



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF P-, INC.

DATE: DEC. 16, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an owner and operator of two convenience stores, seeks to permanently employ the Beneficiary as a store manager under the immigrant classification of skilled worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). After approving the petition on April 19, 2011, the Director, Texas Service Center, revoked the petition's approval on February 20, 2015. The matter is now before us on appeal. The Director's decision will be withdrawn, and the matter will be remanded for further proceedings consistent with the following opinion and for the entry of a new decision.

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." INA § 205, 8 U.S.C. § 1155. A director's realization that a petition was erroneously approved may constitute good and sufficient cause to revoke if supported by the record. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988).

In the instant case, the Director concluded that the record at the time of the petition's approval did not establish the Petitioner's continuing ability to pay the proffered wage or the *bona fides* of the job opportunity. In addition, the Director invalidated the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), which had been approved by the U.S. Department of Labor (DOL). The Director found that the Petitioner willfully misrepresented a material fact on the labor certification by concealing the Beneficiary's business relationships with the Petitioner's president/sole shareholder.

The appeal is properly filed and alleges specific errors in law and fact. The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.¹

¹ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal.

I. THE NOTICE OF INTENT TO REVOKE

Good and sufficient cause exists to issue a notice of intent to revoke where the record at the time of the notice's issuance, if unexplained or un rebutted, would have warranted a petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, a petition's approval is properly revoked if the record at the time of the revocation, including any rebuttal evidence or argument submitted by a petitioner, warranted the petition's denial. *Id.* at 452.

In the instant case, the record indicates the Director's proper issuance of the notice of intent to revoke (NOIR) on December 11, 2014 based on questions regarding the *bona fides* of the job opportunity. The NOIR advised the Petitioner of online government records indicating the simultaneous tenures of its president/sole shareholder and the Beneficiary as corporate officers in two other companies before the petition's filing. The prior business relationships between the Petitioner's president/sole shareholder and the Beneficiary cast substantial doubt on the availability of the offered position to U.S. workers. *See, e.g., Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000) (stating that a non-familial relationship, such as a financial relationship, between an employer and a beneficiary casts doubt on the *bona fides* of a job opportunity).

However, the record does not support the NOIR's questioning of the Petitioner's ability to pay the proffered wage. The NOIR alleges the Petitioner's inability to pay based on insufficient annual amounts of net income and net current assets for 2011 and 2012 as reflected on its federal tax returns for those years.²

A petitioner must demonstrate its ability to pay "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." 8 C.F.R. § 204.5(g)(2). As previously indicated, however, a notice of intent to revoke must cite evidence that "would have warranted" a petition's denial. *Estime*, 19 I&N Dec. at 451. In the instant case, the copies of the Petitioner's 2011 and 2012 tax returns would not have warranted the petition's denial because the evidence concerns the Petitioner's financial condition after the April 2011 decision on the petition.

Therefore, the Director's NOIR raised improper grounds for revocation. The Director's notice of revocation will be withdrawn.

II. INVALIDATION OF THE LABOR CERTIFICATION

A petition for a skilled worker must be accompanied by an individual labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). USCIS may invalidate an individual labor certification after its issuance upon a

² The record indicates the Beneficiary's submission of the Petitioner's tax returns for 2011 and 2012 after the petition's approval in support of his application for adjustment of status.

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finding of “fraud or willful misrepresentation of a material fact involving the labor certification.” 20 C.F.R. § 656.30(d).

The invalidation of a labor certification automatically revokes a petition’s approval. 8 C.F.R. § 205.1(a)(3)(iii)(A). We lack authority to review the automatic revocation of a petition’s approval. *Matter of Zaidan*, 19 I&N Dec. 297, 298 (BIA 1985) (holding that no regulation authorizes appellate review of the automatic revocation of a petition’s approval). However, we have jurisdiction to determine our jurisdiction. *See Matter of G-N-C-*, 22 I&N Dec. 281, 287, 293 (BIA 1998) (finding that an agency has jurisdiction to determine its own jurisdiction).

A willful misrepresentation of a material fact requires a deliberate and voluntary representation made with knowledge of its falsity. *Toribio-Chavez v. Holder*, 611 F.3d 57, 63 (1st Cir. 2010). A misrepresentation is material if it “had a natural tendency to influence” the government’s decision. *Id.* (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

In the instant case, the Director found the Petitioner’s response to Question C.9 on the accompanying ETA Form 9089 to constitute a willful misrepresentation of a material fact. Question C.9 asks: “Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?” The Petitioner answered: “No.”

As the Petitioner argues, the record does not support a finding that it misrepresented or concealed facts in its answer to Question C.9. The record indicates, and the Petitioner concedes, that its president/sole shareholder and the Beneficiary are business associates. However, the record does not indicate, nor did the NOIR allege, the Beneficiary’s possession of an ownership interest in the petitioning corporation or a familial relationship to its shareholder, officers, or incorporators.

The Director’s revocation decision asserts that “the ETA Form 9089 would not have been approved if all the facts had been presented.” However, invalidation of a labor certification requires a misrepresentation. *See* 20 C.F.R. § 656.30(d); *see also Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956) (defining “fraud” to contain the same elements as a willful misrepresentation of a material fact, plus an intent to deceive, and a belief and reliance upon the misrepresentation by the other party to its disadvantage). Question C.9 on the ETA Form 9089 did not ask whether business relationships existed between the Beneficiary and the Petitioner’s shareholders or officers. Therefore, the Petitioner’s response to Question C.9 does not constitute a misrepresentation.

The Petitioner might have knowingly misrepresented the clear availability of the job opportunity to U.S. workers, as it certified in Section N.8 of the accompanying ETA Form 9089. *See* 20 C.F.R. § 656.10(c)(8) (requiring a labor certification employer to certify that “[t]he job opportunity has been and is clearly open to any U.S. worker”). However, the NOIR did not allege such a misrepresentation. *See Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988) (holding that revocation of a petition’s approval may only be grounded upon the factual allegations specified in a notice of intent to revoke).

The record does not support the Director's finding that the Petitioner willfully misrepresented a material fact in response to Question C.9 on the accompanying ETA 9089. Thus, we have jurisdiction to review this revocation ground. We will therefore withdraw the Director's decision and reinstate the validity of the labor certification.

III. THE BONA FIDES OF THE JOB OPPORTUNITY

A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). "This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)).

USCIS may deny a petition accompanied by a labor certification that does not comply with DOL regulations. *See, e.g., Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding a petition's denial where the accompanying labor certification was invalid for the geographic area of intended employment).

In determining whether a *bona fide* job opportunity exists, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to corporate directors, officers, or employees; incorporated or founded the company; has an ownership interest in it; is involved in the management of the company; sits on its board of directors; is one of a small group of employees; or has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Matter of Modular Container Sys., supra*, at *8. Adjudicators must also consider whether a foreign national's pervasive presence and personal attributes would likely cause the Petitioner to cease operations in his or her absence and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

The Petitioner argues that the *Modular Container* test applies only when a foreign national: has an ownership interest in the employer; a familial relationship with its stockholders, corporate officers, incorporators, or partners; or is one of a small number of employees. On the accompanying labor certification, the Petitioner claimed to have five employees. Copies of its federal income tax returns also reflect relatively small, annual amounts of salaries and wages paid. In addition, copies of its payroll documents indicate its employment of an average of about eight employees per year from 2008 through 2010. Therefore, the record indicates the Beneficiary's status as one of a small number of the Petitioner's employees.

Moreover, *Modular Container* refers to a broad range of relationships between an employer and a foreign national that trigger concerns about the *bona fides* of a job opportunity. The decision states that "[w]here an alien for whom labor certification is sought has an ownership interest in, or *some other special relationship with*, the sponsoring employer, the employer must demonstrate that a *bona fide* job opportunity exists for qualified U.S. applicants." *Modular Container*, 1991 WL 223955 at

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*6 (emphasis added). The decision also states that “[w]here the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or *close personal relationship with*, the sponsoring employer’s business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.” *Id.* at *7 (emphasis added). We therefore find the *Modular Container* test applicable in the instant case.

As previously indicated, the instant record establishes prior business relationships between the Petitioner’s president/sole shareholder and the Beneficiary. Copies of online Massachusetts records, dated October 29, 2014, indicated the pair’s service together as “managers” of [REDACTED] since December 3, 2008.³ The records also indicated the Beneficiary’s tenure as president of [REDACTED] from 2003 to 2005, while during the same period the Petitioner’s president/sole shareholder served as a director of the corporation.

In addition, the Petitioner’s response to our notice of intent to dismiss (NOID) of October 6, 2015 reveals another apparent business association between the Beneficiary and the Petitioner’s president/sole shareholder. Copies of the Beneficiary’s federal income tax returns for 2009 and 2010 state income or loss from [REDACTED]. The corporation’s articles of organization identify the Beneficiary and the Petitioner’s president/sole shareholder as directors of the company at the time of its establishment on April 27, 2009. *See* Sec’y of the Commonwealth of Mass., Corps. Div., at <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx> (accessed Nov. 18, 2015).⁴

As the Petitioner argues, the Director erred in finding that the January 2, 2015, affidavit of the Petitioner’s president/sole shareholder “does not constitute evidence” of the *bona fides* of the job opportunity. Unlike the assertions of counsel, a party’s assertions constitute evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (stating that counsel’s assertions do not establish facts of record).

In light of the new evidence of another apparent business association between the Beneficiary and the Petitioner’s president/sole shareholder, and the Director’s decision not to consider the affidavit of the president/sole shareholder, we will remand the petition for reconsideration of the *bona fides* of the job opportunity under the *Modular Container* test.

³ Under Massachusetts law, a limited liability company (LLC) may designate natural persons or entities as managers. Mass. Gen. Laws ch. 156C, § 24. A manager need not be a member (equity owner) of the LLC. *Id.* at § 25. The tenure of the Petitioner’s president/sole shareholder as a [REDACTED] manager apparently ended shortly before the NOIR’s issuance on December 11, 2014. [REDACTED] 2014 annual report, which was filed with the Secretary of the Commonwealth of Massachusetts on November 5, 2014, does not identify the Petitioner’s president/sole shareholder as a manager. *See* Sec’y of the Commonwealth of Mass, Corps. Div., at <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx> (accessed May 8, 2015).

⁴ Online Massachusetts records indicate the departure of the Petitioner’s president/sole shareholder as a director of [REDACTED] on November 20, 2009 and the voluntary dissolution of the corporation on November 9, 2011. *See* Sec’y of the Commonwealth of Mass., Corps. Div., at <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx> (accessed Nov. 18, 2015).

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The Director should review our NOID and the Petitioner's response to it. The Director should then issue a new NOIR to allow the Petitioner an opportunity to respond to the additional derogatory information revealed on appeal. *See* 8 C.F.R. § 103.2(b)(16)(i) (requiring USCIS to notify a petitioner of material, derogatory information of which it is unaware and to afford it an opportunity to respond before issuing an unfavorable decision).

The new NOIR should also address the Petitioner's ability to pay the proffered wage through April 2011 and the Beneficiary's qualifying experience, as discussed below.

IV. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

As previously indicated, the Director may consider the Petitioner's ability to pay the proffered wage through only April 2011, as the Petitioner's financial condition after the petition's approval would not have warranted its revocation. *See Estime*, 19 I&N Dec. at 451 (holding that a notice of intent to revoke must cite evidence that "would have warranted" a petition's denial).

In response to our NOID, the Petitioner submitted evidence that the copy of its 2010 federal income tax return of record reflects an amended filing. However, the record neither explains why the Petitioner amended its 2010 tax return nor includes a copy of the original submitted return.

In addition, the Petitioner submitted a 2010 tax account transcript from the Internal Revenue Service (IRS), reflecting a net taxable income of \$(8,764).⁵ However, as acknowledged by the Petitioner's tax preparer, the net taxable income amount on the transcript does not match the ordinary business income loss of \$(50,764) stated on the Petitioner's amended tax return, as reflected on line 21 of the IRS Form 1120S, U.S. Income Tax Return for an S Corporation. The net taxable income amount on the transcript also does not match the annual net income amount of \$(45,003) from all income sources stated on line 18 of Schedule K to the Petitioner's amended return.

The inconsistency between the 2010 tax account transcript and the amended return casts doubts on the Petitioner's claimed submission of the return to the IRS and the reliability of the return's information. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence); *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that unsupported assertions are insufficient to meet the burden of proof in visa petition proceedings).

⁵ Numbers in parentheses reflect negative amounts.

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The new NOIR should afford the Petitioner an opportunity to explain why it amended its 2010 tax return and to resolve the inconsistencies between the tax account transcript and the amended return.

V. THE BENEFICIARY'S QUALIFYING EXPERIENCE

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the accompanying labor certification states the minimum requirements of the offered position of store manager as 24 months of experience in the job offered. Experience in an alternate occupation is not accepted.

The Beneficiary attested on the labor certification to about 53 months of part-time experience as a store manager for [REDACTED] from January 26, 2006 until June 30, 2010. For labor certification purposes, part-time experience equals half the amount of full-time experience over the same period of time. *See, e.g., Matter of Cable Television Labs., Inc.*, 2012-PER-00449, 2014 WL 5478115, *2 (BALCA Oct. 23, 2014) (finding that 16 months of part-time experience equated to eight months of full-time experience).

An August 24, 2010, letter on [REDACTED] stationery states the company's employment of the Beneficiary as a store manager for 20 hours per week from January 20, 2006 to May 31, 2010. However, in response to our NOID, the Petitioner submitted copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statements, indicating the following payments to him by [REDACTED] \$5,200 in 2006; \$20,800 in 2007; \$31,200 in 2008; and \$15,600 in 2009. If the Beneficiary worked 20 hours per week for the company from January 20, 2006 to May 31, 2010, the record does not explain why he received such a small payment in 2006 compared to those in the following years, or why he received less compensation in 2009 than in 2008.

Also, the record does not contain an IRS Form W-2 from [REDACTED] reflecting the Beneficiary's claimed employment by the company in 2010. The only 2010 Form W-2 of record indicates its issuance by [REDACTED], reflecting payment to the Beneficiary of \$51,129.88. In a November 2, 2015, affidavit, the Beneficiary stated that his last day of employment by [REDACTED] was May 31, 2010. However, the inconsistent payment amounts on the Forms W-2 from 2006 through 2009 and the absence of a 2010 Form W-2 cast doubts on the Beneficiary's claimed duration and hours of employment at [REDACTED]. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).⁶

⁶ Counsel states: "The [B]eneficiary did not receive a salary [from [REDACTED]] in 2010. The salary was paid by an affiliated corporation, [REDACTED]." However, counsel's statements do not constitute evidence. *See Phinpathya*, 464 U.S. at 188 n.6 (stating that counsel's assertions do not establish facts of record). The record also does not explain why [REDACTED] would pay the Beneficiary for work performed for [REDACTED].

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In addition, copies of the Beneficiary's federal income tax returns for 2006 through 2010 do not indicate his employment in the offered position of store manager as specified on the accompanying labor certification. The Beneficiary's tax return for 2006 identifies him as a "cashier," while his 2007 tax return states his occupation as "sales manager." His tax returns for 2008, 2009, and 2010 identify him as a "sales clerk." The occupations attributed to the Beneficiary on his tax returns cast additional doubt on his claimed qualifying experience in the offered position of store manager with [REDACTED] from 2006 through 2010. *Id.* (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The new NOIR should afford the Petitioner an opportunity to explain the inconsistencies between the Beneficiary's financial documentation and his claimed qualifying experience at [REDACTED]

VI. CONCLUSION

The record at the time of revocation lacked substantial evidence of the Petitioner's willful misrepresentation of a material fact in response to Question C.9 on the accompanying ETA Form 9089. We will therefore withdraw the Director's decision and reinstate the validity of the labor certification.

The Director did not give consideration to an affidavit submitted by the Petitioner regarding the *bona fides* of the job opportunity. Evidence on appeal also appears to reveal an additional business relationship between the Beneficiary and the Petitioner's president/sole shareholder. We will therefore remand the petition for the issuance of a new NOIR and further consideration of the position's availability to U.S. workers. In addition to the *bona fides* of the job opportunity, the new NOIR should address the Petitioner's ability to pay the proffered wage through April 2011, and the Beneficiary's qualifying experience for the offered position.

The new NOIR may also notify the Petitioner of any other potential grounds of revocation that the Director may find, including any other reasons to invalidate the accompanying labor certification. Upon consideration of the entire record, including the Petitioner's response to the new NOIR, the Director should enter a new decision.

ORDER: The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FURTHER ORDER: The validity of ETA Form 9089, case number [REDACTED] is reinstated.

Cite as *Matter of P-, Inc.*, ID# 13894 (AAO Dec. 16, 2015)