Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, states, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A willful misrepresentation of a material fact is 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 S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

The Act authorizes immigration officers to administer oaths and consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). The Secretary of Homeland Security has also authorized USCIS to investigate alleged civil and criminal violations of immigration laws, including fraud in applications, recommendations for prosecution, and other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. In a visa petition adjudication, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *See Matter of Ho*, 19 I&N Dec. at 591. Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in an employment-based, immigrant visa petition are "true."

A material misrepresentation constitutes a willful, 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 term "willfully" means knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See*

*Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). 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 [she] be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, to find a willful, material misrepresentation in visa petition proceedings, an immigration officer must determine that: (1) the petitioner and/or beneficiary made a false representation to an authorized official of the United States government; (2) the misrepresentation was willfully made; and (3) the misrepresented fact 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.

In contrast to misrepresentation of a material fact, a finding of fraud requires a determination of a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the officer must have believed and acted upon the false representation. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956); see also *Ortiz-Bouchet v. U.S. Att'y. Gen.*, 24 Fla. L. Weekly Fed. C 233, 11<sup>th</sup> Cir., April 23, 2013, 2013 WL 1729412, at \*2, (deferring to the Board of Immigration Appeal's definitions of the terms "fraud" and "material misrepresentation").

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary has the required experience for the position offered. The beneficiary's employment history with the petitioner is a material fact because, without one year of full-time employment experience in the job offered, or in "textile engineering or quality assurance in the employer's industry," with "hand-knotted imported textiles," the beneficiary would not qualify for the offered position. Signing a labor certification, Form ETA 750B, with false representations of the beneficiary's experience, and submitting false experience letters, amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. 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, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the

relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The beneficiary denies that she falsified her employment experience on the labor certification, and states that any discrepancies in her experience letters and Form G-325A are the result of attorney error. However, the record establishes that the beneficiary falsely represented her employment experience with the petitioner on the labor certification.

On the true facts, the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the Department of Labor in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the Department of Labor issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that she met the petitioner's minimum experience requirements. *Compare* 8 C.F.R. § 204.5(g) with § 204.5(1)(l)(3)(ii)(C). The beneficiary did not establish the necessary qualifications in this case, as she did not possess the experience required. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of her experience qualifications was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, she fails the second and third parts of the materiality test. The beneficiary's reliance upon falsified experience shuts off a line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented that government agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. The labor certification is signed by the petitioner and the beneficiary under penalty of perjury. Pursuant to the regulation in effect at the time:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

20 C.F.R. § 656.21(b)(5) (2004).<sup>28</sup>

<sup>28</sup> Prior DOL regulations govern the instant petition because the petitioner filed the labor certification before the effective date of the current regulations for the Program Electronic Review Management system (popularly known as PERM). *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulations apply to labor certifications filed on or after March 28, 2005, while the labor certification in the instant case was filed on March 24, 2005. The relevant citations are to DOL

Based on the employer's assertions regarding the actual minimum requirements for the job opportunity, as described on the labor certification, DOL must grant the labor certification provided that the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. 20 C.F.R. § 656.24(b)(1). DOL may determine there is no U.S. worker who is able, willing, qualified and available for the job opportunity as described by the actual minimum requirements of that job opportunity. 20 C.F.R. § 656.24(b)(2).

The labor certification states that the actual minimum requirements for the position offered include a baccalaureate degree in textile engineering or a related field of study, and one year of experience, either as a Quality Control Manager or in a related occupation, including textile engineering or quality assurance in the employer's industry, and that the applicant must possess the special requirement of one year of experience with hand-knotted, imported textiles.

On Form ETA 750 (Part B), the beneficiary stated her employment as a Quality Control Technician with the petitioner began August 2003, was full-time, and ended August 2004. She stated that this one year of full-time, continuous experience included experience with hand-knotted, imported textiles, which is in the petitioner's industry.

The W-2 statement issued by the petitioner to the beneficiary in 2003 documents that the beneficiary worked less than the continuous, full-time period from August 2003 through the end of 2003 that was claimed on the labor certification. The beneficiary's initial Form G-325A, signed under penalty of perjury and bearing the warning that "severe penalties" apply for false statements and omissions, claimed she was not employed by the petitioner at all in 2003, and that she commenced employment with the petitioner in the position offered in January 2004. The petitioner's June and July 2007 support letters create ambiguity regarding when the beneficiary commenced employment with the petitioner, and in what role. Objective evidence in the record, created prior to the director's NOIR, indicates the beneficiary was not employed by the petitioner as claimed on the labor certification. The only evidence to support the claim that the beneficiary's employment tracks the period of time claimed on the labor certification are letters and affidavits from former employees of the petitioner, created after the director's NOIR, on appeal, or in response to our notice of derogatory evidence.

The beneficiary's statement on her initial Form G-325A, that she began working for the petitioner in January 2004 in the offered position, contradicted her representation on the labor certification and the representation of the petitioner's former CFO in the June 14, 2007, letter submitted with the petition. The beneficiary's explanation for these contradictions, that she reviewed but did not "thoroughly review" the Forms G-325A, is noted. However, the beneficiary's disavowal of participation in fraud cannot be sustained in light of her admission of willingly signing the document. Her failure to apprise herself of the contents of the paperwork, or the information being submitted, constitutes deliberate avoidance and does not absolve her of responsibility for the content of her 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

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regulations in effect prior to the PERM amendments, which were last published in 2004.

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 herself of responsibility by simply claiming that she had no knowledge or participation in a matter, where she provided all the supporting documents and signed the 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 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.

The small amount of wages shown on the beneficiary's 2003 W-2 form indicates that she did not work full-time for the petitioner from August 2003 to December 2003 as she stated on the labor certification, and her identification of her occupation as "Quality Control Manager" on her 2003 tax return of March 9, 2004 indicates that she did not work in a dissimilar position for at least one year before assuming the position offered with the petitioner as the labor certification requires. The approved H-1B petition for the beneficiary also suggests that she began employment in the offered position less than a year after purportedly beginning employment with the petitioner in August 2003, as the petitioner requested to begin employing the beneficiary in the position offered effective May 1, 2004. The preponderance of the evidence therefore establishes that the beneficiary falsely represented her employment experience on the labor certification, which the beneficiary signed under penalty of perjury.

We note that our notice of derogatory information provided the petitioner another opportunity to provide independent, objective evidence to support its claims that it employed the beneficiary as claimed on the labor certification. We also note that the petitioner, from at least the priority date onward, was a small corporation wholly owned by the beneficiary's father, and that in 2003 the beneficiary's father was one of only two shareholders in the petitioner. Further, from at least the priority date onward, the beneficiary's sister held the position of president with the petitioner. This tends to indicate that the petitioner has greater access to its business records than suggested by counsel and the petitioner. However, in response to our notice, the petitioner's CFO states unequivocally that the petitioner maintains no documentation that would support its claims that it employed the beneficiary on a full-time and continuous basis as its Quality Control Technician from August 2003 to August 2004. The CFO does not provide any information as to whether these documents ever existed, or what the petitioner's normal business practices are in regards to the retention or destruction of business records. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, DOL may

investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the beneficiary actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the Department of Labor was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the Department of Labor had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

The circumstances show that the beneficiary falsely represented her employment experience on the labor certification with an intent to deceive labor and immigration officials. The DOL and USCIS accepted and acted upon the beneficiary's false representations by approving the labor certification and the petition.

By misrepresenting her experience and submitting fraudulent documents to USCIS and making misrepresentations to the Department of Labor, the beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

On appeal, prior counsel asserted that any factual errors in the filings were "inadvertent and harmless" and that "[n]either the petitioner nor the beneficiary intended to defraud and/or deceive the U.S. government." Current counsel asserts that "neither the Petitioner nor the Beneficiary made a false representation on either the labor certification application or the immigrant petition."

On motion, current counsel also argues that even if the beneficiary had made false representations of her employment experience, those representations were not material because we found the instant petition unapproveable on additional grounds beyond just the beneficiary's employment history. Counsel cites no legal authority that would preclude a finding of fraud or willful misrepresentation simply because an application or petition is otherwise unapproveable. Counsel argues, "the Court in *Kungys v. United States* held, 'false statements must be shown to have been predictably capable of affecting the decisions of the decision-making body for it to be material.'" Counsel then states, "since the beneficiary's employment history would not have ultimately affected the decision on the immigrant petition, USCIS may not legally arrive at a finding of fraud or willful misrepresentation." Counsel's contention that we may make a finding of fraud or willful misrepresentation only if the petition is otherwise approvable is without merit. The case cited states that the false statements must

be predictably capable of affecting the decision, not that they must be capable of determining the entirety of the decision regardless of any of the other circumstances in the petition. Such a limitation would prevent us from finding fraud or willful misrepresentation in all but a particular subset of cases that were otherwise approvable but for fraud or willful misrepresentation. Such a limitation is not expressed in the Act or in the case relied on by counsel.

As discussed above, the record shows that the discrepancies in the beneficiary's positions and dates of employment with the petitioner were not inadvertent or harmless. The beneficiary signed the labor certification under penalty of perjury. The beneficiary's employment history with the petitioner was a material fact bearing on the beneficiary's qualifications for the offered position. If the petitioner promoted the beneficiary to the position offered with less than a year of experience as required by the terms of the labor certification, the petitioner may have falsely represented the actual minimum requirements for the job opportunity. The wage amount on the beneficiary's 2003 W-2 form, her identification of her occupation as the offered position on her 2003 tax return, and the dates of the beneficiary's [REDACTED] employment, and then H-1B employment in the offered position, undermine arguments that the discrepancies were inadvertent.

By signing Form ETA 750B, and submitting false experience documents, the beneficiary has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the beneficiary has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that she submitted false documents, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. While the petitioner has chosen to not appeal the other grounds in the previous decisions, this does not negate our findings regarding those grounds.

#### **F. Due Process & Standard of Evidence**

Counsel asserts that USCIS has violated the beneficiary's due process rights, and the beneficiary has not had an opportunity to be heard. It is proper for us, when warranted, to make a finding of fraud or willful misrepresentation pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182. As discussed above, the record contains affidavits from the beneficiary directly responding to these issues. As discussed thoroughly in our initial decision, the petitioner is wholly owned by the beneficiary's father, the petitioner's president is the beneficiary's sister, and at the time of the director's decision, the beneficiary was the petitioner's Director of Quality Assurance. The beneficiary, by sworn statement, has provided various explanations regarding the discrepancies with her alleged employment history; however, neither the petitioner nor the beneficiary has produced independent, objective evidence sufficient to overcome the doubts cast by the discrepancies in evidence of record. Furthermore, even if USCIS had committed a procedural error by failing to solicit further evidence directly from the beneficiary, it is not clear what remedy would be appropriate beyond the appeal and motion processes. The petitioner and the beneficiary have in fact supplemented the record on appeal and again on motion, and in response to our notice; on motion, the petitioner is not advocating that its petition is approvable, but rather is requesting only that we "rescind its finding of fraudulent misrepresentation of the Beneficiary."

We acknowledge counsel's argument that "the applicable standard of evidence for a finding of fraud is clear and convincing." Counsel further asserts by utilizing the preponderance of the evidence standard, we applied the "incorrect standard of proof," and that "the use of an incorrect standard of proof is *de facto* evidence of legal error." To support its contention, counsel states "a finding of willful misrepresentation of a material fact must be based on 'clear, unequivocal, and convincing evidence.'" (*Kungys v. United States*, 485 U.S. 759, 771-72)." Counsel further states, "[i]n order to affirm the Beneficiary *willfully* committed fraud, the AAO and Service must demonstrate clear and convincing evidence." Counsel cites to *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Counsel further quotes from the *Adjudicator's Field Manual*, Chapter 11.1, as follows: "The preponderance of the evidence standard of proof, however, does not apply to those applications and petitions where a higher standard is specified by law."<sup>29</sup>

We are bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Vina, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974) ("A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or

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<sup>29</sup> The full quote provides the examples during which a higher standard of proof may exist. "The preponderance of the evidence standard of proof, however, does not apply to those applications and petitions where a higher standard is specified by law. The statute provides for a higher standard in some cases, such as the 'clear and convincing evidence' standard required to rebut the presumption of a prior fraudulent marriage pursuant to section 245(e)(3) of the Act and to determine citizenship of children born out of wedlock pursuant to section 309(a)(1) of the Act." *Adjudicator's Field Manual*, Chapter 11.1(c), "Burden of Proof and Standard of Proof" available at <http://www.uscis.gov/laws/afm> (accessed June 16, 2014).

rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.") The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Counsel's suggestion that the Adjudicator's Field Manual indicates a higher standard of proof applies to the instant matter is unfounded. That manual does not bind our decision. Further, the manual does not state that a higher standard of proof applies to the finding of fraud or willful misrepresentation in an administrative matter. Chapter 40.6.2(c)(1) of the manual specifically addressed fraud or misrepresentation based on Section 212(a)(6)(C)(i) of the Act.<sup>30</sup> The section on "The Burden and Standard of Proof" provides the following guidance:

The burden of proof during the immigration benefits seeking process is always on the alien to establish by a preponderance of the evidence that he or she is not inadmissible; this is also true in the case of possible inadmissibility under section 212(a)(6)(C)(i) of the Act. ... The burden and standard of proof is different in removal proceedings: If DHS seeks an alien's removal as a deportable alien, section 240(c)(3) of the Act provides that DHS must establish the facts supporting the removal charge by clear and convincing evidence.

While a valid labor certification is required evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, we made no consideration or finding of admissibility in our decision. Our office does not conduct removal proceedings. Thus, the standard of proof in the matter at issue is the preponderance of evidence.

We note that counsel accurately referenced, by footnote, that *Kungys* concerned denaturalization proceedings, rather than the administrative proceedings at issue. However, counsel then argues that the rationale in *Kungys* "can properly be applied with respect to other immigration benefits. See *Monter v. Gonzales*, 430 F. 3<sup>rd</sup> 546 (2<sup>nd</sup> Cir. 2005)." Counsel's reliance on *Monter* is misplaced. First, that decision arose in the jurisdiction of another U.S. Circuit Court of Appeals, the Second Circuit, and the petitioner and beneficiary are based in Georgia, which is located in the Eleventh Circuit. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). Second, the decision in *Monter* considered the "immediate hardship of deportation," an act of administrative removal, which involves a determination of admissibility. Our decision does not make a determination as to admissibility. Our decision makes a finding of fraud or willful

<sup>30</sup> Portions of the Adjudicator's Field Manual were superseded by the USCIS Policy Manual on March 25, 2014. *See* USCIS Policy Manual, Volume 8, Part J, "Fraud and Willful Misrepresentation" located at <http://www.uscis.gov/policymanual> (accessed June 16, 2014).

misrepresentation such that the labor certification filed with the petition was invalidated, and that the petitioner failed to establish that the beneficiary possessed the experience required for the position offered as of the priority date.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *see Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

After the director's NOIR, the petitioner was on notice that the beneficiary's claimed experience was at issue, and that the director initially considered evidence in the record to establish that fraud or willful misrepresentation existed. The petitioner and beneficiary provided information and documentation to rebut the finding of fraud or willful misrepresentation in response to the director's NOIR, on appeal, and on motion. The petitioner had the burden of establishing at least one of the following to overcome the finding:

- the fraud was not made to procure a benefit under the Act;
- there was no false representation;
- the false representation was not willful;
- the false representation was not material;
- the false representation was not made to a U.S. Government official;
- the person did not intend to deceive; or
- the U.S. Government official did not believe or did not act upon the false representation.

We analyzed the evidence in the record above, determining that evidence in the record that would permit a reasonable person to conclude that the beneficiary's employment experience as stated on the labor certification, and supporting documents submitted with the petition, was an assertion or manifestation that was not in accordance with the true facts. After analyzing and weighing the evidence, we concluded that the beneficiary sought an immigration benefit through fraud or willful misrepresentation, as follows:

1. The petitioner and beneficiary sought a benefit under the Act, employment-based immigrant visa classification as a skilled worker or professional.

2. Without the false representation, the beneficiary would have been ineligible for the benefit sought, as she lacked the experience required for the position offered; therefore, the false representation on the labor certification, which is required for the preference classification sought, was made to procure a benefit under the Act.
3. That a false representation exists is documented by objective, independent evidence, including records of payment that indicate the beneficiary was employed in 2003 for less than the continuous five months of full-time experience claimed on the labor certification and in some of the petitioners' supporting letters. Additionally, evidence in the record indicates that the beneficiary was promoted to the position offered earlier than the date asserted on the labor certification, which indicates that she lacked the year of experience claimed on the labor certification.
4. The false representation of the beneficiary's experience was willful because the beneficiary attested to having the experience by signing the labor certification under penalty of perjury. That claimed experience was factually unsupported, as later received evidence, including sworn documents, support letters, and tax records, conflicted with the experience the beneficiary claimed on the labor certification.
5. The false representation was material, as the claimed experience was necessary to demonstrate the beneficiary's eligibility of the job opportunity and the resultant immigration benefit. The materiality of the beneficiary's experience was established because it tended to cut off a line of inquiry before the DOL: had the beneficiary listed her true experience on the labor certification, DOL may have determined that she lacked the minimum experience required for the job opportunity and denied the petitioner's application for labor certification, and the preference classification sought requires a labor certification to document the beneficiary's admissibility.
6. The false representation was made to both DOL and USCIS; therefore, the false representation was made to a U.S. government official.
7. The false representation served a singular purpose, to establish that the beneficiary possessed the minimum experience required for the position offered. Therefore, the false representation was made with the intent to deceive a U.S. government official.
8. DOL granted the labor certification, and the director initially approved the petition; therefore, U.S. government officials believed and acted upon the false representation.

Evidence in the record would permit a reasonable person to find that the petitioner and beneficiary used fraud, or willfully misrepresented a material fact, in an attempt to obtain an immigration benefit. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (agency fact-finding must be accepted unless a reasonable fact-finder would necessarily conclude otherwise). As noted, the standard of proof in this matter is the preponderance of the evidence. The burden of proof in this matter rests with the petitioner. *See Matter of Arthur*, 16 I&N Dec. 558 (BIA 1978).

We considered all of the evidence in the record on appeal, and again on motion, including evidence submitted in response to our Notice of Intent to Dismiss. We find that the evidence for and against a finding of fraud or willful misrepresentation is at most of equal weight.<sup>31</sup> There is a reasonable evidentiary basis to conclude that the immigration benefit was sought by fraud or willful misrepresentation, and the petitioner has not overcome that reasonable basis with evidence. Therefore, all of the elements necessary for a finding of fraud and willful misrepresentation are present in this matter.

### III. CONCLUSION

In summary, the petitioner has not contested the findings in our previous decision that it failed to establish its ability to pay the beneficiary's proffered from the priority date onward, or that it failed to establish that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date. On motion, the petitioner failed to overcome the doubt cast on its evidence regarding the purported dates and positions in which it employed the beneficiary, or our finding that the beneficiary sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion to reconsider is granted. Our previous decision, dated June 3, 2013, will not be rescinded; the approval of the petition shall remain revoked, and the labor certification shall remain invalidated.

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<sup>31</sup> We again note that the limited objective evidence available, which existed independent of the petition process, indicates that the beneficiary was employed by the petitioner less than the continuous and full-time period from August 2003 through December 2003; and that evidence further indicates that the beneficiary was promoted to the position offered prior to August 2004. While the petitioner has provided explanations for specific deficiencies, once identified by the director or our office, it has to date not produced objective, independent evidence that would corroborate those assertions. As such, the petitioner failed to establish that the beneficiary possessed the one year of full-time experience from August 2003 to August 2004, as claimed on the labor certification.