



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

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

MATTER OF E-I-

DATE: JUNE 17, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a provider of computer software services, sought to permanently employ the Beneficiary as a computer programmer. It sought his classification as a professional or skilled worker under the third preference classification. *See* Immigration and Nationality Act sections 203(b)(3)(i), (ii), 8 U.S.C. §§ 1153(b)(3)(i)(ii). These classifications allow a U.S. employer to sponsor a professional with a bachelor's degree or a foreign national with 2 years of training or experience for lawful permanent resident status.

After initially approving the petition on November 26, 2007, the Director, Nebraska Service Center, revoked the petition's approval on October 18, 2012. *See* section 205 of the Act, 8 U.S.C. § 1155 (authorizing U.S. Citizenship and Immigration Services (USCIS) to revoke a petition's approval "at any time" for "good and sufficient" cause). The Director concluded that the Petitioner had gone out of business before the Beneficiary obtained lawful permanent residence and that the record did not establish a successor in interest to the Petitioner or the *bona fides* of the job opportunity.

We affirmed the Director's conclusions and dismissed the Petitioner's appeal on February 18, 2014. We also agreed with the Director that the Petitioner willfully misrepresented a material fact on the accompanying Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The matter is now before us on the Petitioner's motions to reopen and reconsider. The Petitioner asserts that we erred in our conclusions. We will deny the motion to reopen and the motion to reconsider.

I. LAW AND ANALYSIS

A. The Sufficiency of the Motions

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3).

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In the instant case, the Petitioner's Form I-290B, Notice of Appeal or Motion, indicates its filing of both a motion to reopen and a motion to reconsider. However, the filing does not state new facts and is not supported by affidavits or other documentary evidence. We will therefore deny the filing as a motion to reopen and consider it only as a motion to reconsider.

B. Successor in Interest

A labor certification remains valid only for the particular job opportunity and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c) (2004).¹ A business other than an employer stated on a labor certification may use the certification only if it establishes itself as a successor in interest to the stated employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A successor in interest must satisfy three conditions. First, it must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor to it. *Id.* at 482. Second, it must demonstrate that the job opportunity remains the same as stated on a labor certification. *Id.* Third, the successor must prove its eligibility for the immigrant visa in all respects, including its ability to pay the proffered wage. *Id.* at 483.

In his notice of intent to revoke (NOIR) of May 25, 2012, the Director noted that online government records indicate the Petitioner's corporate suspension from doing business. *See* Cal. Sec'y of State, Bus. Programs, Bus. Search, at <http://kepler.sos.ca.gov/> (accessed Apr. 25, 2016). The Director also noted that the termination of the Petitioner's business before the Beneficiary obtained lawful permanent residence would automatically revoke the petition's approval. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D).

In response to the NOIR, the Petitioner stated that another corporation acquired it on January 1, 2010. The Petitioner provided a copy of an agreement indicating its purchase by another company for \$780,000, a job offer portion of Form ETA 750 signed by the purported successor in interest, and a copy of the purported successor's federal income tax return for 2011. In response to our notice of intent to dismiss/request for evidence (NOID/RFE) of August 27, 2013, the Petitioner also submitted a copy of receipt for \$780,000 from the other company.

The record on motion does not establish a successor relationship for immigration purposes between the Petitioner and the company that bought it. First, the record does not establish that the job opportunity remains the same. The accompanying labor certification states the geographic area of intended employment as [REDACTED] California. On the job offer portion of Form ETA 750, the purported successor states that the Beneficiary will work in [REDACTED] California. The municipalities of [REDACTED] and [REDACTED] are located in different Metropolitan Statistical Areas (MSAs). *See* U.S. Dep't of Labor,

¹ Because the instant labor certification was filed before March 28, 2005, it is governed by the DOL's prior regulations. *See* Final PERM Rule, 69 Fed. Reg. 77326, 77326 (Dec. 27, 2004) (stating that current DOL regulations apply to labor certification applications filed on or after March 28, 2005). In this decision, we will therefore cite to DOL's prior regulations as they existed in 2004.

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Foreign Labor Certification Data Center, at <http://www.flcdatacenter.com/OesWizardStep2.aspx?stateName=California> (accessed Apr. 25, 2016). The record does not establish that the job opportunity in [REDACTED] is within normal commuting distance of [REDACTED]. See 20 C.F.R. § 656.3 (defining the term “area of intended employment” as “the area within normal commuting distance of the place (address) of intended employment” and stating that the area of intended employment includes any location within the same MSA).

The record also does not establish the purported successor’s eligibility for the immigrant visa. The Petitioner submitted a copy of the purported successor’s federal income tax return to establish its ability to pay the proffered wage as of 2011. However, the record lacks evidence of the purported successor’s ability to pay the proffered wage from January 1, 2010, the date of its purchase of the petitioner. See 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to demonstrate its “continuing” ability to pay a proffered wage); see also *Dial Auto*, 19 I&N Dec. at 481 (finding that a purported successor had the ability to pay from the date it took over the business of the labor certification employer).

On motion, the Petitioner asserts that we did not follow *Dial Auto* and a USCIS memorandum providing updated guidance on successor-in-interest determinations. See Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions* (Aug. 6, 2009), at <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/2009%20Memos%20By%20Month/August%202009/Successor-in-Interest-8-6-09.pdf> (accessed Apr. 25, 2016).

However, as previously discussed, *Dial Auto* found that a successor must establish its ability to pay a proffered wage from the time it acquired a labor certification employer. *Dial Auto*, 19 I&N Dec. at 481. We have applied that reasoning to the facts of the instant case, finding that the Petitioner has not established the ability of its purported successor to pay the proffered wage from the January 1, 2010, date of acquisition.

Also, the USCIS memo cited by the Petitioner states that a business need not acquire all of the assets and liabilities of a labor certification employer to be considered a successor in interest. Rather, the memo states that a business need only acquire the essential rights and liabilities needed to carry on the employer’s business.

However, our determination in the instant case does not stem from the fact that the Petitioner’s purported successor did not acquire all of the Petitioner’s assets and liabilities. Because we followed *Dial Auto* and the USCIS memo cited by the Petitioner, we reject the Petitioner’s assertions on motion.

The record does not establish a successor in interest to the Petitioner. Because the record indicates that the Petitioner’s business terminated as of January 1, 2010, the petition’s approval was automatically revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(D). We will therefore affirm our prior decision.

C. Willful Misrepresentation of a Material Fact on the Labor Certification

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). USCIS may invalidate a labor certification after its issuance upon a finding of fraud or willful misrepresentation of a material fact involving the labor certification. 20 C.F.R. § 656.30(d) (2004).

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 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)).

In the instant case, the record contains evidence that the Beneficiary and his wife were corporate officers and/or senior managers of the Petitioner at the time of the filing of the labor certification application on April 17, 2001. The Beneficiary signed his own Form I-140, Immigrant Petition for Alien Worker, filed on July 20, 2007, on behalf of the Petitioner. He also signed a Form I-140, dated April 16, 2007, and an accompanying labor certification, dated March 30, 2001, on behalf of his wife as the Petitioner's "[p]resident." In addition, the Beneficiary's wife signed the instant accompanying labor certification, dated May 17, 2006, as the Petitioner's "[v]ice-[p]resident."

In our prior decision, we found that the Petitioner willfully misrepresented a material fact on the accompanying labor certification because it did not disclose its relationships to the Beneficiary. But, upon reconsideration, we will withdraw that portion of our decision.

The record does not establish that the Petitioner misrepresented its relationships to the Beneficiary. The Form ETA 750 did not ask the Petitioner to disclose any special relationships between it and the Beneficiary. Copies of DOL notices to the Petitioner during the labor certification proceedings also did not question its relationships to the Beneficiary. The Petitioner therefore did not make any representations involving the labor certification about its relationships to the Beneficiary.

But the record still contains substantial evidence of the Petitioner's willful misrepresentation of a material fact on the labor certification. The Petitioner identified the offered position as computer programmer. The petition and labor certification for the Beneficiary's wife state his actual position with the Petitioner as president. The record therefore indicates that the Petitioner intended to employ the Beneficiary as president, not as computer programmer, and misrepresented the offered position on the labor certification.

The Petitioner's misrepresentation of the offered position on the labor certification constituted a misrepresentation of a material fact. "A labor certification involving a specific job offer is valid only for the particular job opportunity." 20 C.F.R. § 656.30(c)(2). Thus, had the DOL known that the Petitioner intended to employ the Beneficiary in a position other than the one stated on the labor certification, the agency would not have approved the application.

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The record also indicates that the Petitioner's misrepresentation was willful. The differences between the offered position of computer programmer and the Beneficiary's actual position of president were so great that the Petitioner had to knowingly misrepresent the title and duties of the offered position on the labor certification. See *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (BIA 1986) (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 further indicates that the Beneficiary misrepresented his employment history on the accompanying labor certification. The Beneficiary attested that he was "unemployed" from August 1998 until at least the filing of the labor certification on April 17, 2001. But, as previously indicated, he signed a labor certification for his wife as the Petitioner's president on March 30, 2001.

The Beneficiary's misrepresentation regarding his employment history involved a material fact. Had the DOL known that the Beneficiary was the Petitioner's president, the agency likely would have questioned the *bona fides* of the job opportunity and might have denied the application. See 20 C.F.R. § 656.20(c)(8) (requiring a labor certification employer to certify that a job opportunity has been and is clearly open to any qualified US. worker).

The misrepresentation also appears to be willful. The Beneficiary disclosed his position as the Petitioner's president on his wife's labor certification application less than a month before the submission of the instant labor certification application on his behalf. The record therefore indicates that the omission of his position with the Petitioner on his own application was willful and designed to conceal his relationship to the Petitioner.

The Petitioner asserts that the record does not support a finding of willful misrepresentation of a material fact. Citing *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), the Petitioner states that we must establish willful misrepresentation of a material fact by clear and convincing evidence.

But *Tijam* is distinguishable from the instant case. *Tijam* involved a respondent charged with deportability based on willful misrepresentation of a material fact at the time of her entry into the United States. *Tijam*, 22 I&N Dec. at 409. Thus, in that case, the Act required the immigration service to prove the respondent's deportability, and thus her willful misrepresentation of material fact, by clear and convincing evidence. See section 240(c)(3) of the Act, 8 U.S.C. § 1129a(c)(3); see also *Woodby v. INS*, 385 U.S. 276 (1966).

In contrast, the instant Petitioner is in visa petition revocation proceedings. In these proceedings, the Petitioner bears the burden of proof, which never shifts to the government. See section 291 of the Act, 8 U.S.C. § 1361; see also *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Thus, we need only support a finding of misrepresentation of a material fact with substantial evidence. See, e.g., *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (requiring the immigration service to produce substantial evidence to support the revocation of a petition).

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As discussed above, substantial evidence supports findings that both the Petitioner and the Beneficiary misrepresented material facts on the accompanying labor certification. We will therefore affirm our prior decision, and the accompanying labor certification will remain invalidated.

D. The Bona Fides of the Job Opportunity

As previously indicated, by signing the accompanying labor certification, the Petitioner certified that “[t]he job opportunity has been and is clearly open to any U.S. worker.” 20 C.F.R. § 656.20(c)(8) (2004). As the Board of Alien Labor Certification Appeals (BALCA) explained in *Matter of Modular Container Systems, Inc.*, the regulation at former 20 C.F.R. § 656.20(c)(8) “infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market.” *Modular Container*, 89-INA-228, 1991 WL 223955 at *7 (BALCA 1991) (*en banc*).

Where 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.

We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. See *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg’l Comm’r 1979) (upholding a petition’s denial where a petitioner did not intend to employ a beneficiary in the area of intended employment stated on the accompanying labor certification pursuant to 20 C.F.R. § 656.30(c)(2)).

To determine the *bona fides* of a job opportunity, 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 an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in it; is involved in its management; 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 on an accompanying labor certification. *Id.* at *8. 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 DOL regulations and otherwise acted in good faith. *Id.*

In the instant case, some *Modular Container* factors indicate the availability of the job opportunity to U.S. workers. The record does not indicate that the Beneficiary incorporated or founded the Petitioner, or that he has an ownership interest in the company. The record also does not indicate that he has qualifications matching specialized or unusual job duties.

However, as previously indicated, the record contains evidence that the Beneficiary and his wife were corporate officers and/or senior managers of the Petitioner at the time of the labor

certification's filing. The Beneficiary signed his own Form I-140, on behalf of the Petitioner. He also signed a Form I-140 and accompanying labor certification on behalf of his wife as the Petitioner's "[p]resident." In addition, the Beneficiary's wife signed the accompanying labor certification as the Petitioner's "[v]ice-[p]resident."

Thus, multiple *Modular Container* factors indicate that the offered position was not clearly available to U.S. workers. The record indicates that the Beneficiary was related to his wife, who was a corporate officer and/or manager of the Petitioner, and that he himself was involved in the Petitioner's management as its president. The record also indicates that the Beneficiary was one of a small group of employees. Copies of the Petitioner's federal income tax returns from 2001 through 2009 do not reflect any salaries or wages paid to employees during that period.

The Petitioner provided copies of its recruitment materials for the offered position during the labor certification process. The materials indicate that no U.S. workers applied for the position. However, the Beneficiary's wife signed the Petitioner's recruitment report, indicating her involvement and possible influence on the recruitment efforts. Thus, considering all of the *Modular Container* factors, the record does not establish the clear availability of the offered position to U.S. workers.

Citing *Matter of Paris Bakery Corp.*, 88-INA-337, 1990 WL 1232931 (BALCA 1990) (*en banc*), the Petitioner notes that a familiar relationship between a beneficiary and a petitioner's principal does not necessarily disqualify a job opportunity from being *bona fide*. In *Paris Bakery*, BALCA found that the job opportunity was clearly open to U.S. workers despite the foreign national's relationship to the employer's president, his brother. BALCA found that the employer demonstrated "a genuine need" for an employee with the foreign national's qualifications. *Paris Bakery*, 1990 WL 1232931 at *3.

In the instant case, the record does not similarly establish the Petitioner's need for an employee with the Beneficiary's qualifications. Also, unlike the foreign national in *Paris Bakery*, the record indicates that the Beneficiary, in addition to his familiar relationship to his wife, was himself an officer and/or senior manager of the Petitioner. We therefore find the instant case distinguishable from *Paris Bakery*.

The Petitioner also asserts that its recruitment documentation demonstrates the availability of the position to U.S. workers. However, as previously discussed, the involvement of the Beneficiary's wife in the recruitment efforts undermines the evidential value of the recruitment documentation. Further considering the Petitioner's small number of employees, the Beneficiary's status as an officer or senior manager of the Petitioner, and his relationship to his wife who also served as an officer and/or manager, the record does not establish the clear availability of the position to U.S. workers.

The record does not establish the *bona fides* of the job opportunity. We will therefore affirm our prior decision and deny the motion to reconsider.

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E. The Beneficiary's Qualifying Experience

Although not addressed in our prior decision, the record at the time of the petition's approval also does not establish the Beneficiary's qualifying experience for the offered position.

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); *see also 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 petition's priority date is April 17, 2001, the date an office in the DOL's employment service system accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states the minimum requirements of the offered position of computer programmer as a U.S. bachelor of science degree or a foreign equivalent degree in engineering, plus 2 years of experience in the job offered. The labor certification indicates that experience in a related occupation is unacceptable.

The Beneficiary attested on the accompanying labor certification to more than 6 years of qualifying experience. He stated the following experience:

- About 6 years, 8 months of experience as a computer programmer for [REDACTED] in Romania from November 1991 to August 1998; and
- About 1 year, 1 month of experience as a computer programmer for [REDACTED] in Romania from July 1997 to August 1998.

The Beneficiary did not state the hours of employment for each position as instructed by the Form ETA 750. The record suggests that at least part of his employment was part-time in nature, as the labor certification indicates that his positions at [REDACTED] and [REDACTED] were concurrent.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters must provide the names, addresses, and titles of the employers, and descriptions of a beneficiary's experience. *Id.*

In response to the Director's request for evidence of September 6, 2007, the Petitioner submitted letters on the stationery of [REDACTED] and [REDACTED]. The letter on [REDACTED] stationery stated the Beneficiary's

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employment from November 1992 to March 1997 as a project manager. The letter on [REDACTED] stationery stated his employment from April 1997 to May 1998 as a production systems manager.

The letters on [REDACTED] and [REDACTED] stationery contain different position titles and dates of employment than indicated on the accompanying labor certification. The letters are also nearly identical in format and font, suggesting that they do not constitute independent, objective evidence of the Beneficiary's experience. The Petitioner must resolve inconsistencies for record by independent, objective evidence pointing to where the truth lies. *Ho*, 19 I&N Dec. at 591.

In response to the Director's notice of intent to deny of November 2, 2007, the Petitioner submitted another letter on different [REDACTED] stationery. The second [REDACTED] letter contains a more detailed description of the Beneficiary's experience. The Petitioner also submitted copies of the Beneficiary's monthly payroll records at [REDACTED] from November 1992 to March 1997.

The record does not explain why the second [REDACTED] letter is on different stationery than the first letter. However, more importantly, none of the letters submitted establish the Beneficiary's qualifying experience in the job offered as specified on the accompanying labor certification.

Experience in the job offered means experience performing the "major job duties" of the offered position as indicated on a labor certification. *See Matter of Maple Derby, Inc.*, 1989-INA-185, 1991 WL 120137, *3 (BALCA 1991) (*en banc*).

In the instant case, the accompanying labor certification states the job duties of the offered position of computer programmer as "[d]evelop[ing] software programs for computer Internet security, creat[ing] systems applications for various programs V.F. P. applications, build[ing] and manag[ing] data bases." The letter on [REDACTED] stationery states the Beneficiary's job duties as "build[ing] applications using Visual FoxPro for managing in real-time production operations." The letter does not state that the Beneficiary's duties included developing software programs for computer internet security, or building and managing data bases as specified on the accompanying labor certification.

The first letter on [REDACTED] stationery states the Beneficiary's job duties as "develop[ing] system applications using FoxPro for accounting and inventory needs." This letter also does not state that the Beneficiary's duties included developing software programs for computer internet security, or building and managing data bases as specified on the accompanying labor certification.

The second letter on [REDACTED] stationery details the Beneficiary's creation of bookkeeping software using FoxPro. However, like the other letters, the second [REDACTED] letter does not state that the Beneficiary's duties included developing software programs for computer internet security, or building and managing data bases as specified on the accompanying labor certification.

Therefore, the record at the time of the petition's approval did not establish the Beneficiary's possession of at least 2 years of experience in the job offered as specified on the accompanying labor certification. The petition remains revoked for this additional reason.

II. CONCLUSION

The Petitioner's filing does not state new facts and is not supported by affidavits or other documentary evidence. We will therefore deny the filing as a motion to reopen.

The record on motion contains substantial evidence that both the Petitioner and the Beneficiary willfully misrepresented material facts on the accompanying labor certification. We will therefore affirm our prior decision, and the labor certification will remain invalidated. The record does not establish the *bona fides* of the job opportunity. We will therefore also affirm our prior decision for this reason and deny the motion to reconsider. The record also does not establish the Beneficiary's qualifying experience for the offered position.

For the foregoing reasons, the motion will be denied, with each considered an independent and alternate ground of denial. In visa revocation proceedings, as in visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act; *Ho*, 19 I&N Dec. at 589. Here, the instant Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of E-I-*, ID# 10671 (AAO June 17, 2016)