identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: AUG 2 7 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth M. Cook

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative (Form I-130), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner is an information technology consulting firm. It seeks to employ the beneficiary permanently in the United States as an assistant controller under section 203(b)(3) of the Immigration and Nationality Act (the Act). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on June 18, 2001 and certified by DOL on May 10, 2004. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on June 13, 2005, which was approved on February 9, 2006.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. Two Forms I-130 were filed on the beneficiary's behalf on March 24, 2003 and June 25, 2004. Concurrent with the filing of the Forms I-130, the beneficiary also sought lawful permanent residence. The file contains the completed forms, signed by the beneficiary, photographs, and a copy of a marriage certificate between the beneficiary and [redacted] reflecting the date of marriage as January 7, 2003. The two Forms I-130 were each denied on March 26, 2008.

As set forth in the director's revocation, the issues in this case are whether or not the marriage bar under section 204(c) of the Act applies to this case, whether the petitioner demonstrated its ability to pay the proffered wage, whether the beneficiary had the experience required by the terms of the labor certification, and whether the visa category was supported by the terms of the labor certification.

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)[1] no petition shall be approved if:

(1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
(2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On August 22, 2008, the director sent a NOIR to the petitioner containing the language of 204(c) above and stating that the discrepancies in the two Forms I-130 and the suspicious action taken by the beneficiary in the adjustment of status interview led to a conclusion "that the marriage was entered into with the sole intention of gaining immigration benefits for the beneficiary. Therefore, it appears that [the] I-140 is revocable under the provisions of section 204(c)." In addition to the 204(c) provisions, the NOIR stated that the evidence in the record did not indicate that the beneficiary possessed the necessary education as required by the terms of the labor certification or that the petitioner had the ability to pay the proffered wage from the priority date onward. The director allowed the petitioner 30 days to respond to the NOIR.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

On January 14, 2009, the director revoked the approval of the I-140 visa petition, finding that the beneficiary entered into a fraudulent or sham marriage. On appeal, counsel states that neither he nor the petitioner received the NOIR and were, therefore, never given the opportunity to respond to the proposed revocation. The record reflects that both the NOIR and the NOR were sent to the petitioner at its address of record and neither was returned as undeliverable by the U.S. postal service. Counsel stated that he would submit a brief on appeal and the documents requested by the NOIR/NOR within 30 days. We have received nothing further from the petitioner or counsel.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). *Tawfik*, 20 I&N

[1] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

Dec. at 167 also states the following in pertinent part:

> Section 204(c) of the Act . . . prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy,* Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay,* 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta,* 14 I&N Dec 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

The evidence in the record indicates that the beneficiary in this case was the beneficiary of two separate Forms I-130 indicating that he married [redacted] on January 7, 2003. Those Forms I-130 contained pictures of two different individuals purporting to be [redacted] with two radically different signatures both from [redacted]. When the beneficiary was notified about his adjustment of status interview for each application, he withdrew them. The evidence indicates that the beneficiary entered into a marriage with the purpose of evading the immigration laws and not for the purpose of starting a new life with [redacted]

The beneficiary submitted no evidence either with the Forms I-130 or in response to the NOIR or on

---

[2] Section 204(c) of the Act provides that no petition shall be approved if the alien "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Section 204(c) of the Act was amended by section 4(a) of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). Prior to IMFA, Congress held hearings on fraudulent marriage and fiancé arrangements and discussed the following fraudulent acts that aliens had committed in order to obtain immigration benefits: concealment of prior undissolved marriages, issuance of counterfeit New York City marriage certificates in support of petitions for petitions for permanent residence, and use of "stolen identification documents and stand-in grooms and brides to 'marry' U.S. citizens." *See Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary,* 99th Cong., 1st Sess. 2 (1985) (statements of INS Commissioner Alan C. Nelson and Roger L. Conner, Executive Director Federation of American Immigration Reform). After the hearing, Congress enacted IMFA and added section 204(c)(2) of the Act, 1000 Stat. at 3543. "Paper" marriages are now covered by the "...attempted ... to enter into a marriage" language of the statute. Based on the scenarios discussed in the 1985 hearing and the subsequent amendment to the Act, Congress clearly intended that section 204(c) of the Act be applied to aliens who seek an immigration benefit through a fraudulent marriage, even in cases where there is no marriage in fact.

appeal that he and Ms. Smith ever cohabitated, ever comingled finances, or ever took any other steps to combine their individual lives into the life of a married couple.

The term "willfully" in the statute has been interpreted to mean "knowingly 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) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). Under this test, the beneficiary made a material misrepresentation about the identity of his spouse including her appearance and her signature.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed. The beneficiary is thus barred from obtaining an immigration benefit under Section 203(b)(3) of the Act. For this reason alone, the director's revocation of approval of the petition is upheld.

In addition to the 204(c) bar, the director found the petition's approval revocable because the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage. The AAO agrees. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may

> accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the date that the Form I-140 was filed, which in this case was June 18, 2001. The proffered wage stated on the Form ETA 750 us $56.40 per hour ($117,312 per year). The Form ETA 750 states that the position requires a Master's degree in Finance, Business, or Accounting (a Bachelor's degree with five years of experience may be substituted for the Master's degree requirement) and two years of experience in the job offered or in a related occupation as an accountant.

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of over $1 million, and to currently employ 22 workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have begun working for the petitioner in March 2001.[4]

---

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] Although the beneficiary indicated on the Form ETA 750B and on a G-325A submitted with a Form I-485, Application for Permanent Residence filed on June 13, 2005 that he began working for the petitioner in March 2001, the Form G-325A submitted with the beneficiary's June 25, 2004 Form I-485 indicates that the beneficiary was a student for the past five years with no employment and the Form G-325A submitted with a Form I-485 filed November 24, 2003 states that he worked at the petitioner as a "clerk" from April 2001 to August 2002 and at [redacted]. from August 2002 to March 14, 2003. Letters submitted from the petitioner dated June 10, 2005 and June 15, 2007 state that the beneficiary worked as an Assistant Controller from March 2001 to the date of the letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

We additionally note that the beneficiary was the recipient of an approved H1-B petition to work for the petitioner from March 15, 2001 to October 31, 2003 and November 1, 2003 to October 29, 2006. Although this issue is not before the AAO, we note that if the beneficiary did not work for the petitioner during this time in the positions applied for, the beneficiary would have violated the terms

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted the following evidence of wages paid to the beneficiary:

- The 2001 Form W-2 states that the petitioner paid the beneficiary $26,500.05.
- The 2002 Form W-2 states that the petitioner paid the beneficiary $33,600.00.
- A paycheck dated November 15, 2005 states that the petitioner paid the beneficiary $37,800.00 as of that date.
- The 2006 Form W-2 states that the petitioner paid the beneficiary $41,400.00.
- A paycheck dated June 5, 2007 states that the petitioner paid the beneficiary $19,800.00 as of that date.

As these amounts are less than the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which in 2001 was $90,812; in 2002 was $83,712; in 2005 was $79,512; in 2006 was $75,912; and in 2007 was $97,512. The petitioner would need to demonstrate its ability to pay the full proffered wage in 2003 and 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.

---

of the visas and accrued unlawful status.

Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed in September 2008, 33 days after the director's issuance of the NOIR. The petitioner failed to submit a response to the NOIR. On appeal, the petitioner stated that the NOIR was not received. On appeal, the petitioner submits tax returns dated 2001, 2002, 2003, and 2004. The petitioner's income tax return for 2004 is the most recent return submitted. The petitioner's tax returns demonstrate its net income for 2001 through 2004, as shown in the table below.

- In 2001, the Form 1120 stated net income of $117,846.
- In 2002, the Form 1120 stated net income of $126,828.
- In 2003, the Form 1120 stated net income of $113,410.
- In 2004, the Form 1120 stated net income of $125,161.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2004, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of $216,511.
- In 2002, the Form 1120 stated net current assets of $291,490.
- In 2003, the Form 1120 stated net current assets of $347,313.
- In 2004, the Form 1120 stated net current assets of $440,411.

Although the petitioner's net income and/or net current assets for the years in which the petitioner submitted tax returns exceeds the proffered wage or the difference between the actual wage paid and the proffered wage, USCIS records indicate that the petitioner has filed over 200 Form I-140 and Form I-129 petitions since the petitioner's establishment in 1998, including ten approved I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Although the director specifically listed the names of the sponsored beneficiaries in his revocation decision, the petitioner submitted no evidence concerning the other sponsored workers including the proffered wage of each or any actual wages paid to each of the other sponsored workers. As a result, the petitioner did not demonstrate its ability to pay the proffered wage to the instant beneficiary or the other sponsored workers.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612

[5]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

(Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no evidence of its ability to pay the proffered wage of each sponsored worker from the date the petition was accepted onward. Similarly, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. The petitioner submitted no evidence of its ability to pay the proffered wage after 2004 although the director's decision faulted the petitioner for not submitting evidence through 2007. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The director also revoked the approval of the petition because the petitioner did not submit evidence that the beneficiary has the education required by the terms of the labor certification. The petitioner submitted evidence that the beneficiary became a member of [redacted] on April 18, 2002.

As noted above, the Form ETA 750 in this matter was certified by DOL. Here, the Form ETA 750 was filed on June 18, 2001. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the

required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this matter, Part 14 reflects that the minimum level of education is a Master's degree in Finance, Business, or Accounting and that two years of experience is required in the position offered or as an accountant. The petitioner indicated that a Bachelor's degree plus five years of experience would be accepted in lieu of a Master's degree.

Evidence in the record establishes that membership in [redacted] is equivalent to a U.S. bachelor's degree in Accounting. The beneficiary, however, was not a member of [redacted] as of the priority date, but only became a member ten months later. As a result, he did not hold the equivalent of a U.S. bachelor's degree as of the priority date and was, therefore, not qualified for the position under the terms of the labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

The approval of the petition remains revoked for the above-stated reasons, with each considered as an independent and alternate basis for revocation.[6] We also find that the beneficiary willfully misled USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.

FURTHER ORDER: The AAO finds that the beneficiary willfully misled USCIS on elements material to his eligibility for a benefit sought under the immigration laws of the United States.

[6] When the AAO dismisses and appeal on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.