

(b)(6)



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

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

MATTER OF W-1, INC.

DATE: NOV. 16, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant/bakery, seeks to permanently employ the Beneficiary as a baker under the immigrant classification of professional or skilled worker. *See* Immigration and Nationality Act (the Act) § 203(b)(3), 8 U.S.C. § 1153(b)(3). The Director, Nebraska Service Center, initially approved the petition on July 29, 2009. Subsequently, on March 18, 2010, and on December 19, 2014, the Director issued two notices of intent to revoke to the Petitioner. The Director revoked the approval of the petition on April 9, 2015, and invalidated the labor certification. The matter is now before us on appeal. The appeal will be dismissed.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

I. PROCEDURAL HISTORY

The petition was filed by the Petitioner on August 18, 2006. With the petition, the Petitioner submitted a job offer letter dated July 24, 2006, from [REDACTED] President, stating that the Petitioner “is willing to offer employment to [the Beneficiary] as soon as he is granted lawful permanent residency in the United States.” The letter indicated that the job offer was for the full-time position of baker at [REDACTED] IL [REDACTED]

The petition was also accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 1, 2006. *See* 8 C.F.R. § 204.5(d).

The Director’s decision revoking the petition’s approval concluded that the job offer letter submitted by the Petitioner was fraudulent, and that the Petitioner had not overcome the inconsistencies in the record regarding the Beneficiary’s work experience. Since the Director found fraud or material

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

(b)(6)

Matter of W-1, Inc.

misrepresentation of a material fact in the application for labor certification, he invalidated the labor certification.

The Beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the Beneficiary qualifies for the offered position based on experience as a baker with [REDACTED], a restaurant and bakery located at [REDACTED] - [REDACTED] from March 15, 1989, until May 31, 1994. The labor certification states that the Beneficiary's job duties included preparing and baking "all sorts of confectionery, such as cookies, cakes, pastries, donuts, bagels and muffins." 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.

The record contains an experience letter dated June 10, 1994, from [REDACTED] on [REDACTED] letterhead stating that the company employed the Beneficiary as a baker from March 15, 1989, until May 31, 1994. The letter indicates that the Beneficiary "baked bread, pastries, cookies, cakes, etc." The address on the letterhead is [REDACTED] - [REDACTED]

(b)(6)

Matter of W-1, Inc.

II. NOTICES OF INTENT TO REVOKE

Good and sufficient cause exists to issue a notice of intent to revoke if the evidence of record at the time of the notice's issuance, if unexplained or un rebutted, would warrant the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987).

The experience letter dated June 10, 1994, from [REDACTED] on [REDACTED] letterhead states that the company employed the Beneficiary as a baker from March 15, 1989, until May 31, 1994. The address on the letterhead is [REDACTED] - [REDACTED]

On March 25, 2009, USCIS conducted a field site visit at [REDACTED] India [REDACTED] [REDACTED] could not be located at that address. Consequently, on March 18, 2010, the Director issued a notice of intent to revoke (First NOIR). The Director notified the Petitioner of the results of the field site visit in India and stated that the work experience letter dated June 10, 1994, from [REDACTED] appeared to be fraudulent. The Director also stated that there did not appear to be a bakery located on the premises of [REDACTED] [REDACTED], Illinois, where the Petitioner claimed that the Beneficiary would work.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent, objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The First NOIR was properly issued by the Director for good and sufficient cause. The First NOIR sufficiently detailed the results of the site visit and pointed out inconsistencies in the evidence of record that would warrant a denial if unexplained and un rebutted.

In response to this First NOIR, the Petitioner asserted that [REDACTED] was located in the premises of a school, [REDACTED] located at [REDACTED] and that [REDACTED] closed several years ago.

The Petitioner provided evidence that [REDACTED] is located at [REDACTED] - [REDACTED]. The Petitioner provided an agreement dated April 28, 1977 between [REDACTED] and the trust in charge of [REDACTED] which shows that [REDACTED] was contracted to run the school's canteen and provide school lunches, dinners, and snacks to students during school hours, in return for a monthly rent payment to the school. The agreement also permitted [REDACTED] to run a restaurant after school hours on the premises, as well as carry on business as "Caterers, Sweet Sellers, Bakers, Snack Sellers." The agreement does not indicate an end date for rental of the premises. There is a notation at the top of the agreement that states [REDACTED] owner, [REDACTED]

(b)(6)

Matter of W-1, Inc.

The Petitioner also provided a receipt showing that [REDACTED] paid the trust \$5,400.00 for conducting changes and maintenance for the period from January 12, 1985 to May 5, 1986; a bank statement dated January 1, 1990, for [REDACTED] several billing statements, sales tax, and other receipts for [REDACTED] and correspondence relating to a lawsuit between [REDACTED] and the trust in charge of [REDACTED]. We note that these documents give two individual names related to [REDACTED]. The Petitioner asserted that these documents proved [REDACTED] was at one time an operating business at the listed address.

The Petitioner also provided payroll documentation for [REDACTED], a different entity than the Petitioner; invoices between [REDACTED] and the Petitioner; invoices between [REDACTED] and [REDACTED]; federal and state tax returns for the Petitioner for 2007, 2008 and 2009;² federal and state tax returns for [REDACTED] for 2007, 2008 and 2009; employment tax returns for [REDACTED] for 2009; and pictures of two [REDACTED] locations.

Based on the Petitioner's response to the First NOIR, USCIS made a field site visit to [REDACTED] on March 6, 2014. Investigators met with officials from the school who were present at the site between March 1989 and May 1994. Those officials confirmed that no baking business had ever been there and that the Beneficiary had never worked there. The officials also indicated that the two former owners of [REDACTED] are now deceased.

Therefore, the Director issued a second notice of intent to revoke (Second NOIR) on December 19, 2014, informing the Petitioner of the results of the second site visit. The Director also indicated that in an interview with USCIS on April 5, 2007, [REDACTED] provided a list of employees for whom he had petitioned, and the Beneficiary's name was not on that list. Moreover, during the interview, [REDACTED] stated that he had neither hired nor employed the Beneficiary. Therefore, the Director stated that the job offer letter submitted by [REDACTED] "must be considered fraudulent" and indicated that "since it appears that the petitioner committed fraud or willful misrepresentation of a material fact in this application for labor certification, the submitted labor certification may be invalidated."

The Second NOIR was properly issued by the Director for good and sufficient cause. The Second NOIR sufficiently detailed the results of the site visit at [REDACTED] and pointed out inconsistencies in the evidence of record that would warrant a denial if unexplained and un rebutted.

² With the petition, the Petitioner provided its federal and state tax returns for 2005 and bank statements for certain months in 2006. In response to the Director's request for evidence dated May 26, 2009, the Petitioner provided its 2006, 2007 and 2008 federal and state tax returns; certain employment records; and pictures of a [REDACTED]. The Petitioner indicated that the Beneficiary has worked for [REDACTED] since April 2009.

(b)(6)

Matter of W-1, Inc.

In its response to the Second NOIR, the Petitioner submitted an affidavit dated February 19, 2015, from [REDACTED] affirming that he had filed the labor certification and Form I-140 in this case. He confirmed that the job offer remains valid. The Petitioner also provided two affidavits: one dated February 13, 2015, from [REDACTED], and one from [REDACTED] dated February 13, 2015. The affidavit from [REDACTED] states that he was one of the partners of [REDACTED] and that he hired the Beneficiary as a baker in the baking section of his business from 1987 to 1994. The affidavit later states “[m]y establishment of [REDACTED] was located at [REDACTED]...” He later refers to the business as [REDACTED]

The affidavit from [REDACTED] states that he is a retired assistant engineer, that he inspected the premises of [REDACTED] and that he has known [REDACTED] since 1979 “who was conducting business of eating house, known as [REDACTED]” The Petitioner also provided copies of evidence provided in response to the First NOIR.

III. NOTICE OF REVOCATION

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 for revocation if supported by the record. *Ho*, 19 I&N Dec. at 590.

The Director revoked the petition’s approval on April 9, 2015. The Director stated that the job offer letter written by [REDACTED] was fraudulent. The Director also determined that the documents presented in response to the Second NOIR show that a business called [REDACTED] had existed, but there was insufficient evidence in the record to establish that a business called [REDACTED] existed at the [REDACTED]. Thus, the Director determined that the Beneficiary’s experience could not be corroborated and that the Petitioner had not overcome the inconsistencies in the record regarding the Beneficiary’s work experience with independent, objective evidence. Since the Director found fraud or material misrepresentation of a material fact in the application for labor certification, he invalidated the labor certification.

A. Job Offer Letter

The Director determined that the job offer letter dated July 24, 2006, from [REDACTED] was fraudulent. In his decision, the Director stated that the affidavit of [REDACTED] dated February 19, 2015, submitted in response to the Second NOIR, was not persuasive because he had not provided evidence to support his assertion that the job offer was bona fide, such as the Beneficiary’s recent pay stubs or Forms W-2. As correctly noted by the Petitioner on appeal, the Petitioner does not have to establish that it is currently employing the Beneficiary. The Petitioner never claimed that it employed the Beneficiary. Instead, it provided ample evidence that the Beneficiary was employed by another [REDACTED] franchise owned by [REDACTED]. The Petitioner has expressed its clear intent to employ the Beneficiary.

(b)(6)

Matter of W-1, Inc.

However, the job offer letter indicated that the job offer was for the full-time position of baker at [REDACTED], IL [REDACTED]. The letter states that the Beneficiary's job duties will include "preparing and baking cookies, donuts, bagels, muffins, etc." In his First NOIR, the Director stated that there did not appear to be a bakery located on the premises located at [REDACTED] Illinois, where the Petitioner claimed that the Beneficiary would work.

The Petitioner provided numerous invoices between [REDACTED] and the Petitioner. They show that the Petitioner receives its baked goods, including many flavors of bagels, many types of muffins, croissants, biscuits, English muffins, and flatbreads, from the [REDACTED] in [REDACTED] IL. These items are not prepared and baked on the Petitioner's premises. In addition, there are no ingredients on the invoices for preparing and baking donuts or cookies. It is not clear from the invoices if the Petitioner bakes its donuts and cookies onsite or has them delivered from another location.

Further, the Petitioner provided pictures of the premises located at [REDACTED] Illinois. There is a [REDACTED] franchise at the location. The pictures show only one small oven at the location. The pictures do not show that the Petitioner bakes and prepares its baked goods on the premises.

We agree with the Director's finding that the job offer letter dated July 24, 2006, submitted by [REDACTED] was fraudulent. The Petitioner has offered the Beneficiary the full-time position of baker, but the Petitioner has not established that any baking is done on the premises. The job offer is not bona fide.

B. Beneficiary's Work Experience

In his decision, the Director determined that the Petitioner had not overcome the inconsistencies in the Beneficiary's work experience with independent, objective evidence. The Director stated that the documents presented in response to the Second NOIR show that a business called [REDACTED] had existed, but there was insufficient evidence in the record to establish that the beneficiary worked there or that a business called [REDACTED] operated at that location.

On appeal, the Petitioner submits a copy of an affidavit of [REDACTED] dated April 21, 2015. [REDACTED] states that [REDACTED] was "known by its d/b/a of [REDACTED] Restaurant and Bakery." He states that he operated [REDACTED] from 1997 through 2000. He states that he had a restaurant and bakery establishment at the [REDACTED] school building and that the sign on the premises stated the business name of [REDACTED]. He states that the Beneficiary worked at [REDACTED] from March 15, 1989, to May 31, 1994, as a baker in the bakery section. He further states that the Beneficiary had worked for him in "different capacities prior to starting as a baker going back to 1987."

When the record contains inconsistent evidence, the petitioner bears the burden of proving the truth of the matter with competent, independent and objective evidence. *Ho*, 19 I&N Dec. at 591-92.

(b)(6)

Matter of W-1, Inc.

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. *Id.* at 591.

The labor certification states that the Beneficiary qualifies for the offered position based on experience as a baker with [REDACTED] located at [REDACTED] - [REDACTED] from March 15, 1989, until May 31, 1994. The labor certification states that the Beneficiary's job duties included preparing and baking "all sorts of confectionery, such as cookies, cakes, pastries, donuts, bagels and muffins."

The experience letter dated June 10, 1994, from [REDACTED] on [REDACTED] letterhead states that the company employed the Beneficiary as a baker from March 15, 1989, until May 31, 1994. The letter indicates that the Beneficiary "baked bread, pastries, cookies, cakes, etc." The address on the letterhead is [REDACTED] - [REDACTED]. The letter does not give [REDACTED] title as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The Petitioner has not established [REDACTED] identity or role in the business. [REDACTED] name is not listed on any of the documents submitted by the Petitioner, except for the experience letter.

We also note that the Indian Parliament changed the name of [REDACTED], India to [REDACTED] India a few years after the date of the letter. Therefore, it is not clear why the letter lists an address in [REDACTED] when the city was named [REDACTED] in 1994.

The record also contains a Form G-325A for the Beneficiary. On the Form G-325A, the Beneficiary left blank the sections requesting information relating to his last address outside of the United States of more than one year, and his last occupation abroad. The Form G-325A does not support the Petitioner's claim that the Beneficiary was employed as a baker in India from March 1989 to May 1994.

The second site visit conducted by USCIS indicated that a company called [REDACTED] operated at the site, but that the Beneficiary never worked for [REDACTED]. The site visits also indicated that a bakery called [REDACTED] never operated at that site and that no baking was conducted at the site.

The Petitioner asserted that certain documents proved [REDACTED] was at one time an operating business at the listed address:

- An agreement dated April 28, 1977, between [REDACTED] and the trust in charge of [REDACTED] shows that [REDACTED] was contracted to run the school's canteen and provide school lunches, dinners and snacks to students during school hours, in return for a monthly rent payment to the school. The agreement also permitted [REDACTED] to run a restaurant after school hours on the premises, as well as carry on business as "Caterers, Sweet Sellers, Bakers, Snack Sellers." There is a notation at the top of the agreement that states [REDACTED] owner, [REDACTED]. However, the agreement does not

(b)(6)

Matter of W-1, Inc.

indicate that a business called [REDACTED] ever existed or operated on the premises. Further, the agreement does not indicate an end date for rental of the premises. It does not establish that a business called [REDACTED] operated on the premises between March 15, 1989, and May 31, 1994, or that the Beneficiary ever worked there.

- A receipt showing that [REDACTED] paid the trust \$5,400.00 for conducting changes and maintenance for the period from January 12, 1985, to May 5, 1986. However, the receipt does not indicate that a business called [REDACTED] ever existed or operated on the school premises or that the Beneficiary ever worked there.
- A bank statement dated January 1, 1990, for [REDACTED]. The bank statement does not indicate that a business called [REDACTED] ever existed or operated on the school premises or that the Beneficiary ever worked there.
- Several billing statements, sales tax, and other receipts for [REDACTED]. These documents give two individual names related to [REDACTED]. They do not identify [REDACTED] as part of the business. The documents not indicate that a business called [REDACTED] ever existed or operated on the premises or that the Beneficiary ever worked there.
- Correspondence relating to a lawsuit between [REDACTED] and the trust in charge of [REDACTED]. The correspondence does not indicate that a business called [REDACTED] ever existed or operated on the premises or that the Beneficiary ever worked there.
- Affidavit from [REDACTED] dated February 13, 2015. [REDACTED] states that he was one of the partners of [REDACTED] and that he hired the Beneficiary as a baker in the baking section of his business from 1987 to 1994. The affidavit later states “[m]y establishment of [REDACTED] was located at [REDACTED]....” He later refers to the business as [REDACTED]. The affidavit has many grammatical and spelling errors and appears to be written by someone with limited English knowledge. None of the billing statements, bank statements, tax documents or other documents submitted by the Petitioner listed [REDACTED] name as owner of [REDACTED]. The agreement with [REDACTED] referenced above lists [REDACTED] as the owner of [REDACTED]. The Petitioner has not established with independent, objective evidence that [REDACTED] was an owner of the business.
- The affidavit from [REDACTED] dated April 21, 2015. [REDACTED] states that [REDACTED] was “known by its d/b/a of [REDACTED].” He states that he operated [REDACTED] from 1997 through 2000. He states that he had a restaurant and bakery establishment at the [REDACTED] building and that the sign on the premises stated the business name of [REDACTED]. He states that the Beneficiary worked at [REDACTED] d/b/a [REDACTED] from March 15, 1989, to May 31, 1994 as a baker in the bakery section. He further states that the Beneficiary had worked for him in “different capacities prior to starting as a baker going back to 1987.” This affidavit is written in clear English without the grammatical and spelling errors of the earlier affidavit. It appears that the two affidavits were written by different individuals. The first affidavit makes no mention of an assumed name for the business. The second affidavit asserts that there was an assumed name for the business, but provides no independent, objective evidence to support that

(b)(6)

Matter of W-1, Inc.

assertion. None of the billing statements, bank statements, tax documents or other documents submitted by the Petitioner listed [REDACTED] name as owner of [REDACTED]. The agreement with [REDACTED] referenced above lists [REDACTED] as the owner of [REDACTED]. The Petitioner has not established with independent, objective evidence that [REDACTED] was an owner of the business.

- Affidavit from [REDACTED] dated February 13, 2015. The affidavit from [REDACTED] states that he is a retired assistant engineer, that he inspected the premises of [REDACTED] and that he has known [REDACTED] since 1979 “who was conducting business of eating house, known as [REDACTED]. The affidavit does not indicate that a business called [REDACTED] ever existed or operated on the school premises or that the Beneficiary ever worked there.

We affirm the Director’s decision that the Petitioner had not overcome the inconsistencies in the record regarding the Beneficiary’s work experience with independent, objective evidence. The experience listed on the labor certification cannot be corroborated. The Petitioner has not established that the Beneficiary met all of the requirements of the offered position set forth on the labor certification by the priority date of the petition.

C. Invalidation of Labor Certification

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. 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact must be voluntary and deliberate, made with knowledge of its falsity. *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). A misrepresentation is material if it has “a natural tendency to influence the decisions” of the government. *Id.* at 442-43 (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

Fraud includes the same elements as willful misrepresentation of a material fact. However, a fraud finding also requires evidence of intent to deceive government officials and the government’s reliance on the deception. *See Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956).

In the instant case, the Director found fraud or material misrepresentation of a material fact in the application for labor certification and invalidated the labor certification.

We agree with the Director’s finding that the job offer letter dated July 24, 2006, submitted by [REDACTED] was fraudulent. The job offer is not bona fide. The labor certification was filed for the full-time position of baker, but the Petitioner has not established that any baking is done on the premises.

Further, we agree with the Director’s finding that the Petitioner had not overcome the inconsistencies in the record regarding the Beneficiary’s work experience with independent, objective evidence. The experience letter from [REDACTED] is fraudulent and the experience listed on the labor certification cannot be corroborated.

Matter of W-1, Inc.

The Petitioner and the Beneficiary knowingly misrepresented material facts in this case by submitting fraudulent documents in an effort to procure a benefit under the Act. We affirm the Director's decision to invalidate the labor certification.

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of W-1, Inc.*, ID# 14589 (AAO Nov. 16, 2015)