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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 2 4 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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), initially approved the immigrant visa petition on April 11, 2003. However, after issuing two Notices of Intent to Revoke (NOIRs), the Director revoked the petition's approval on May 5, 2010. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. We granted the petitioner's subsequent motion to reopen, but again dismissed the appeal. The matter is now before us on the petitioner's motion to reconsider and reopen. The motion will be granted, our previous decisions will be affirmed in part and withdrawn in part, and the appeal will be dismissed.

The petitioner described itself on the Form I-140, Petition for Alien Worker, as an import and export company.[1] It seeks to permanently employ the beneficiary as a bilingual secretary, requesting her classification as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[2]

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date an office within DOL's employment service system accepted the labor certification for processing, is October 10, 2000. *See* 8 C.F.R. § 204.5(d).

In dismissing the petitioner's appeal in our prior decisions, we affirmed the Director's conclusion that the petitioner and the beneficiary fraudulently represented the beneficiary's qualifying experience for the offered position on the accompanying labor certification and in evidence supporting the petition. We therefore affirmed the Director's invalidation of the labor certification and his revocation of the petition's approval. *See* former 20 C.F.R. § 656.30(d) (2004) (authorizing U.S. Citizenship and Immigration Services (USCIS) to invalidate a labor certification after its issuance upon a finding that it involved fraud or willful misrepresentation of a material fact).[3]

On motion, the petitioner asserts that we ignored a precedent decision of the U.S. Court of Appeals for the Eleventh Circuit by presuming that the petitioner and the beneficiary knew of the fraudulent activities of their former attorney. *See, e.g., Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993) (stating that federal agencies must generally follow the law of U.S. circuits in which cases arise). The motion also argues that, because the Director's NOIRs addressed only the misrepresentation of

---

[1] The record contains evidence that the petitioner sells cellular telephones, other wireless communications devices and accessories, and personal travel items. Online Florida records also indicate that the petitioning corporation does business under the name [redacted]. *See* Fla. Dep't of State, Div. of Corps., at [redacted] (accessed Oct. 17, 2014).

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

[3] Because the accompanying labor certification was filed before March 28, 2005, the former DOL regulations at 20 C.F.R. § 656, *et seq.*, govern the instant labor certification. *See* Final PERM Regulations, 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). Therefore, we cite to Title 20 of the Code of Federal Regulations in this decision as the title existed in 2004, before the effective date of the current regulations.

the beneficiary's experience, we may not affirm the revocation of the petition's approval on any other grounds.

The petitioner's motion states reasons for reconsideration and is supported by pertinent, precedent decisions. *See* 8 C.F.R. § 103.5(a)(3). We therefore grant the motion as a motion to reconsider.

Sufficiency of the NOIRs

USCIS may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. A director's realization that he or she erroneously approved a petition may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS issues a notice of intent to revoke a petition's approval for good and sufficient cause if "the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS properly issues a notice of revocation if "the evidence of record at the time the decision was issued (including any explanation, rebuttal, or evidence submitted by the petitioner [in response to the notice of intent to revoke], warranted such a denial." *Id.* at 452.

In the instant case, the Director's first NOIR, dated June 30, 2003, informed the petitioner that its former attorney had been criminally convicted during the prior month of several federal offenses involving fraudulent immigrant visa petitions. Because the attorney represented the petitioner in the instant visa petition proceedings and was found guilty of fraud in connection with other petitions, the NOIR concluded that the instant petition "may contain fraudulent documents" and "cannot be considered approvable with the documents submitted." The NOIR requested additional evidence to support the *bona fides* of the job opportunity and the authenticity of documentation accompanying the petition.

The evidence of record at the time the Director issued the first NOIR, if unexplained and unrebutted, would not have warranted the petition's denial. The attorney's criminal conviction for submitting fraudulent visa petitions casts doubt on the validity of the instant petition and its supporting evidence. However, the attorney's conviction alone, if unexplained and unrebutted, would not have warranted the petition's denial. The NOIR did not indicate that the petitioner's former attorney was convicted of fraud in connection with the instant petition, or that the record contained other indications that the petition was fraudulent. Therefore, the first NOIR was not issued for good and sufficient cause, and cannot sustain the revocation of the petition's approval. Accordingly, we will withdraw findings in our previous decisions stating that the first NOIR was properly issued.

The Director's second NOIR, dated February 17, 2010, also referred to the 2003 criminal conviction of the petitioner's former attorney. However, the second NOIR informed the petitioner of additional derogatory information. Contrary to information on the labor certification and in evidence

accompanying the petition, the NOIR stated that an official from [redacted] in Brazil told U.S. consular officers that it had no record of employing the beneficiary. *See Matter of Ho*, *supra*, at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence). Because the petitioner relied solely on the purported university employment to establish the beneficiary's qualifying experience for the offered position, the second NOIR, if unexplained and unrebutted, would have warranted the petition's denial. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring a skilled worker petition to include evidence that a beneficiary meets the educational, training, experience, or other requirements of an individual labor certification). Therefore, USCIS properly issued the second NOIR.

Fraud or Willful Misrepresentation of a Material Fact

An individual labor certification must generally accompany a petition for a skilled worker or a professional. *See* 8 C.F.R. § 204.5(l)(3)(i) (stating that a skilled worker or professional petition accompanied by a Schedule A application or by documentation that a beneficiary qualifies for a DOL "shortage occupation" does not require an individual labor certification). However, USCIS may invalidate a labor certification after its issuance "upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification." Former 20 C.F.R. § 656.30(d).

Fraud "consist[s] of false representation of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Ortiz-Bouchet v. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (citing *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). Also, to constitute fraud, "[t]he representation must be believed and acted upon by the party deceived to his [or her] disadvantage." *Id.*

A willful misrepresentation of a material fact consists of the same elements as fraud. *Id.* at 1356-57. However, a willful misrepresentation does not require proof "that the person to whom the misrepresentation was made was motivated to action because of the misrepresentation." *Id.* A willful misrepresentation also does not require "intent to deceive." *Id.* at 1357 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)). As stated above, USCIS may invalidate a labor certification for either fraud or willful misrepresentation. Former 20 C.F.R. § 656.30(d).

In the instant case, the petitioner and the beneficiary admit that the labor certification and a September 6, 2002 letter from an administrator at the Brazilian university accompanying the petition falsely state that the beneficiary worked there as a bilingual secretary from February 17, 1994 to June 7, 1996. In accordance with the finding of consular officials, the beneficiary states that the university did not employ her.[4]

[4] The record contains a letter from a manager of the university's business management school, stating that the beneficiary participated in two, supervised internships at the university in 1995, which were required as part of her baccalaureate degree program there. The university informed consular officials that it had no record of registering the beneficiary's employment as would have been required to legally employ her under Brazilian law. Therefore, the record suggests that the beneficiary's 1995 internships at the university were unpaid and did not constitute employment, but

The petitioner and the beneficiary blame the false statements and documents on their former attorney, who the record shows was sentenced to more than eight years in prison after his criminal conviction in 2003. They assert that they did not know of the attorney's submission of false statements and documents in the instant matter until the petitioner received the Director's second NOIR in 2010.

On motion, the petitioner argues that we failed to follow Eleventh Circuit precedent in *Ortiz-Bouchet v. Att'y Gen.*, *supra*, which holds that an alien may not be presumed to know of fraudulent documentation submitted in support of a visa petition on his behalf. *Ortiz-Bouchet v. Att'y Gen.*, *supra*, at 1356. The petitioner argues that the record lacks substantial evidence that it or the beneficiary "made, knew of, or authorized" their former attorney's submission of false statements and documents in the instant matter.

In *Ortiz-Bouchet v. Att'y Gen.*, *supra*, the alien hired a third party to file a petition for a religious worker on his behalf. *Id.* Several documents falsely identifying the beneficiary as an ordained minister accompanied the petition. *Id.* The alien testified that he had never seen the filed documents and that his signature on them was forged. *Id.* An Immigration Judge found that the alien himself did not willfully misrepresent a material fact. *Id.* However, the judge held that the alien must be deemed to have full knowledge of the fraudulent documents and was therefore inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). *Id.*

Because the Immigration Judge found that the alien did not make a willful misrepresentation, which is an essential element of both fraud and willful misrepresentation of a material fact, the Eleventh Circuit found that the alien was not inadmissible. *Id.* The Eleventh Circuit rejected the government's argument that the alien must be presumed to have knowledge of the fraudulent petition and that this presumption demonstrated his inadmissibility. *Id.* The court found that the Board of Immigration Appeals (BIA) "has made clear that fraud requires an actual misrepresentation." *Id.* (citing *Matter of G-G-*, *supra*, at 164). The court determined that the record lacked evidence that the alien "made, knew of, or authorized" the misrepresentation by the petition's filer. *Id.*

Like the alien in *Ortiz-Bouchet v. Att'y Gen.*, *supra*, the petitioner and the beneficiary blame the false statements and documents in the instant case on a third party who prepared and filed the immigration paperwork on their behalf. However, we find the material facts of *Ortiz-Bouchet v. Att'y Gen.*, *supra*, distinguishable from those in the instant case.

In *Ortiz-Bouchet v. Att'y Gen.*, *supra*, the alien did not make any actual misrepresentations. Unlike the instant case, the Eleventh Circuit case involved a petition for a religious worker, which does not require an accompanying labor certification. *See* 8 C.F.R. § 204.5(m) (stating the requirements for religious worker petitions). Therefore, the alien in *Ortiz-Bouchet v. Att'y Gen.*, *supra*, was not required to attest to his employment history on a Form ETA 750B or on any similar document.

---

rather provided academic credit or otherwise constituted a part of her education and degree.

Neither the Immigration Judge nor the Eleventh Circuit found that he signed any forms or documents containing misrepresentations.

However, in the instant case, the beneficiary falsely stated on the accompanying labor certification that she worked for the Brazilian university for more than two years. The record shows that she signed the accompanying Form ETA 750B on September 28, 2000, declaring under penalty of perjury that its contents – including her stated employment experience at the university - were true and correct, that she authorized her former attorney to prepare the labor certification application on her behalf, and that she took full responsibility for the accuracy of his representations. In response to the Director's first NOIR, the beneficiary also signed a sworn statement on July 28, 2003, attesting that the information on the accompanying labor certification was true and correct. Thus, unlike the alien in *Ortiz-Bouchet v. Att'y Gen.*, *supra*, the record indicates that the beneficiary made actual false statements on the labor certification and later provided a sworn statement that again was false.

The September 6, 2002 letter accompanying the petition also falsely stated that the beneficiary worked for the Brazilian university. Yet, the record shows that the petitioner's former shareholder and president signed the Form I-140, which was received on October 21, 2002, certifying under penalty of perjury that the information on the Form I-140 and the evidence submitted with it were true and correct.[5] In response to the first NOIR, the petitioner's former president also signed and certified a revised Form I-140 on July 21, 2003. The petitioner also submitted copies of salary receipts indicating that the beneficiary received monthly salary payments in February 1994 and June 1996 while working at the Brazilian university as an executive bilingual secretary. Thus, unlike the alien in *Ortiz-Bouchet v. Att'y Gen.*, *supra*, the record indicates that both the petitioner and the beneficiary made actual false statements and provided false documents.

The record also indicates that the misrepresentations of the petitioner and the beneficiary were material. *See Matter of S- & B-C-*, 9 I&N Dec. 436, 447 (BIA 1960; AG 1961), *abrogated on other grounds by Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980) (holding that a misrepresentation is material if an alien is ineligible for the benefit sought on the true facts, or the misrepresentation tends to shut off a relevant line of inquiry that might have resulted in a proper determination of ineligibility). The labor certification states that the offered position of bilingual secretary requires at least two years of experience in the job offered. The September 6, 2002 letter and the labor certification falsely state that the beneficiary worked in the job offered for the Brazilian university from February 17, 1994 to June 7, 1996. The salary receipts falsely indicate that she received monthly salary amounts for employment at the university in February 1994 and June 1996. The beneficiary did not claim any other related experience on the labor certification. The petition did not include letters from any other purported, prior employers of the beneficiary.

[5] A copy of the petitioner's 2002 federal income tax return states that the former president held 50 percent of the petitioner's stock. However, the record suggests that she eventually obtained full ownership of the petitioning corporation, as a copy of a 2006 contract for the petitioner's sale identifies only her as the corporation's owner.

Had the DOL and USCIS known that the beneficiary did not work for the university in the job offered as claimed, the agencies would have likely denied the labor certification application and the petition. *See* former 20 C.F.R. § 656.21(b)(6) (stating that an employer must not have hired workers with less training or experience for jobs similar to the offered position); 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that a beneficiary meets the educational, training, experience, or other requirements of an individual labor certification to accompany a skilled worker petition). The misrepresentations of the petitioner and the beneficiary were therefore material.

The record also indicates that the DOL and USCIS believed and acted upon the misrepresentations to their disadvantage. The agencies initially approved the labor certification and the petition, which both identified the beneficiary's purported employment at the Brazilian university as her only qualifying experience for the offered position.

Finally, the record contains evidence that the petitioner and the beneficiary knowingly misrepresented the beneficiary's qualifying experience with an intention to deceive the DOL and USCIS. As indicated above, the beneficiary attested - not once, but twice - that the contents of the accompanying labor certification were true and correct. Similarly, the petitioner twice certified under penalty of perjury that the evidence in support of the petition was true and correct. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986) (finding the misrepresentations of a corporate president regarding a beneficiary's position and supervisor on a labor certification form willful "because the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise"). The beneficiary's attestations and the petitioner's certifications indicate that they knowingly misrepresented the beneficiary's qualifying experience with the intention of deceiving the DOL and USCIS.

In affidavits, the petitioner's former president and the beneficiary assert that they were not aware of the misrepresentations. They claim that they did not review the labor certification and petition forms carefully before signing them, and that their former attorney did not explain the contents of the forms to them. The beneficiary also states that her pregnancy and the emotional stress from the death of her mother-in-law at that time affected her decision to sign the July 28, 2003 statement in response to the first NOIR.

The record includes substantial evidence in support of the assertions of the petitioner and the beneficiary, including documentation of the beneficiary's pregnancy, the death of her mother-in-law, her good character, failures of the former attorney to respond to her inquiries from 2000 to 2003, and her filing of an official complaint against the attorney in 2010. The record also contains affidavits from the university administrator who purportedly signed the false 2002 experience letter on behalf of the beneficiary. The administrator, who claims he could not read English at that time, states that he received the letter's contents from the former attorney via email, printed the contents onto university stationery, and neglectfully signed the letter, which was in the English language, without having its contents read to him. He states that he mistakenly assumed that the letter confirmed the beneficiary's studies and internships at the university, not her purported employment there.

In our May 23, 2013 appellate decision, we questioned why the clerk's signatures on the 2002 letter differed from his signatures on a 2010 letter and statement. The petitioner submitted a June 18, 2013 report from a forensic document examiner, who concluded that the clerk's signatures on the 2002 and 2010 letters were probably genuine. The report states that our concern about the differences in the clerk's signatures "was warranted when the comparison was based solely upon those two documents." However, after examining other purported signature samples of the clerk supplied by the beneficiary, the report states that the examiner believes "the differences between the questioned and known signatures were the result of natural variations in [the clerk's] writing and not significant in nature."

The record does not establish the reliability of the forensic document examiner's report. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (stating that USCIS may reject or afford less weight to expert testimony that is inconsistent with other evidence or is questionable in any way); *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (noting that expert testimony may be afforded different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). The report states that the beneficiary, an interested party in these proceedings, provided the documents containing the clerk's "known signatures" to the examiner. However, the record does not include copies of the documents containing the clerk's known signature samples. Therefore, the record does not establish the reliability of the signature samples or the report's conclusion.

Even assuming that the university clerk signed both the 2002 and 2010 letters, the record does not adequately explain all of the evidence of fraud. *See Matter of Ho*, *supra*, at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence). The petitioner and the beneficiary attribute the misrepresentations in this matter to their former attorney. However, the petitioner submitted the revised Form I-140 of July 21, 2003 and the beneficiary's sworn statement of July 28, 2003 in response to the Director's first NOIR, when the former attorney no longer represented the petitioner and the beneficiary.

Also, as stated in our appellate decision, the record does not explain the copies of the false salary receipts. The receipts indicate that the university employed the beneficiary as a bilingual executive secretary during the months of February 1994 and June 1996. The record indicates that the petitioner also submitted the salary receipts in response to the first NOIR, when the former attorney no longer represented the petitioner and the beneficiary. Therefore, the timing of the submission of the salary receipts, the revised Form I-140, and beneficiary's sworn statement of July 2, 2003 suggests that the former attorney was not responsible for all of the misrepresentations of record as the petitioner and the beneficiary claim. The submission of these materials casts doubt on the claims of the petitioner and the beneficiary that they were unaware of the submission of any fraudulent documents. *Id.* at 591 (doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of a petition).

The beneficiary asserts that she had no reason to misrepresent her experience on the labor certification or in connection with the petition. She claims that she truthfully represented her

employment history to the former attorney and that she qualified for the offered position based on experience with the petitioner since 1998 and prior employment in Brazil.

However, although the instructions to Form ETA 750B required the beneficiary to state her employment during the prior three years and all other relevant experience, she did not indicate any employment with the petitioner or with prior Brazilian employers on the labor certification. The record contains copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements indicating that the petitioner employed her in 1999 and 2000. However, the record does not contain any evidence that the beneficiary worked for the petitioner before 1999.[6]

Moreover, a beneficiary's experience with a petitioning employer generally cannot qualify him or her for a job opportunity. *See* former 20 C.F.R. § 656.21(b)(6) (requiring an employer to document that it has not hired workers with less training or experience for jobs similar to the offered position, or that it is not feasible to hire workers with less training or experience); *Matter of Brent-Wood Prods., Inc.*, 88-INA-259, 1989 WL 250396, *2 (BALCA Feb. 28, 1989) (*en banc*) (holding that, if an alien gained required experience with a petitioning employer, the employer must establish that the alien gained the experience in jobs not similar to the offered position). The record does not indicate that the petitioner employed the beneficiary in a different position before the filing of the labor certification. On a Form G-325A, Biographic Information, submitted with the beneficiary's Form I-485, Application for Adjustment of Status, on November 18, 2002, the beneficiary stated that she worked for the petitioner since 1998 as an "Office Assistant," a position that appears to be similar to the offered position. Therefore, the record does not indicate that the beneficiary gained the required qualifying experience for the offered position through her employment with the petitioner.

As evidence that the beneficiary gained the required qualifying experience with other employers, the petitioner, through counsel, provided the names of six organizations that purportedly employed her in Brazil from 1991 to 1995. However, counsel's submission of the mere names of these entities does not establish the beneficiary's qualifying experience. The names are the assertions of counsel, which do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner did not, as required by 8 C.F.R. § 204.5(l)(3)(ii)(A), submit letters from any of the six purported Brazilian employers giving the name, address, and title of the employer and a description of the beneficiary's purported experience. The record contains a May 19, 2010 letter from one of the beneficiary's purported, former employers in [redacted] However, the English translation of the letter states that the entity cannot verify her claimed employment because it does not "keep register of the preceding companies." We cannot accept this letter as evidence of the beneficiary's experience because it does not contain the information required by regulation.

---

[6] The record contains a copy of a 1998 Form W-2. However, the boxes of the Form W-2, which include spaces for the names of the employer and the employee, and the amount of wages paid to the employee, do not contain any information. Therefore, the copy of the incomplete Form W-2 does not establish that the petitioner employed the beneficiary in 1998.

The May 19, 2010 letter may demonstrate that a letter from the beneficiary's purported former employer is unavailable. However, the petitioner must submit secondary evidence, such as copies of government or business records, to establish the beneficiary's claimed employment. 8 C.F.R. § 103.2(b)(2)(i). If the petitioner demonstrates the unavailability of both the required and secondary evidence, it may submit two or more affidavits from people who have "direct personal knowledge" of the beneficiary's purported experience. *Id.*

The petitioner provided a declaration from a woman who purportedly participated in an internship with the beneficiary at the same, purported Brazilian employer. The declaration states that the beneficiary performed "secretarial activities" there from 1992 to 1994. However, the declaration does not specify the exact dates of the beneficiary's purported employment between 1992 and 1994, or whether she worked on a full- or part-time basis. Also, the record does not contain any documentary evidence to corroborate the woman's participation in the internship. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193(Reg'l Comm'r 1972) (finding that uncorroborated statements are insufficient to meet the burden of proof in visa petition proceedings). As noted above, we may accept affidavits as evidence of a beneficiary's claimed experience only after the unavailability of required and secondary evidence is demonstrated. 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner has not demonstrated the unavailability of secondary evidence of the beneficiary's claimed experience.

Moreover, the copies of the beneficiary's educational documents of record indicate that she studied full-time at the university from 1991 to 1995. The record does not explain how the beneficiary could have worked full-time for some or all of the purported employers while also attending school on a full-time basis.[7] The record also does not establish that any aggregate, part-time employment during this period fulfilled the offered position's qualifying experience requirements of at least two years of full-time employment. *See Matter of Ho*, *supra*, at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

Thus, the record does not establish the beneficiary's qualifying experience in or out of the United States. Just as evidence of the beneficiary's qualifying experience would support her assertion that she had no reason to fraudulently represent her employment history, the petitioner's failure to document the beneficiary's qualifying experience undermines that claim.

For the foregoing reasons, the petitioner has not overcome the evidence of record that it and the beneficiary fraudulently represented her employment experience. Therefore, we will affirm the invalidation of the accompanying labor certification under former 20 C.F.R. § 656.30(d). Because the labor certification should not have been approved, an individual labor certification did not accompany the petition pursuant to 8 C.F.R. § 204.5(l)(3)(i) and the record at the time of the NOR's issuance warranted the petition's denial. The petition's approval was therefore properly revoked.

---

[7] The instructions to Form ETA 750B required the beneficiary to provide information about the "schools, colleges, and universities" she attended. However, the form signed by the beneficiary does not provide any required information beyond her high school graduation in December 1990.

Revocation on Additional Grounds

The petitioner argues that, because the Director's NOIRs addressed only the fraudulent representation of the beneficiary's qualifying experience, we may not affirm the revocation of the petition's approval on any other ground.

As the petitioner argues, the scope of a notice to intent to revoke generally limits the grounds on which a petition's approval may be revoked. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (stating that a revocation of a petition's approval can only be grounded upon, and the petitioner need only respond to, the factual allegations in the notice of intent to revoke). This general rule stems from the regulatory requirement that USCIS provide a petitioner with notice of derogatory information of which it is unaware and an opportunity to respond to the information before issuing an adverse decision based on the information. *See Matter of Estime*, *supra*, at 451; 8 C.F.R. § 103.2(b)(16)(i).

The petitioner correctly states that the Director's NOIRs addressed only the misrepresentation of the beneficiary's experience. The Director's findings in the NOR that the petitioner did not demonstrate its ability to pay the proffered wage or its successorship in interest did not validly revoke the petition's approval because the petitioner did not receive notice of these grounds or an opportunity to respond to them.[8]

However, the Director's findings in the NOR served to notify the petitioner of the potential additional grounds of revocation that arose in response to the NOIR. *See Matter of Estime*, *supra*, at 452 (holding that USCIS properly issues a notice of revocation if "the evidence of record at the time the decision was issued (including any explanation, rebuttal, or evidence submitted by the petitioner [in response to the notice of intent to revoke], warranted such a denial"). On appeal, the petitioner submitted argument and evidence regarding the additional, potential revocation grounds. Therefore, because the petitioner received notice of the additional grounds and an opportunity to respond to them as required by the regulations, we may revoke the petition's approval on the additional grounds. *See Betancur v. Roark*, No. Civ. A 10-11131-RWZ, 2012 WL 4862774, *9 (D. Mass. Oct. 15, 2012) (similarly finding that a later notice of derogatory information "unquestionably constitutes a valid notice and cures the errors of the original NOIR").

The Beneficiary's Qualifying Experience

The record does not establish the beneficiary's qualifying experience for the offered position. We may revoke the petition's approval on this ground because the same facts that support the Director's

[8] The NOR does not state that the Director revoked the petition's approval on the two additional grounds. The NOR describes the petitioner's ability to pay and the "successor-in-interest" question as "[t]wo additional issues [that] have arisen upon receipt of the petitioner's response to the notice of intent to revoke." However, the NOR states the fraud determination as the only basis of its revocation decision. "It has been determined that fraud and willful misrepresentation was used in obtaining Form ETA 750. For this reason, Form ETA 750 is hereby invalidated and the petition is revoked as of the date of approval."

fraud determination support a finding that the petitioner has not demonstrated the beneficiary's qualifying experience. The Director's second NOIR therefore provided the petitioner with notice and an opportunity to respond to these factual allegations.

A beneficiary must meet all of the requirements of the offered position stated on the accompanying labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); s*ee also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In determining the minimum requirements for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying labor certification states the minimum requirements of the offered position of bilingual secretary as at least four years of high school, two years of experience in the job offered, and oral and written fluency in the Portuguese language.

The beneficiary stated on the labor certification that she worked full-time in the offered position for the Brazilian university from February 17, 1994 to June 7, 1996. However, as indicated previously, the petitioner and the beneficiary admit that the university did not employ the beneficiary.

As discussed previously, although the petitioner, through counsel, provided names of the beneficiary's purported former employers in Brazil, it has not established her qualifying experience for the offered position. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring letters from employers giving the name, address, and title of the employer and a description of the beneficiary's experience to support any experience requirements for skilled workers or professionals). The petitioner did not establish the unavailability of the required or secondary evidence before attempting to rely on affidavits to establish the beneficiary's qualifying experience. *See* 8 C.F.R. § 103.2(b)(2)(i).

Because the record at the time of the NOR's issuance did not establish the beneficiary's possession of the qualifying experience by the petition's priority date, the petition's approval was also revocable on this ground.

Ability to Pay the Proffered Wage

As stated in the Director's NOR, the record also does not establish the petitioner's continuing ability to pay the proffered wage. On appeal, we declined to address whether the petitioner demonstrated an ability to pay because our affirmance of the Director's invalidation of the accompanying labor certification rendered review of the issue unnecessary. However, on reconsideration, we will withdraw our deferral of that issue and address the petitioner's ability to pay.

A petitioner must demonstrate its continuing ability to pay the proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence

of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The record before the Director closed on March 17, 2010, with his receipt of the petitioner's submissions in response to the second NOIR. As of that date, the petitioner's 2008 federal income tax return was the most recent return available. However, the record does not contain copies of any annual reports, federal tax returns, or audited financial statements for 2000, 2003, 2004, and 2005. In addition, the petitioner's federal tax returns for 2006, 2007, and 2008 are partial returns, containing only the first pages and the Schedules L of the annual Forms 1120 U.S. Corporation Income Tax Return. Therefore, the record lacks evidence of the petitioner's ability to pay the proffered wage for the year of the October 10, 2000 priority date and the majority of the following years.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date through 2008 constituted sufficient cause to revoke the petition's approval. While additional evidence may be submitted to establish a petitioner's ability to pay a proffered wage, a petitioner may not substitute additional materials for evidence required by regulation.

Also, the petitioner's financial documentation for 2002 contains an unexplained discrepancy. The copy of the petitioner's federal tax return indicates that it paid a total of $14,813 in salaries and wages in 2002. However, a copy of a Form W-2 indicates that the petitioner paid the beneficiary $23,956 during the same year. The record does not explain how the petitioner paid the beneficiary more in 2002 than the total amount of salaries and wages reflected on its federal tax return for the same year. The discrepancy casts doubt on the accuracy and authenticity of the petitioner's financial documentation. *See Matter of Ho*, *supra*, at 591 (doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of a petition).

Accordingly, the record at the time of the NOR's issuance did not establish the petitioner's continuing ability to pay the proffered wage to the beneficiary since the petition's priority date. Therefore, the petition's approval was also revocable on this ground.

Successor-in-Interest

The record shows that the ownership of the petitioning corporation has changed since the issuance of the first NOIR on June 30, 2003. The record contains a copy of a January 27, 2006 contract, indicating that the petitioner's former president sold the assets of the corporation to another individual, effective February 1, 2006.[9] Online Florida records and letters in evidence also indicate

[9] The copy of the contract of record indicates that the corporation's assets were sold. However, the contract does not specify whether the corporation's stock shares were transferred in the transaction. Thus, the record does not clearly indicate whether the petitioner's former president retained an ownership interest in the company. Online Florida records do not identify the former president as a company officer after the 2006 sale. Also, in a joint personal bankruptcy

that acquired the petitioning corporation in *See* Fla. Dep't of State, Div. of Corps., at (accessed Oct. 20, 2014). Finally, online Florida records indicate and the petitioner confirms that the beneficiary acquired the petitioning corporation in [10] *Id.* at

Throughout the ownership changes, the record indicates that the name and the federal employer identification number of the petitioning corporation has remained the same. The address of the petitioner changed from Florida to Florida. However, online DOL information indicates that are in the same Metropolitan Statistical Area (MSA). *See* Foreign Labor Certification Data Center, (accessed Oct. 20, 2014). Therefore, the "area of intended employment" has not changed for labor certification purposes. *See* former 20 C.F.R. § 656.3 (defining the term "area of intended employment" to include any place within the same MSA).

The record also indicates that the petitioner has remained in the same business throughout the changes in its ownership. The record contains copies of invoices, contracts, and letters from suppliers, indicating that the petitioner has continually sold cell phones and other wireless communications and accessories.

In the NOR, the Director found that, because of its ownership change, the petitioner must demonstrate that it is a "successor in interest" that acquired the essential rights and duties to carry on the employer's business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1987) (explaining how an entity other than one stated on the labor certification can continue to offer the same job opportunity to a beneficiary).

On appeal, we declined to address the successor-in-interest issue because our affirmance of the Director's invalidation of the accompanying labor certification rendered review of the issue unnecessary. However, on reconsideration, we will address the Director's successor-in-interest determination.

In the instant case, the record establishes that the petitioning corporation remains the same entity that filed the labor certification, the petition, and the appeal in this matter. The corporation's name and federal employer identification number remain the same. Although both the management and ownership of the corporation appear to have changed, the record shows that the corporation continues to engage in the same business as when it filed the labor certification. Thus, the petitioner

---

petition in the former president and her husband indicated that neither of them had an ownership interest in the petitioner. *See In re Morimoto & Mai*, No. 6:09-bk-19422-ABB (Bankr. M.D. Fla. May 13, 2010).

[10] A sole shareholder may be a beneficiary of a petition filed by a corporation because a corporation is a separate legal entity existing independently of its shareholders. *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296, 298 (Acting Reg'l Comm'r 1979); *Matter of M-*, 8 I&N Dec. 24, 53 (BIA 1958; A.G. 1958).

need not demonstrate that it is a successor-in-interest because there is no other entity that the corporation could succeed.[11]

Conclusion

In summary, we grant the petitioner's motion to reconsider and affirm our previous conclusions that the petitioner and the beneficiary fraudulently represented the beneficiary's qualifying experience. Accordingly, we will affirm the invalidation of the accompanying labor certification and the revocation of the petition's approval.

However, we withdraw our prior findings that the first NOIR was issued for good and sufficient cause, as well as the Director's finding that the petitioner must demonstrate its relationship as a successor in interest to the original employer. We also find that the record at the time of the issuance of the NOR did not establish the beneficiary's qualifying experience for the offered position or the petitioner's continuing ability to pay the proffered wage. Therefore, the petition's approval was also revocable on these grounds.

The appeal will remain dismissed for the above stated reasons, with each considered an independent and alternative basis for revocation of the petition's approval. The accompanying labor certification remains invalidated. As in visa petition proceedings, the petitioner in visa petition revocation proceedings bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *see also Matter of Ho*, *supra*, at 588. Here, that burden was not met.

ORDER: The motion to reconsider our previous decision is granted. Our previous decisions are modified in part and affirmed in part. However, the petition's approval remains revoked and the labor certification remains invalidated.

[11] The beneficiary's ownership of the petitioner raises additional issues that we do not address in this decision. For example, we do not consider whether the petitioner, in the wake of its acquisition by the beneficiary, continues to intend to employ her in the offered position specified on the accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding denial of a petition where the petitioner did not intend to employ the beneficiary as a live-in domestic worker as specified on the labor certification).