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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The approval of the employment-based visa petition was revoked by the Director, Nebraska Service Center, (director) and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a budget analyst. 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 director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director revoked the approval of the petition accordingly.

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.

As set forth in the director's revocation, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is $28.68 per hour ($59,654.40 per year, based on a 40-hour work week). The Form ETA 750 states that the position requires four years of college and a bachelor's degree in management or finance, as well as two years of experience in the offered job or two years of experience in a management position in the travel industry.

The AAO conducts appellate review on a *de novo* basis. *See 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.[1]

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 on June 15, 1995, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary did not claim to have worked for the petitioner.

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. In the instant case, copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, provided by the petitioner reflect the beneficiary was paid as follows:

2001	$9,350.00
2002	$20,322.70

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

2003	$19,455.00
2004	$24,761.00

In addition, paystubs submitted by the petitioner show the beneficiary was paid at least $4,300.00 in 2005.

The petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages from 2001 through 2005. As the proffered wage is $59,654.40 per year, the petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the beneficiary, that is:

2001	$50,304.40
2002	$39,331.70
2003	$40,199.4
2004	$34,893.40
2005	$55,354.40

Since the evidence does not reflect any wages paid to the beneficiary after 2005, the petitioner must establish that it can pay the full proffered wage of $59,654.40 for each year after 2005. In addition, the director noted that the petitioner must establish the ability to pay the wages proffered to each of the beneficiaries for which it had petitioned. USCIS records reveal that the petitioner has filed 42 petitions since the petitioner's establishment, including 28 I-129 petitions, and 14 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.

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 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d 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 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* at 537 (emphasis added).

The petitioner's tax returns reflect the following net income[2]:

2001	$114,635
2002	$65,295
2003	$68,293

The petitioner did not submit any evidence of its net income after 2003.

Therefore, for the years 2001 and 2004, the petitioner's net income was greater than the proffered wage; however, USCIS records indicate that, outside of the petition filed on behalf of the beneficiary, the petitioner has filed 63 petitions since the petitioner's establishment in 1995,

[2] 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.

including 43 I-129 petitions, and 20 I-140 petitions. Under the circumstances, the petitioner must 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. Therefore, the petitioner has failed to establish its ability to pay the proffered wage to the instant beneficiary and the beneficiaries of the other Form I-140 petitions in 2001 through 2004 out of its net income.

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.[3] 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 as:

2001	$28,109
2002	$102,952
2003	$427,110

The petitioner did not submit evidence of its net current assets after 2003.

Therefore, for the year 2001, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Moreover, as discussed above, the petitioner has filed 63 petitions since the petitioner's establishment in 1995, including 43 I-129 petitions, and 20 I-140 petitions, about which the petitioner has failed to provide required information. Therefore, the petitioner has failed to establish its ability to pay the proffered wage from 2001 through 2004 out of its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner's bank account statements for 2001 and 2002 show it had the financial ability to meet the proffered wages of the beneficiary and other beneficiaries on

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[3] 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.

whose behalf it has filed petitions. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets.

The petitioner submits a letter from dated November 17, 2009 recommending the use of retained earnings to pay the proffered wage by including additional assets. Retained earnings are a company's accumulated earnings since its inception less dividends. , *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

On appeal, counsel asserts that, in its December 28, 2009 revocation, the director calculated the total proffered wages of the petitions for its I-140 beneficiaries as $346,465. Counsel misreads the director's decision. In his decision, the director lists the proffered wages of four petitions filed by the petitioner. The director notes that the total of these four proffered wages is $286,811. Moreover, the director also notes that USCIS is aware of other beneficiaries that are not included in this calculation. Therefore, the petitioner must demonstrate its ability to pay all proffered wages, which is *at least* $286,811.

Counsel asserts on appeal that the petitioner has withdrawn one of the I-140 petitions filed on behalf of one of the other beneficiaries. The notice of withdrawal is dated January 12, 2010. The petitioner must still establish its ability to pay the proffered wage of this beneficiary until the immigrant visa petition was withdrawn in 2010, as well as all other beneficiaries for whom the petitioner has petitioned. The petitioner fails to provide the required information in regard to the other individuals on whose behalf the petitioner has filed I-140 and I-129 petitions. The director noted in the revocation that the petitioner had withdrawn one petition and this petition was not one of the four listed by the director as an obligation for the petitioner.

The director also made note of evidence of wages paid to the four beneficiaries for 2001 and 2002 and calculated that the petitioner's net income and net current assets was insufficient to cover the difference between wages already paid to the beneficiaries and the proffered wages. On appeal, the petitioner fails to demonstrate that it has the ability to pay the proffered wages of the four sample beneficiaries noted by the director, let alone the instant beneficiary and all other beneficiaries for whom the petitioner has petitioned.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 (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.

Counsel contends that the business was established in 1995 and suffered an industry related loss in response to the September 11, 2001 attacks. Counsel states that despite these setbacks, the company has continuously grown since 2001 and that it has received airline company awards which reflect its reputation in the travel industry. The gross sales amounts reflected on the petitioner's tax records do not reflect a steady increase over the years. The petitioner's 2003 tax returns show total salaries and wages paid of less than the $286,811 minimum amount calculated with a sample size of only four employees. As discussed above, the petitioner has failed to establish that it would be able to pay the proffered wage to all beneficiaries on whose behalf it filed petitions from 2001 through 2003.[4]

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[4] The awards issued to the petitioner by airlines do not reflect a continuing high reputation within the industry. The awards state the petitioner is being recognized for its contributions to and

In the instant case, there is insufficient evidence in the record of the historical growth of the petitioner's business, or of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Further, the petitioner failed to submit necessary information regarding other I-140 and I-129 petitions filed on its behalf, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for any relevant year. 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.

Beyond the decision of the director,[5] the petitioner has also not established that the beneficiary is qualified for the offered position.[6] The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the 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 Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the offered job or in a management position in the travel industry. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an

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award is the "million dollar sales award" for 2004, 2005, and 2006. The award is the "PAL award" and it was given "in recognition of [the petitioner's] valuable contribution to the passenger sales and marketing programs of in 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, and 2007-2008. The awards appear to be tied to the petitioner's sales figures for and The record contains no information about the requirements for receiving these awards, how many other businesses in the petitioner's industry received the same awards for and or how prestigious the awards are considered in the industry.

[5] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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information controller/station controller for from September 1997, through April 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). In support of the petition, the petitioner provided an employment letter dated September 3, 2001, on photocopied letterhead from The letter states that the beneficiary was employed as a Station Control Officer from September 1997 to April 2000, and as a Customer Service Agent from April 1992 through August 1997. The letter bears the purported signature of who identified her position with the company as "

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Through a Notice of Derogatory Information and Request for Evidence (NDI/RFE) issued on May 31, 2013, the AAO advised the petitioner that USCIS investigations had revealed that the signature on the submitted employment letter had been forged.

In response to the NDI/RFE the petitioner submitted a new employment letter, this one bearing the purported signature of , who identified his position with the company as "." This letter states that the beneficiary was employed as a Customer Service Agent I from September 10, 1992, as a Customer Service Agent II from September 16, 1995, and as a Customer Service Agent III (Station Controller/Information Coordinator) since September 1, 1997. The AAO notes that the letter does not list any duties for the beneficiary's positions, and that the date the employment commenced is inconsistent with the earlier, forged letter. Counsel asserts that since the beneficiary actually worked at as stated on the labor certification and on the forged experience letter, the forged document cannot be considered to be a misrepresentation of a material fact.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The evidence submitted by the petitioner merely affirms the experience claimed by the beneficiary. The evidence does not explain why a forged document was submitted or why an authentic employment verification letter was not submitted with the petition. Further, the labor certification requires experience in the offered position of budget analyst or in a management position in the travel industru. The beneficiary's employment with Philippine Airlinesas a Customer Service Agent does not meet the requirements as listed on the labor certification. Therefore, the evidence submitted in response to the NDI/RFE is not sufficient to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Finally, the regulation at 20 C.F.R. § 656.30(d) provides:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The petitioner's submission of a forged employment verification letter constitutes the willful misrepresentation of a material fact. Counsel's assertion that verification of the beneficiary's qualification for the offered job is not material to the petition is without merit. Therefore, the labor certification will be invalidated.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed with a finding of fraud and willful misrepresentation of a material fact against the petitioner and the beneficiary.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly misrepresented a material fact by the submission of a fraudulent document and misled DOL and USCIS on elements material to eligibility for a benefit sought under the immigration laws of the United States. The labor certification application (P2001-CA-09501350/JS) is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's and the beneficiary's fraudulent misrepresentation.