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: JAN 24 2013

OFFICE: TEXAS 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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The AAO will enter an administrative finding of willful misrepresentation and will also invalidate the labor certification.

The petitioner, an engineering consultant, seeks to permanently employ the beneficiary in the United States as an administrative assistant. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 1, 2008. *See* 8 C.F.R. § 204.5(d).

The record shows that the appeal is properly filed 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 June 1, 2009 decision, the director determined that the petitioner failed to submit evidence that the beneficiary was qualified for the position of administrative assistant. The petitioner also failed to establish its continuing ability to pay the proffered wage beginning on the priority date.

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.[2]

The Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's*

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

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

Tea House, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered of administrative assistant. The labor certification also states that the beneficiary qualifies for the offered position based on the following employment experience:

Employer:	
Location:	Ambato, Ecuador
Position:	Administrative Assistant
Type of Business:	Trade
Start Date:	January 2, 1993
End Date:	April 3, 1995

No other experience is listed on the labor certification. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on April 9, 2008.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The director determined that the record lacked a letter to support that the beneficiary acquired 24 months of experience as an administrative assistant.

The Petitioner's Ability to Pay

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.

The proffered wage as stated on the ETA Form 9089 is $19.80 per hour ($41,184 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director noted in his decision that, at the time the petition was filed, the petitioner's 2008 income tax return was not yet due. The director then considered the petitioner's 2005 through 2007 income tax returns which were submitted. The director ultimately concluded, "Without a list of the petitioner's personal living expenses, the evidence on record does not establish that the owner of the petitioning entity and any dependents would have sufficient funds on which to live after paying the beneficiary's salary."

The Petitioner's Argument on Appeal

On appeal, counsel argues that it was arbitrary and capricious for the director to deny the petition without first issuing a request for evidence and allowing the petitioner an opportunity to provide missing information. Counsel states that a letter describing the beneficiary's experience was submitted

at the time the petition was filed, but he is submitting a new letter on appeal.[3] Counsel also states that the petitioner has the ability to pay the proffered wage and submits the petitioner's 2005 through 2008 federal income tax returns and a list of monthly expenses for 2008.

The director's decision denying the petition concluded that the petitioner did not submit evidence of the beneficiary's employment experience. Counsel claims that the director acted arbitrarily and capriciously by not requesting additional evidence after determining that all required evidence was not submitted with the petition. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

> *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the record lacked the required evidence of the beneficiary's experience and the director was not obligated to issue a request for evidence seeking the missing initial evidence of the petitioner's eligibility. Although counsel claims that the petitioner submitted a letter detailing the beneficiary's experience at the time the petition was filed, the only experience letter found in the record is the one submitted by counsel on appeal.[4]

Notice of Derogatory Information and Request for Evidence

On August 24, 2012, the AAO sent the petitioner a Notice of Derogatory Information and Request for Evidence (Notice). The Notice stated in part:

> Your Form I-140 was signed by both you, as the petitioner, and by Esq., as the person preparing the form. Your Form I-140 was also accompanied by a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by you and U.S. Citizenship and Immigration Services (USCIS) was notified by U.S. Immigration and Custom Enforcement (ICE) that ICE and U.S. Department of Labor Office of Labor Racketeering and Fraud Investigations (DOL OLRFI) Agents interviewed attorney and that he denied handling any immigration cases and stated that his name was used without his knowledge or consent. Attorney stated that he has never filed any applications with USCIS or the DOL and that all Forms G-28 or petitions purportedly filed by him are fraudulent.

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[3] Notably, the petition was not filed by the same attorney who filed the instant appeal.

[4] Counsel did not provide a copy of the experience letter he alleges was submitted at the time the petition was filed. The experience letter submitted on appeal is dated June 19, 2009. The petition was filed on June 17, 2008. Thus, the experience letter submitted on appeal was drafted well after the petition was filed.

Additionally, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification. Part J.23 of the ETA Form 9089 asks, "Is the alien currently employed by the petitioning employer?" Your response to that question was "no." However, in Part D of the ETA Form 9089, you list the beneficiary as your contact person and the cover letter from the DOL which accompanied the certified Form ETA 9089 was addressed to your business in care of the beneficiary. If the beneficiary was not working for you at the time the ETA Form 9089 was filed on February 1, 2008, it is not clear why you would list her as your contact person.

In addition, according to the ETA Form 9089, the beneficiary qualifies for the offered position based on her employment as an administrative assistant with ' ' in Ambato, Ecuador from January 2, 1993 to April 30, 1995. The type of business stated for is "trade" and the details of her employment with stated on the ETA Form 9089 are the following:

> Provided high-level administrative support by conducting research, preparing statistical reports, handling information requests, and performing clerical functions such as preparing correspondence, receiving visitors, arranging conference calls, and scheduling meetings. May also train and supervise lower-level clerical staff.

These duties are identical to the job duties of the position stated in Part H of the ETA Form 9089.

The record contains an employment experience letter dated June 19, 2009 from the General Manager of and an English translation. The signature of the General Manager is illegible, and his or her name is not stated. The letter states that the company employed the beneficiary as an administrative assistant from January 2, 1993 until April 30, 1995. The letter also states that she worked 40 hours per week and "Her responsibilities included to provide high level administrative support by conducting searches, preparing statistical reports, managing informational petitions as well as mailing, conference calls, arranging meetings [and] supervising administrative personnel." It is noted that the beneficiary's date of birth is October 4, 1976. Thus, she was 16 years old at the time she began her employment with It is doubtful that a 16 year-old would be entrusted to provide "high level" administrative support and to train and supervise lower-level clerical staff as described in the letter and on the ETA 9089.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is

incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

Based on the information discussed above, it appears that your company knowingly and intentionally submitted false information to USCIS regarding representation by attorney It also appears that your company and the beneficiary knowingly and intentionally submitted false information to both USCIS and DOL regarding the beneficiary's employment status with the petitioner. Further, it appears that the description of the beneficiary's duties with her previous employer, were embellished and tailored to match the duties of the position that the petitioner is seeking to fill. Unless you can resolve the inconsistencies as noted above, the AAO intends to dismiss the appeal and make a finding of fraud or willful misrepresentation against your company. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).[5]

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[5] 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). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.17(i), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989).

> The AAO will also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).[6] While you may withdraw the appeal, withdrawal will not prevent a finding that you have engaged in fraud or the willful misrepresentation of material facts.
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> In addition, the AAO cannot conclude that the beneficiary possesses the required experience for the offered position if the letter submitted to establish the claimed experience is dubious. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).
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> Finally, it appears that the petition is also not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). If the beneficiary was already working for the petitioner at the time the Form ETA 9089 was filed with the DOL, it appears that the certification by the petitioner that the job was open to any qualified U.S. worker was not true, since the position was already filled by the beneficiary.

The petitioner did not respond to the AAO's Notice. The AAO specifically alerted the petitioner that failure to respond to the Notice would result in dismissal because the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that

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[6] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

For the reasons set forth above, the AAO concludes that the petitioner knowingly and intentionally submitted false information to USCIS regarding representation by attorney Additionally, the AAO concludes that the petitioner and the beneficiary knowingly and intentionally submitted false information to both USCIS and DOL regarding the beneficiary's employment status with the petitioner, the beneficiary's duties with her previous employer, the actual minimum requirements for the position, and the existence of a *bona fide* job opportunity open to qualified U.S. workers.

As referenced in the AAO's Notice, willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* INA Section 212(a)(6)(C), [8 U.S.C. 1182(a)(6)(C)], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary was already working for the petitioner at the time the ETA Form 9089 was submitted to DOL. According to 20 C.F.R. § 656.17(i)(3), if the beneficiary is already employed by the petitioner, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer. By indicating on the ETA Form 9089 that the beneficiary was not working for the petitioner, the petitioner and the beneficiary precluded the DOL from further inquiry about the actual minimum requirements for the position.

Another material issue is whether the beneficiary is qualified to perform the duties of the offered position through meeting the experience requirements of the labor certification. The labor certification states that the job offered requires 24 months of prior experience as an administrative assistant. The labor certification also states that the beneficiary gained this experience with in Ecuador and the beneficiary signed the ETA Form 9089 under penalty of perjury. As discussed above in the AAO's Notice, it is concluded that the beneficiary's experience with was misrepresented to make it appear that the beneficiary was qualified for the offered position.

Further, in addition to making a determination that the petitioner and the beneficiary made willful misrepresentations of material facts involving the petition and the labor certification, the AAO is also invalidating the labor certification.

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.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The AAO invalidates the labor certification based on a determination of willful misrepresentation of a material fact involving the labor certification pursuant to 20 C.F.R. § 656.31(d).