



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

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

MATTER OF S-A-S, INC.

DATE: NOV. 27, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a used-car dealership, seeks to permanently employ the Beneficiary as a computer software engineer under the immigrant classification of skilled worker or professional. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A), 8 U.S.C. § 1153(b)(3)(A).¹ The Director, Texas Service Center, approved the petition on July 21, 2008. However, on November 6, 2014, he revoked the petition's approval. The matter is now before us on appeal. The appeal will be dismissed.

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, 590 (BIA 1988).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date is June 27, 2007, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The Director concluded that the Petitioner and the Beneficiary willfully misrepresented material facts involving the accompanying labor certification. Accordingly, the Director invalidated the labor certification and revoked the petition's approval.

The record shows that the appeal is properly filed and alleges specific errors of fact and law. *See* 8 C.F.R. § 103.3(a)(1)(v). The record documents the case's procedural history, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

¹ Section 203(b)(3)(A)(i) of the Act provides immigrant visas to qualified immigrants capable of performing permanent skilled labor (requiring at least two years training or experience) for which qualified workers are unavailable in the United States. Section 203(b)(3)(A)(ii) provides immigrant visas to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.²

I. THE NOTICE OF INTENT TO REVOKE

USCIS issues a notice of intent to revoke for good and sufficient cause where the record at the time of the notice's issuance, if unrebutted or unexplained, would warrant the petition's denial based on a petitioner's failure to meet its burden of proof. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS properly revokes a petition's approval if the record at the time of revocation - including any explanation, rebuttal, or evidence submitted by a petitioner - warranted a denial. *Id.* at 452.

In the instant case, the Director issued a notice of intent to revoke (NOIR) on July 2, 2014. The NOIR alleges the Petitioner's misrepresentation on the accompanying labor certification of the availability of the offered position to U.S. workers. The NOIR notes the Petitioner's attestation of the job opportunity's clear availability to any U.S. worker. The NOIR also notes the Beneficiary's testimony on May 24, 2014 before an officer of the Department of Homeland Security (DHS) that the Petitioner's president is "a friend of [his]."

A concealment of a relationship between a petitioner and a beneficiary in labor certification proceedings may constitute willful misrepresentation of a material fact and grounds for invalidation of an accompanying labor certification. *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). In the instant case, the Petitioner attested to the clear availability of the offered position to U.S. workers. However, evidence of a friendship between the Petitioner's president and the Beneficiary cast substantial doubt on the veracity of that statement.

If unrebutted or unexplained, the record at the time of the NOIR's issuance did not establish the clear availability of the offered position to U.S. workers and indicated the Petitioner's willful misrepresentation of the *bona fides* of the job opportunity. The Director therefore issued the NOIR on this ground for good and sufficient cause.

The NOIR also alleges the Beneficiary's willful misrepresentation on the accompanying labor certification of his qualifying experience for the offered position. The NOIR notes the Beneficiary's attestation of full-time employment as a systems software engineer from 2004 to 2007. The NOIR also notes documentation of record indicating the Beneficiary's status as a founder and managing member of his employer. In addition, the NOIR notes the Beneficiary's purported start of employment as a systems software engineer in 2004 shortly after the denial of an immigrant visa petition for him by his employer as an executive or manager.

² 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 submission of additional evidence on appeal. The instant record provides no reason to preclude consideration of any documents newly submitted on appeal.

If unexplained or un rebutted, the record at the time of the NOIR's issuance indicated the Beneficiary's employment after 2004 as an executive or manager, rather than as a systems software engineer as stated on the accompanying labor certification. The circumstances and timing of the Beneficiary's purported job change from manager to systems software engineer suggested his willful misrepresentation of his experience in an attempt to qualify for the instant requested immigrant classification. The Director therefore also properly issued the NOIR on this ground.

II. INVALIDATION OF THE LABOR CERTIFICATION

A petition for a skilled worker or professional must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation establishing the alien'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 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 consists of a false representation of a material fact made with knowledge of its falsity. *Ortiz-Bouchet v. Att'y Gen.*, 714 F.3d 1353, 1356-57 (11th Cir. 2013) (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

A. The Petitioner's Alleged Misrepresentation

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). An employer must establish the existence of a *bona fide* job opportunity and its good faith recruitment of a U.S. worker to fill the offered position. *Matter of Amger Corp.*, 87-INA-545, 1987 WL 341738, *2 (BALCA 1987) (*en banc*).

In determining the *bona fides* of a job opportunity, we must consider the "totality of the circumstances." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA July 16, 1991) (*en banc*). We must consider multiple factors, including but not limited to, whether the 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; and has qualifications matching specialized or unusual job duties or requirements stated in the labor certification. *Id.* We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence, and whether the employer complied with regulations and otherwise acted in good faith. *Id.*

In the instant case, many of the *Modular Container* factors support the existence of a *bona fide* job opportunity. The record does not indicate the Beneficiary's employment by the Petitioner at any time. Thus, the record does not indicate the Beneficiary's involvement in the company's management or the likely cessation of its operations without his presence or personal attributes. The record also does not indicate the Beneficiary's incorporation or founding of the Petitioner, or his membership on its board of directors.

However, the record indicates, and the Petitioner concedes, that a friendship exists between the Beneficiary and its president. The record contains the following exchange between the Beneficiary and a DHS officer on May 24, 2014 after the Beneficiary told the officer of the Petitioner's offer of employment to him:

Q: How did they contact you for this job . . . ?

A: I know the manager who is a friend of mine.

The Beneficiary also addressed the job offer in a July 10, 2014, sworn statement, which the Petitioner submitted in response to the Director's NOIR.³ The Beneficiary stated that the Petitioner's president told him in early 2007 of the company's intention to hire a permanent information technology (IT) manager.⁴ The Beneficiary stated: "I asked him if he would offer me the position and sponsor a labor certification for me, which he agreed." The Beneficiary's statements suggest the Petitioner's offer of the position to the Beneficiary to help him obtain lawful permanent resident and the unavailability of the job opportunity to U.S. workers. The record does not contain any further evidence describing or explaining the friendship between the Petitioner's president and the Beneficiary.

The record also indicates a lack of good faith in the Petitioner's recruitment for the offered position. A "U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training." 20 C.F.R. § 656.24(b)(2)(i). "[W]here the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if the resume does not expressly state that he or she meets all the requirements, an employer bears the burden of further investigating the applicant's credentials." *Matter of JP Morgan & Chase Co.*, 2011-PER-01164, 2012 WL 3091676, *2 (BALCA July 25, 2012).

The record contains copies of "interview sheets" regarding applications received by the Petitioner for the offered position during the labor certification recruitment process. The interview sheets state the Petitioner's rejection of eight applicants because they lacked at least two years of experience "providing support to IBM Portal, IBM Websphere Commerce Suite & other IBM software applications; as well as integration between IBM and Microsoft Platforms," as stated in the job description of the offered position on the accompanying labor certification.

The applicant interview sheets indicate the Petitioner's determination that all eight applicants met the educational qualifications of the offered position. Resumes of six applicants also indicate their experience in the software industry. However, the record indicates the Petitioner's rejection of all of

³ We received an additional letter from the Beneficiary on July 31, 2015, after our receipt of the Petitioner's response to our notice of derogatory information and intent to dismiss (NOID), dated July 2, 2015. The Beneficiary's additional letter did not address his relationship with the Petitioner's president.

⁴ In the July 10, 2014, statement and in his testimony before a DHS officer, the Beneficiary referred to the offered position's title as "IT manager." However, the labor certification and other evidence of record identify the position's title as "computer software engineer."

the applicants based on reviews of their resumes, finding that they lacked experience with the technologies stated in the position's job description.

In response to our NOID, the Petitioner submitted a July 15, 2015, letter from the president of a Florida software company that purportedly specializes in network solutions for small- and medium-sized businesses.⁵ The letter states that an applicant lacking experience with the technologies stated in the job description of the offered position would not have been able to acquire the skills during a reasonable period of on-the-job training. The letter states that "the technical expertise and the level of sophistication required to adequately perform the job would have taken an unreasonable period of time to acquire." The letter also states that, "in light of the state of the internet and eCommerce at that time, a potential employer who was not itself involved in computer software programming would not have had the capacity to provide such training." The record therefore establishes the inability of the applicants to acquire the necessary skills for the offered position during a reasonable period of on-the-job training.

However, the record does not establish that all applicants lacked experience with the technologies stated in the job description of the offered position. Six of the eight applicants possessed both the educational qualifications for the offered position and experience in the software industry. Yet, the record shows the Petitioner's rejection of them based solely on reviews of their resumes. *See JP Morgan & Chase*, 2012 WL 3091676, at *2 (stating that "where the applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, even if the resume does not expressly state that he or she meets all the requirements, an employment bears the burden of further investigating the applicant's credentials"). The record indicates that, despite the broad range of experience, education, and training of six applicants, the Petitioner did not further investigate their credentials. The record therefore does not indicate the Petitioner's recruitment for the offered position in good faith.

The record at the time of the revocation also suggested the Beneficiary's possession of specialized job duties or requirements stated in the accompanying labor certification. The labor certification states the requirements of the offered position of computer software engineer as a Bachelor's degree or a foreign equivalent degree in computer engineering, plus at least 24 months of experience in the job offered. As previously indicated, the position's job duties include "provid[ing] support regarding IBM Portal, IBM Websphere Commerce Suite and other IBM software applications; [and] ensur[ing] adequate integration between IBM and Microsoft Platforms."

However, the letter from the president of the Florida software company states that "IBM has always been a recognized leader in web commerce solutions." The letter also states that a small company like the Petitioner seeking to launch an e-commerce initiative would "reasonably" require someone with at least 24 months of experience with IBM Portal, IBM Websphere Commerce Suite, and other

⁵ The letter states that the president of the software company has no relationship with the Petitioner, the Beneficiary, or the Beneficiary's employers. The letter also states that the company's president received no compensation for his opinion.

IBM software applications, including knowledge of integration between IBM and Microsoft platforms. The preponderance of the evidence therefore indicates that the job duties or requirements of the offered position are not specialized in nature.

In summary, the record does not indicate any ownership, employment, or management relationships between the Beneficiary and the Petitioner. However, the record indicates a friendship between the Beneficiary and the Petitioner's president that the Petitioner has not fully explained. The record also indicates the Petitioner's rejection of potentially qualified U.S. workers without further investigation of their credentials. Therefore, after careful consideration of the *Modular Container* factors, the record does not establish the clear availability of the offered position to U.S. workers.

The Petitioner is presumed to know about its recruitment efforts for the offered position and the friendship between the Beneficiary and its president. *See Silver Dragon Chinese Rest.*, 19 I&N Dec. at 404 (stating that "the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise"). The record therefore contains substantial evidence that the Petitioner willfully misrepresented a material fact involving the labor certification, supporting the invalidation of the accompanying labor certification and the revocation of the petition's approval.

The Petitioner argues that it could not have misrepresented the friendship between the Beneficiary and its president because the ETA Form 9089 does not allow a statement regarding such a relationship. The Petitioner notes that Section C.9 of the form asks only whether a foreign national has an ownership interest in an employer or a familial relationship with its owners, stockholders, partners, corporate officers, or incorporators.

However, the Director did not find the Petitioner's misrepresentation in its response to Section C.9 on the ETA Form 9089. Rather, he found the Petitioner's false certification of the availability of the position to U.S. workers pursuant to Section N.8 of the form and 20 C.F.R. § 656.10(c)(8) to be the Petitioner's misrepresentation.

The Petitioner interprets DOL's regulatory comments as limiting an inquiry into a foreign national's influence and control over a job opportunity to whether he or she has an ownership interest in the employer or a familial relationship with its principals. *See* Final PERM Rule, 69 Fed. Reg. 77326, 77355-56 (Dec. 27, 2004). However, in response to comments on its proposed rule, the DOL added a regulatory provision "addressing the possible influence of the alien as one of a small number of employees." 69 Fed. Reg. at 77356. The DOL also added a question to ETA Form 9089 asking for an employer's number of employees. *Id.* Thus, the final regulation at 20 C.F.R. § 656.17(l) requires an employer to demonstrate the *bona fides* of a job opportunity not only if a foreign national has an ownership interest in the employer or a family relationship with one of its principals, but also if the foreign national will be one of a small number of employees. The accompanying labor certification states that the Petitioner had five employees at the time of the labor certification's filing.

In addition, case law of the Board of Alien Labor Certification Appeals (BALCA) holds that a friendship between a foreign national and an employer's principal may affect the *bona fides* of a job

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opportunity. See *Matter of R-C-*, 92-INA-00070, 1993 WL 104707, *4, (BALCA Mar. 31, 1993) (finding that a labor certification application was a “pretext” for obtaining lawful permanent residence for a “friend” of the employer); see also *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000) (stating that “a relationship [between an alien and an employer’s principal] is not only of the blood; it may also be financial, by marriage, or *through friendship*”) (emphasis added). We therefore do not find our inquiry into the Beneficiary’s influence and control over the instant job opportunity limited to whether he has an ownership interest in the Petitioner or a familial relationship with one of its principals.

The Petitioner notes that the term “friend” “can encompass a broad spectrum of relationships (from a casual acquaintance to a life-long best friend).” The Petitioner argues that “there is nothing in the record to establish where along that spectrum the relationship between the Beneficiary and the Petitioner falls.”

We agree that the record does not describe or explain the nature of the friendship between the Beneficiary and the Petitioner’s president. However, the Petitioner bears the burden in these proceedings of establishing its eligibility for the requested benefit. See *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (holding that, once the government has produced “some evidence” to show cause for revoking a petition’s approval, a petitioner bears the burden of proving eligibility); see also *Ho*, 19 I&N Dec. at 589 (holding that, as in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the benefit sought). Pursuant to the Director’s NOIR and our NOID, the Petitioner received opportunities to explain the relationship between its president and the Beneficiary, but did not do so.

The record does not explain the friendship between the Petitioner’s president and the Beneficiary. The record also does not establish the Petitioner’s good faith recruitment for the offered position. The record therefore does not establish the clear availability of the offered position to U.S. workers. Accordingly, the record contains substantial evidence of the Petitioner’s willful misrepresentation of a material fact on the accompanying labor certification. We will therefore affirm the Director’s invalidation of the accompanying labor certification and revocation of the petition’s approval.

B. The Beneficiary’s Alleged Misrepresentation

As previously indicated, the accompanying labor certification states the requirements of the offered position of computer software engineer as a Bachelor’s degree or a foreign equivalent degree in computer engineering, plus at least 24 months of experience in the job offered.

The Beneficiary attested on the labor certification to about 40 months of full-time, qualifying experience. He stated that he worked for [REDACTED] in the United States as a systems software engineer from February 18, 2004 until the labor certification’s filing on June 27, 2007.⁶ The record also contains a February 14, 2007, letter from the corporate secretary of [REDACTED]

⁶ The labor certification identifies the Beneficiary’s employer as [REDACTED]. However, online Florida

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U.S., confirming the company's employment of the beneficiary since February 2004 and describing his job duties as a systems software engineer.

However, statements by the Beneficiary indicate his employment by [REDACTED] since 2004 as an executive or manager, not as a systems software engineer. A portion of the Beneficiary's 2014 sworn statement to the DHS officer states:

Q: What was your job title [REDACTED] under the H-1B visa?

A: Systems Software Engineer.

Q: Are you still at this moment under the same position?

A: Yes, also as a Managing Director.

Similarly, in his sworn statement of July 10, 2014, the Beneficiary stated that, while in H-1B status, he "continued to work for and to grow [REDACTED] incorporating new business alliances and growing our customer base." These statements suggest the Beneficiary's employment as an executive or manager by [REDACTED] after 2004 and cast doubts on his claimed qualifying experience with the company as a systems software engineer. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The record also contains documentary evidence of the Beneficiary's duties as an executive or manager for [REDACTED] after 2004. Copies of corporate minutes document the Beneficiary's attendance as a member manager of [REDACTED] at annual company meetings in 2010 and 2011. The minutes of the January 14, 2011, meeting indicate the Beneficiary's presentation of "a detailed business plan of the company for year 2011," which the company's other member managers unanimously accepted.

A copy of an IRS Form W-3, Transmittal of Wage and Tax Statements, for [REDACTED] in 2010 also identifies the Beneficiary as the company's contact and "member manager." In addition, in response to a request for evidence on its second immigrant visa petition for the Beneficiary, [REDACTED] submitted a company organizational chart identifying the Beneficiary as its "managing director" and positioning him at the top of the organization. Further, in response to our NOID, the Petitioner submitted copies of the Beneficiary's personal U.S. income tax returns for 2004 through 2007, all stating his occupation in those years as "executive." Thus, contrary to the Beneficiary's

records indicate the administrative dissolution of [REDACTED] about 18 months after its incorporation on [REDACTED]. *See Fla. Dep't of State, Div. of Corps.*, at [http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultsDenial?inquirytype=EntityName&directionType=Initial&searchNameOrder=\[REDACTED\]](http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultsDenial?inquirytype=EntityName&directionType=Initial&searchNameOrder=[REDACTED])

[REDACTED] (accessed Aug. 27, 2015).

Documents of record identify the Beneficiary's employer as [REDACTED] a Florida limited liability company established on [REDACTED] that remains active. The record indicates that [REDACTED] continues to employ the Beneficiary. We will therefore refer to [REDACTED]

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representation on the accompanying labor certification, the record indicates his performance of executive or managerial duties for [REDACTED] after 2004.

The Beneficiary's role with [REDACTED] before 2004 also casts doubt on his later claimed qualifying experience with the company. As indicated in the Director's NOIR, the record identifies the Beneficiary as a founder of [REDACTED] and indicates his appointment as a member manager of the limited liability company shortly after its founding.⁷ He testified to the DHS officer of his proposal to expand [REDACTED] into the U.S. and his arrival in the United States in 2001 to establish a U.S. entity. The beneficiary stated in his July 10, 2014, sworn statement that he "gr[e]w a company that [he] started from scratch."

The operating agreement of [REDACTED] delegates primary responsibility for the company's operations to its member managers, who may also make all employment decisions for the company. Online Florida records also identify the Beneficiary's wife as a member manager of the company from 2003 to 2014. See Fla. Dep't of State, Div. of Corps., at [http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResults?inquiryType=EntityName&searchNameOrder=\[REDACTED\]](http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResults?inquiryType=EntityName&searchNameOrder=[REDACTED]) (accessed Aug. 27, 2015).

Documentation of record also indicates the Beneficiary's past ownership of up to 49 percent of [REDACTED] and his current ownership of about 42 percent of the company. The record identifies [REDACTED] as the majority owner of [REDACTED]. The record also indicates the Beneficiary's ownership of about 4.5 percent of the stock of [REDACTED] where he served as general manager from 1989 to 2000. An exhibit to [REDACTED] operating agreement states that the Beneficiary contributed \$5,880 of the company's initial capital of \$12,000, with [REDACTED] providing the remaining amount.

In 2002, [REDACTED] unsuccessfully petitioned to classify the Beneficiary as a multinational executive or manager under INA § 203(b)(1)(C). Shortly after the January 14, 2004, denial of the immigrant petition, the Beneficiary received authorization to work for the company in H-1B status as a worker in a specialty occupation. See INA § 101(a)(15)(H). The record indicates the Beneficiary's authorization to work for [REDACTED] in H-1B status from February 5, 2004 until January 26, 2014 as a systems software engineer. On August 19, 2010, [REDACTED] filed another immigrant petition for the Beneficiary as a multinational executive or manager in the position of managing director. USCIS approved the second petition on July 23, 2012.

The Beneficiary's role as a founder, owner, and member manager of [REDACTED] casts doubt on his claimed qualifying experience with the company. The record does not explain why the Beneficiary would work full-time as a systems software engineer for a company that he founded, co-owns, and directs as a member manager. See *Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

⁷ As of January 1, 2015, Florida law eliminated the term "managing member," deeming all limited liability companies to be member-managed unless specifically stated otherwise. See Fla. Stat. § 605.0407(i)(b).

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The Petitioner asserts that the Beneficiary's executive or managerial activities for [REDACTED] after 2004 constitute a small part of his duties as a systems software engineer. The letter from the president of the Florida software company states that "it would have been reasonable for [the Beneficiary] to devote his time almost entirely to IT work and very little of his time to executive and/or managerial duties." The letter states that small software companies "require relatively little in the way of management," that nearly all of their employees focus on providing software solutions, and that senior IT professionals, such as systems software engineers, normally provide any required executive or managerial services.

However, the record does not support the Petitioner's assertion that the Beneficiary devoted a small part of his time as a systems software engineer to executive or managerial duties. The accompanying labor certification and the February 14, 2007, letter from the corporate secretary of [REDACTED], do not state the Beneficiary's performance of executive or managerial duties as a systems software engineer with [REDACTED].

Further, if systems software engineers at small software companies typically spend only small parts of their time managing the companies, the record does not explain the Beneficiary's full-time duties as a general manager before 2004. In its 2002 immigrant visa petition for the Beneficiary, [REDACTED] indicated the Beneficiary's performance of solely executive or managerial duties for the company as a general manager, with no mention of software development services provided by him. The record also does not indicate the Beneficiary's performance of software development services in his role as general manager with [REDACTED].

The record further indicates the growth of [REDACTED] after 2004. Financial records indicate an increase in the company's annual gross incomes from \$122,359.40 in 2003 to \$5.102 million in 2010. Copies of payroll tax records also indicate an increase in the company's number of employees to seven in 2010. The record therefore does not explain why the Beneficiary served full-time as a general manager before 2004, but spent only a small amount of time managing the company as it grew after 2004.

The Petitioner argues that the Beneficiary changed positions after the denial of the first immigrant visa petition for him by [REDACTED] in 2004 because "the company was deemed to be too small to justify his executive/managerial position."⁸ Once the company grew large enough to require a full-time manager in 2010, the Petitioner argues that [REDACTED] filed another immigrant petition for the Beneficiary as an executive or manager.

However, the timing of the Beneficiary's purported job change, shortly after the denial of the first immigrant visa petition, also suggests the misrepresentation of the nature of his position after 2004

⁸ USCIS records indicate that the first immigrant visa petition by [REDACTED] was denied, in part, because the company already had two employees in L-1A executive or managerial status at that time. Because another manager worked at the small company, USCIS found that the record did not establish the Beneficiary's primary performance of executive or managerial duties.

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for immigration reasons. After the denial of the first immigrant visa petition, the Beneficiary may have feared the potential denial of a request to extend his prior L-1A visa status, which requires qualifications similar to those of a multinational manager or executive. The Beneficiary may also have sought to qualify for the instant immigrant classification after his denial as a multinational manager or executive.

The Petitioner has not sufficiently explained evidence of record indicating the Beneficiary's continued employment as an executive or manager for [REDACTED] after 2004. The record therefore contains substantial evidence of the Beneficiary's willful misrepresentation of his claimed, full-time qualifying experience as a systems software engineer on the accompanying labor certification. We will therefore also affirm the Director's invalidation of the accompanying labor certification and revocation of the petition's approval on this ground.

III. THE BENEFICIARY'S QUALIFYING EXPERIENCE

Beyond the Director's decision, the record at the time of the petition's approval also did not establish the Beneficiary's qualifying experience for the offered position.⁹

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 evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor 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).

As previously discussed, the record contains evidence of the Beneficiary's continued employment by [REDACTED] as an executive or manager after 2004. The record does not establish his possession of at least 24 months of full-time experience in the offered position by the petition's June 27, 2007, priority date as specified on the accompanying labor certification. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

In response to our NOID, the Petitioner submitted copies of the Beneficiary's IRS Forms W-2 Wage and Tax Statements and his personal income tax returns from 2004 through 2007. The Forms W-2 indicate the Beneficiary's employment by [REDACTED] during that period. However, the forms do not indicate his position with the company. Also, as previously discussed, the Beneficiary's personal income tax returns identify his occupation from 2004 through 2007 as "executive." The

⁹ We may deny a petition on grounds unidentified by a director. *See* 5 U.S.C. § 557(b) (stating that, unless limited by notice or rule, an administrative agency on review retains all the powers it possessed in issuing the original decision).

Beneficiary's tax materials therefore do not establish his claimed qualifying experience for the offered position.

The record does not establish the Beneficiary's possession of at least 24 months of qualifying experience in the job offered by the petition's priority date as specified on the accompanying labor certification. We will therefore also dismiss the Petitioner's appeal for this reason.

IV. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY IN THE OFFERED POSITION

A labor certification remains valid only for the particular job opportunity, the alien, and the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work." 20 C.F.R. § 656.3.

A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (affirming a petition's denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker as stated on the accompanying labor certification).

The accompanying labor certification states the primary job duties of the offered position as designing and developing software systems using scientific analysis and mathematical models, and developing an e-commerce division of the company.

The record contains copies of payroll tax returns indicating that, as of 2007, the Petitioner was relatively small, employing five people. The evidence does not demonstrate the Petitioner's need for a permanent, full-time computer software engineer.

The Petitioner argues that the letter from the president of the Florida software company establishes the reasonableness of its need for the offered position. The letter states that a small business like an auto dealership "could reasonably have developed a business plan to launch and sell its products through the internet" and "would reasonably seek to employ an individual as a systems software engineer."

However, while such a plan and need for a computer software engineer might theoretically be reasonable, the record lacks specific details of the Petitioner's e-commerce plan and its particular need for a computer software engineer. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings). The letter from the president of the Florida software company does not indicate his review of the Petitioner's e-commerce plan or of the company's purported need for the offered position. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (stating that USCIS may reject or accord less weight to an expert opinion that is inconsistent with other information or questionable in any way).

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At the time of the petition's approval, the record did not establish the Petitioner's intention to employ the Beneficiary in the offered position specified on the accompanying labor certification. We will therefore also dismiss the petition's appeal for this reason.

V. CONCLUSION

The Petitioner has not rebutted substantial evidence of willful misrepresentation of material facts by itself and the Beneficiary on the accompanying labor certification. We will therefore affirm the Director's invalidation of the labor certification and revocation of the petition's approval. Accordingly, we will dismiss the Petitioner's appeal on these grounds.

In addition, the record at the time of the petition's approval did not establish the Beneficiary's qualifying experience or the Petitioner's intention to employ him in the offered position. Therefore, we will also dismiss the appeal for these reasons.

The petition's approval will be revoked for the above-stated reasons, with each considered an independent and alternative basis for revocation. As in visa petition proceedings, a petitioner in visa revocation proceedings bears the burden of establishing eligibility for the benefit sought. INA § 291; *Ho*, 19 I&N Dec. at 589. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-S-, Inc.*, ID# 14129 (AAO Nov. 27, 2015)