U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11198717

Date: AUG. 23, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a plastic bag manufacturer, seeks to employ the Beneficiary as an operator. It requests classification of the Beneficiary under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the minimum experience required for the offered position. The Director also found that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's experience and invalidated the labor certification.[1]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position.

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[1] The limits of the AAO's appellate jurisdiction are set by delegation of authority from the Secretary of Homeland Security and by regulation. *See* DHS Delegation Number 0150.1 (limiting appellate jurisdiction to the matters described at 8 C.F.R. § 103.1(f)(3)(iii), as in effect on Feb. 28, 2003). *Cf. Matter of Sano*, 19 I&N Dec. 299, 301 (BIA 1985) (reviewing jurisdiction as a threshold matter).

The regulation at 8 C.F.R. § 205.2(d) states that the petitioner may appeal a revocation decision when approval was revoked on notice. There is no similar provision for appellate review when approval is automatically revoked under 8 C.F.R. § 205.1.

Id. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien entitled to immigrant classification under the Act may file a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F); *see* 8 C.F.R. § 204.5(c). Such petitions must be accompanied by a labor certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5); *see also* 8 C.F.R. § 204.5(l)(3)(i). The Petitioner must intend to employ a beneficiary under the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming denial where, contrary to an accompanying labor certification, a petitioner did not intend to employ a beneficiary under the terms of the labor certification); s*ee also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not remain valid for the intended geographic area of employment). Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The *bona fides* of the job opportunity are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Further, the Act requires USCIS to determine eligibility for the visa classification requested. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Certain classifications require a labor certification to establish eligibility. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. § 204.5(l)(3)(i). Section 204(b) of the Act allows a petition's approval only after an investigation of the facts in each case to ensure that the facts stated in the petition, which necessarily includes the labor certification, are true. Section 204(b) of the Act, 8 U.S.C. § 1154(b). For those petitions requiring a labor certification, USCIS' investigation into the facts must include consultation with DOL. *Id*. Thus, the labor certification is not conclusive evidence of eligibility. Instead, it is a pre-condition to being eligible to file a Form I-140. USCIS is responsible for reviewing the Form I-140, and the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). USCIS is required to approve an employment-based immigrant visa petition only where it is determined that the facts stated in the petition, which incorporates the labor certification, are true and the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

II. ANALYSIS

A. Procedural History

The Petitioner has filed two separate Form I-140 petitions on behalf of the Beneficiary based on the same labor certification. The underlying labor certification was filed with DOL on August 19, 2005.[2] The labor certification states that the offered position requires a high school, or foreign equivalent, diploma and 24 months of experience in the offered job of operator. Experience in an alternate occupation is not accepted, and the position does not require any special skills. The job duties of the offered position are stated as only, "To operate extrusion machine for plastic bags."

Following certification, the Petitioner timely filed an immigrant petition with the labor certification seeking to employ the Beneficiary as an operator, and that immigrant petition was approved on October 28, 2005. Following the approval of that petition, the Director notified the Petitioner of inconsistencies regarding the Beneficiary's claimed employment history. He issued two separate notices of intent to revoke (NOIR) the petition's approval, to which the Petitioner provided responses.[3] On July 12, 2017, the Director revoked the approval of the petition, concluding that the Petitioner did not establish that the Beneficiary possessed the 24 months of experience required for the offered position.

The instant petition was filed on December 29, 2016 based on the same underlying labor certification, while the first petition remained pending.[4] On December 18, 2019, the Director issued a notice of intent to deny (NOID) the instant petition based on the same unresolved inconsistencies in the Beneficiary's employment history that were the basis of the first petition's revocation.

On the same date the Director issued the NOID in the second petition, the Director reopened the first petition *sua sponte* and issued a third NOIR, to which the petition responded. On February 19, 2020, the Director again revoked the approval of the first petition, concluding that the Petitioner still did not establish by a preponderance of the evidence that the Beneficiary met the minimum experience requirement listed on the labor certification. He further found that the Petitioner and the Beneficiary misrepresented a material fact regarding the Beneficiary's claimed experience and invalidated the labor certification. On the same date, he denied the instant petition on the same basis.

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[2] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[3] At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

[4] In general, every petition for skilled worker classification "must be accompanied by an individual labor certification from the Department of Labor." 8 C.F.R. § 204.5(l)(3)(i).

The matter before us now is the appeal of the denial of the second petition. On appeal, the Petitioner asserts that the Beneficiary does possess the required 24 months of experience as an operator as stated on the labor certification, and asserts that the Director erred in requiring a higher standard of evidence than is required for the requested benefit.

At the outset, we note one issue that requires resolution in any further filings. The Form I-290B, Notice of Appeal or Motion, identifies the Petitioner as '[redacted]' and the cover letter from counsel states that, '[redacted] has been renamed to [redacted] since the filing of this petition." However, the record does not include evidence to support this claim, and a search of taxable entities in Texas identifies both [redacted] and [redacted] as active businesses with two different taxpayer identification numbers. *See* Texas Comptroller of Public Accounts, Taxable Entity Search, https://mycpa.cpa.state.tx.us/coa/coaSearchBtn (last accessed July 22, 2021). Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). With any further filings, the Petitioner must submit evidence to explain this inconsistency and to support its claim that it has been renamed and that Full Wealth LLC is a valid successor-in-interest to the Petitioner. A valid successor-in-interest relationship exists if three conditions are satisfied. First, the successor must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must establish by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.*

B. The Beneficiary's Qualifications

As noted above, the accompanying labor certification states that the offered position requires a high school, or foreign equivalent, diploma and 24 months of experience in the offered job of operator performing the duties of operating an extrusion machine for plastic bags. The DOL classified the occupation on the labor certification as "Machinist."

On the labor certification, the Petitioner asserts that the Beneficiary earned a bachelor's degree in China in mechanical and chemical engineering in 1982. Section K of the labor certification describes the Beneficiary's work experience as follows:

- As a mechanical engineer with [redacted] from March 29, 2004 until at least August 19, 2005, the date the labor certification was filed.
- As a machinist with [redacted] from April 16, 2003 to March 28, 2004.
- As a mechanical engineer with '[redacted]' in China, from March 1, 1988 to September 30, 2002.

The initial evidence submitted with the petition included three letters describing the Beneficiary's work experience, including:

- A letter dated March 6, 2005, signed by [redacted] president of [redacted] titled "Job description." The letter is written in English and states that the Beneficiary was employed as "a extrusion machanines" [sic] from March 1988 to September 2002.
- A letter dated March 4, 2015, with English translation, from [redacted] stating that he and the Beneficiary were coworkers employed as machinists at [redacted] from October 1, 1990 (the date the author began employment) to March 2, 1994.
- A letter dated March 4, 2015, with English translation, from [redacted] stating that he and the Beneficiary were coworkers employed as machinists at [redacted] from March 1, 1988 to March 2, 1994.

The Director's NOID advised the Petitioner that the record did not establish that the Beneficiary had the minimum education and experience for the offered position. The Director further advised that it appeared that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's employment experience on the labor certification. Specifically, the Director stated:

> In light of the contradictory information in the record, and lack of corroborating documentation regarding his claimed experience with [redacted] it appears that the Beneficiary's experience in Section K of the labor certification was not correct. The Petitioner submitted documents to convey the false impression that the Beneficiary had 24 months of experience in the job offered, as required by Section H of the labor certification.

Concerning the Beneficiary's education, the Director noted that the record included a copy of the Beneficiary's "graduation certificate" issued by the University of [redacted] dated July 15, 1982, with an English translation that did not identify the translator or include the translator's certification.[5] The record does not include the Beneficiary's high school, or foreign equivalent diploma, or other evidence of his education.

Concerning the Beneficiary's prior claimed experience, the Director noted that the "Job description" signed by the company president [redacted] for one former employer contained several spelling errors, and did not describe the Beneficiary's experience in the offered position of operator, as required by the labor certification, or demonstrate that the Beneficiary performed the job duties of the offered position (operating an extrusion machine for plastic bags).

The Director further noted that the English translations of the letters from the Beneficiary's former coworkers also did not include the required certified translation pursuant to 8 C.F.R. § 103.2(b)(3), and the Petitioner did not establish that the primary evidence, an acceptable letter from [redacted]

[5] "Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." 8 C.F.R. § 103.2(b)(3).

[redacted], was unavailable or could not be obtained.[6] Additionally, he noted that the two letters from the Beneficiary's coworkers included identical job descriptions, casting doubt as to who authored the letters.

The Director pointed out additional inconsistencies that cast doubt on the Beneficiary's employment with [redacted] including:

- Section K of the labor certification does not describe any of the Beneficiary's experience as a machinist operating an extrusion machine for plastic bags, but instead lists his position as a mechanical engineer.
- The record includes a previously submitted letter signed by [redacted] of [redacted] titled "Employment Certificate." The letter is also dated March 6, 2005 and is written in English, but is in a different font and format and states the Beneficiary's title as "mechanical engineer" in contrast to the prior letter that stated he was employed as "a extrusion machanines [sic]."

In response to the NOID, the Petitioner provided the Beneficiary's "graduation certificate" from [redacted] University, with a certified English translation. The certificate states that the Beneficiary studied four years in chemical machinery in the department of mechanics, completed all courses with passing grades, and "is approved to graduate." The record does not include academic transcripts describing the Beneficiary's coursework or confirming his graduation, nor does it include the Beneficiary's diploma.

The Petitioner also submitted an evaluation of the Beneficiary's education from Morningside Evaluations and Consulting, dated March 17, 2003. The evaluation states, "On the basis of the credibility of [redacted] University, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, and the hours of academic coursework, …, [the Beneficiary] has attained the equivalent of a bachelor of science in mechanical and chemical engineering degree from an accredited institution of higher education in the United States." The evaluation further states it "relies upon copies of the original documents provided by [the Beneficiary]," but does not list the specific documents reviewed.

The Petitioner submitted an "expert opinion evaluation," from [redacted] Dean of the Graduate School of Engineering and Management of the [redacted] stating that the Beneficiary is qualified to perform the duties of machinist. The evaluator states that he reviewed the Beneficiary's resume, reference letters from the Beneficiary's coworkers, an employment verification letter from the Petitioner, and DOL resources to conclude that the Beneficiary's 31 years of experience in mechanical engineering and related fields qualify him to perform the duties of a machinist. The record does not include the Beneficiary's resume.

The Petitioner also resubmitted the same letters from the Beneficiary's former coworkers, and a new letter from an additional individual, [redacted], stating that he is a friend of the Beneficiary and attesting to the

[6] If a required document is unavailable, a petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. If secondary evidence is also unavailable, the petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits from persons who have direct personal knowledge of the circumstances. *See* 8 C.F.R. § 103.2(b)(2)(i).

Beneficiary's employment with [redacted]," responsible for technical operations of machines. Finally, the Petitioner noted that the earlier version of the letter from [redacted] ("Employment Certificate") stated that the Beneficiary "was responsible for our company's plastic machine's automation plan, including operating and maintaining extrusion machines," which matches the job duties of the offered position.

As noted above, the Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary met the minimum requirements listed on the labor certification, and finding based on the conflicting employment evidence submitted that the Petitioner and the Beneficiary misrepresented material facts on the labor certification. The Director also invalidated the labor certification.

With its appeal, the Petitioner submits two new letters from the Beneficiary's former coworkers previously identified, [redacted] and [redacted] and a statement from the Beneficiary requesting a favorable decision.[7]

The first issue before us is whether the Beneficiary possesses the minimum education required for the offered position. The Petitioner must establish by a preponderance of the evidence that the Beneficiary possesses a high school, or foreign equivalent, diploma. Here, the "graduation certificate" submitted states that the Beneficiary completed four years of study in chemical machinery at [redacted] University. However, the record does not include conclusive evidence of his education such as the Beneficiary's actual bachelor's degree, and transcripts to confirm actual attendance, or more pertinently, his high school diploma or any official academic record to evidence he met the requirements of the labor certification. The Petitioner does not explain why this information is not provided or that this information is unavailable for any reason. Therefore, the Petitioner has not established that the Beneficiary meets the minimum education requirement as stated on the labor certification.

The next issue we consider is whether the Beneficiary possesses the minimum experience required for the offered position. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* 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.

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). Therefore, the Petitioner must establish by a preponderance of the evidence that the Beneficiary possessed 24 months of experience as an operator of extrusion machines for plastic bags as of the August 19, 2005 priority date.

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[7] We note that the translation of the new letters refers to the foreign company as [redacted] Therefore, the record includes three different translations of the business name: 1) [redacted], 2) [redacted] and 3) [redacted] This presents an additional inconsistency, which must be resolved.

The record demonstrates that the Beneficiary claims employment with three employers: [redacted], and [redacted]. The Petitioner has not submitted evidence to support the Beneficiary's experience with [redacted] or [redacted]. The record includes Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the Beneficiary by both companies, however the Forms W-2 do not list the Beneficiary's job title or duties. Therefore, as no other employment is claimed or documented appropriately in the record, the Petitioner relies on the Beneficiary's employment with [redacted] in attempt to qualify for the offered position.

We note that the Beneficiary's claimed employment as a mechanical engineer with [redacted] began on March 29, 2004. While the Petitioner asserts that the Beneficiary's job duties as a mechanical engineer included the job duties of operator of extrusion machines for plastic bags, the Beneficiary's experience with [redacted] accounts for less than 24 months of experience before the priority date.[8]

The Petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In other words, the petitioner must show that what it claims is "more likely than not" or "probably" true. *Id.* On appeal, the Petitioner asserts that the Director applied a higher standard than the preponderance of the evidence standard that should apply to the adjudication of the petition. We disagree.

In adjudicating immigration benefit requests, USCIS regularly reviews affidavits, testimonials, and letters from both laypersons and recognized experts. To be probative, a document must generally provide: (1) the nature of the affiant's relationship, if any, to the affected party; (2) the basis of the affiant's knowledge; and (3) a specific - rather than merely conclusory - statement of the asserted facts based on the affiant's personal knowledge. *Matter of Chin*, 14 I&N Dec. 150, 152 (BIA 1972); *see also* 8 C.F.R. § 103.2(b)(2)(i) (requiring affidavits in lieu of unavailable required evidence from "persons who are not parties to the petition who have direct personal knowledge of the event and circumstances"); *Matter of Kwan*, 14 I&N Dec. 175, 176-77 (BIA 1972); *Iyamba v. INS*, 244 F.3d 606, 608 (8th Cir. 2001); *Dabaase v. INS*, 627 F.2d 117, 119 (8th Cir. 1980). A petitioner may submit a letter or affidavit that contains hearsay or biased information, but such factors will affect the weight to be accorded the evidence in an administrative proceeding. *See Matter of D-R-*, 25 I&N Dec. 445, 461 (BIA 2011) (citations omitted). Probative evidence beyond a letter or affidavit may be considered when submitted to resolve inconsistencies or discrepancies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Ultimately, to determine whether a petitioner has established eligibility for a requested benefit by a preponderance of the evidence, USCIS must examine each piece of evidence - both individually and within the context of the entire record - for relevance, probative value, and credibility. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

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[8] The record includes a letter on [redacted] letterhead, explaining that the Petitioner and [redacted] are separate companies owned by the same individual; however, the letter does not describe the Beneficiary's job duties with [redacted]. The record also includes a letter on [redacted] letterhead stating that the Beneficiary "started working for our company when it used to be known as [redacted] (or [redacted]." Although the letter describes the Beneficiary's experience as an operator of the plastic extrusion machine, the record does not identify [redacted] as the Beneficiary's current or former employer, or as a successor-in-interest to the Petitioner. Nor does the letter identify the specific period of time that the Beneficiary was employed with [redacted] performing the duties of the offered position, or even that [redacted] is a plastic bag manufacturer with a need for an operator of extrusion machines for plastic bags.

With respect to the "expert opinion evaluation," we note that the evaluator states that the Beneficiary has been employed with the Petitioner since March 2004. This is inconsistent with the labor certification and other evidence in the record demonstrating that the Beneficiary was employed with [redacted], and not the Petitioner, since March 2004. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988).

The Petitioner asserts that the Director "refuses to consider the letter from the president of the company, [redacted] that was originally submitted back in 2005" as probative evidence of the Beneficiary's employment and experience in the job offered. However, the Petitioner has not explained why the record includes two letters, purportedly from the same individual, with the same date, but with different job titles for the Beneficiary for the same dates of employment. The Petitioner has not addressed the discrepancies in the "Job description" and the "Employment Certificate" and these issues remain unresolved. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Petitioner has not provided an updated letter from this company, nor does it assert that a new letter is unavailable for any reason. Rather, the Petitioner, in lieu of the regulatory prescribed evidence, submits statements from individuals claiming to have knowledge of the Beneficiary's employment and experience.

According to the U.S. Department of State's Bureau of Consular Affairs, most records from China can be obtained from one of China's Notarial Offices (Gong Zheng Chu) in the form of notarial certificates. With written authorization, notarial offices may issue notarial certificates to relatives or friends in the People's Republic of China (PRC) on behalf of someone now living abroad. *See* U.S. Dep't of State, Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/China.html (last accessed July 22, 2021).

With respect to notarial work experience certificates, the Bureau of Consular Affairs states:

> Notarial Work Experience Certificates (NWECS) briefly describe an applicant's work experience in the PRC. They should be required of all employment-based preference immigrant applicants who claim work experience in China. *Employer's letters or sworn statements from persons claiming person's knowledge should not be accepted in lieu of NWECS. The inability of an applicant to obtain a NWEC should be regarded as prima facie evidence the applicant does not possess the claimed experience.*

(Emphasis added).

Here, the Petitioner relies only on testimonial evidence from the Beneficiary's former coworkers in attempt to establish his claimed employment experience, without providing independent, objective evidence in support of this testimony. Based on inconsistencies and discrepancies in the content and format of the experience letters, further independent evidence is required. The record does not include a notarial certificate, along with the Beneficiary's income tax or payroll records to corroborate his claimed employment. Nor does the record include business registration information to verify the

existence and correct name of the foreign business. The Petitioner does not assert that these records are unavailable for any reason. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

As the inconsistencies in the record have not been resolved, the Petitioner has not established with independent, objective evidence that the Beneficiary possesses the required 24 months of experience in the offered position, as required by the labor certification. The Beneficiary has not overcome this basis of the Director's denial.

A preponderance of evidence does not demonstrate the Beneficiary's possession of a high school, or foreign equivalent, diploma and 24 months of experience required for the offered position as required by the labor certification and for the requested skilled worker classification. Therefore, we will dismiss the appeal.

IV. WILFULL MISREPRESENTATION OF A MATERIAL FACT

The Director found that the inconsistencies in the record and the discrepancies in the content and appearance of the "Job description" and "Employment Certificate" from [redacted] cast doubt on "whether [the Beneficiary] was ever employed by that entity (and if so, the capacity in which he was employed)." In finding that the Petitioner and the Beneficiary willfully misrepresented the Beneficiary's experience with [redacted], the Director stated, "The Beneficiary's false attestation on the labor certification …, and the Petitioner's submission of documents containing false attestations and certifications regarding the Beneficiary's experience to support Form I-140, constitute false representations."

To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

Here, the Petitioner was put on notice of the deficiencies in the record, including the spelling errors and format differences in the two letters from [redacted] The contradictory letters and the conflicting labor certification information were filed in support of the I-140 petition, and the submission was willfully made. The contradictory letters and claimed experience on the labor certification are material to the issue of the Beneficiary's eligibility. The Director issued four separate notices specifically identifying his concerns with the letters. The Petitioner has not specifically addressed these concerns in its responses or on appeal. The Petitioner has not addressed why these letters, purportedly written on the same date by the same individual, are in different fonts, with one containing significant spelling and grammar errors. A document may be found fraudulent without forensic analysis where the document contains obvious defects or identifiable indicators of fraud, and an opportunity to explain the defects has been provided. *See Matter O-M-O*, 28 I&N Dec. 191 (BIA 2021). Therefore, we agree with the Director that the Beneficiary willfully misrepresented a material fact in these proceedings, in submitting a fraudulent document to verify his employment with [redacted]

As noted above, the labor certification is incorporated into the Form I-140 by statute and regulation. *See* section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C); 8 C.F.R. § 204.5(a)(2); 8 C.F.R. §103.2(b)(i). After examination of the facts stated in the petition, which incorporates the labor certification, we cannot conclude that they are true and that the foreign worker is eligible for the benefit sought. Section 204(b) of the Act, 8 U.S.C. § 1154(b).

Although we agree with the Director that a petitioner's signature on the labor certification is an attestation, under penalty of perjury, that its contents are true and correct, the information is currently inconclusive to allow us to find that the Petitioner willfully misrepresented a material fact on the labor certification. As the Director notes, the false attestations in the form of the "Job description and "Employment Certificate" from [redacted] "cast doubt" on the Beneficiary's experience; however, without resolution of the Beneficiary's true job title, we cannot conclude that the description of the Beneficiary's claimed employment in Section K is false in its entirety, or that the Petitioner had knowledge of false information in Section K of the labor certification at the time it signed the labor certification. Rather, the issue lies in the contradictory submitted experience letters, one of which, or possibly both, are incorrect.

Further, Section K of the labor certification also lists the Beneficiary's claimed experience with [redacted] and [redacted] totaling approximately 28 months of experience, which is more than the required 24 months. Although the Petitioner does not submit regulatory prescribed evidence with the petition to support the Beneficiary's experience with these employers, the record does not demonstrate that this experience was willfully misrepresented on the labor certification. Therefore, we will withdraw the Director's finding of willful misrepresentation against the Petitioner with respect to its signing of the labor certification.

V. INVALIDATION OF THE LABOR CERTIFICATION

As discussed above, we have withdrawn the finding of misrepresentation against the Petitioner with respect to attestations made on the labor certification. Without resolution of the discrepancies in the Beneficiary's claimed job title on documentation submitted, it is unclear whether the labor certification contains a misrepresentation. However, the documentation submitted in support of the labor

certification includes contradictory experience letters and a fraudulent document. Therefore, we will reinstate the labor certification for the present.

As discussed above, we have withdrawn the finding of misrepresentation against the Petitioner with respect to attestations made on the labor certification. Based on the discrepancies in the Beneficiary's claimed job title on documentation submitted, without resolution, it is unclear whether the labor certification contains a misrepresentation, as opposed to the documentation submitted in support of the labor certification, or both. Therefore, we will reinstate the labor certification for the present.

VI. ABILITY TO PAY

Because we conclude that the Petitioner did not demonstrate that the Beneficiary met the minimum requirements for the offered position or the requested visa classification, we need not fully address other issues evident in the record. That said, we will briefly identify an additional ground of ineligibility to inform the Petitioner that this issue should be addressed in future proceedings.

Although not discussed by the Director, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage of $32,850 per year, from the priority date on August 19, 2005, and continuing until the Beneficiary obtains lawful permanent residence. The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

The record contains partial copies of the Petitioner's IRS Form 1120, U.S. Corporate Income Tax Return, for 2005 to 2015. Although the Petitioner's net income or net current assets appear to be greater than the proffered wage to this Beneficiary in each year, we note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed Form I-140 petitions for at least three other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.

Therefore, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage to all of its beneficiaries from the priority date. This must be addressed in any future filings.[9]

[9] At the time the instant petition was filed on December 29, 2016, the Petitioner's 2016 tax return was not yet due, and the Petitioner did not include additional tax returns with the appeal. However, with any further filings the Petitioner must include complete copies of its tax returns for all years. Further, if [redacted] is a successor to the Petitioner, it must establish eligibility for the immigrant visa in all respects, including evidence of ability to pay. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. *Id.* at 482.

VII. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum education or experience requirements as set forth on the accompanying labor certification, or that it is eligible for the requested benefit in all respects. The record includes unresolved inconsistencies with respect to the Beneficiary's claimed employment history and supports the Director's finding of willful misrepresentation against the Beneficiary. However, for the reasons discussed above, the record does not support invalidation of the labor certification and this portion of the Director's decision is withdrawn and the labor certification is reinstated.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number [redacted] is reinstated.