**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

(b)(6)

[redacted]

Date: JUN 2 5 2013 Office: TEXAS SERVICE CENTER [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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a convenience store. It seeks to permanently employ the beneficiary in the United States as a marketing 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] To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). 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 June 27, 2008. *See* 8 C.F.R. § 204.5(d).

On appeal, the AAO found that the beneficiary does not have the 24 months of experience in the proffered position and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. The AAO also found that the beneficiary knowingly misrepresented a material fact by misrepresenting his experience on the labor certification and submitting fraudulent documents in an effort to procure a benefit under the Act. The AAO affirmed the director's invalidation of the labor certification.

The record shows that the motion 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 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 motion.[2] On motion, counsel submits a brief, an affidavit from the beneficiary, a copy of the beneficiary's Social Security Card (SSC), certified copies of the beneficiary's individual

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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). While the petitioner did not comply with regulations governing motions, requiring submission of any new documentation or argument with the motion, the AAO will consider the documents newly submitted subsequent to motion.

federal tax returns, Federal Insurance Contributions Act (FICA) statements for the petitioner, Internal Revenue Service (IRS) Wage and Tax Transcripts and copies of documents that are already in the record.

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)(l), (12). *See Matter of Wing's 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 has the following minimum requirements:

H.4. Education: None.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as an assistant manager/marketing assistant with [redacted] Florida from March 10, 2003 until April 30, 2007. The only other experience listed is experience gained with the petitioner in the proffered position beginning May 17, 2007.[3] The

[3] The certified ETA Form 9089, clearly indicates at J.21 that the beneficiary's experience with the

beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury. 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 record contains an experience letter from letterhead stating that the company employed the beneficiary as an assistant manager and marketing assistant from March 2003 until April 2007. As advised in the AAO's decision, however, the letter conflicts with a Form G-325A the beneficiary submitted in connection with an immediate relative petition filed on his behalf in 2005 and a concurrent application for adjustment of status. The Form G-325A indicates that the beneficiary had been unemployed in the United States up until May 9, 2005, the date on which the beneficiary signed the Form G-325A. Specifically, the beneficiary stated on the Form G-325 that he was unemployed for the five years prior to May 9, 2005, the date on which the Form G-325 was signed. It is incumbent upon a petitioner to resolve the inconsistencies in the record concerning the beneficiary's experience by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted a copy of an Internal Revenue Service (IRS) Wage and Income Transcript for 2005 and copies of IRS Forms W-2, Wage and Tax Statements, for 2006 and 2007 which indicate that the beneficiary received $10,400.00 in 2005, $10,000.00 in 2006 and $2,800.00 in 2007 from The petitioner submitted copies of the Florida Department of State Division of Corporations verifying that has been doing business as . As advised in the AAO's decision, this documentation was not sufficiently independent and objective evidence of the beneficiary's employment by , in view of the noted inconsistencies, as the tax transcript was not certified and there was no evidence that the copies of the IRS Forms W-2 were actually filed with the IRS.[4] As such the AAO advised the petitioner that it had failed to provide independent

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employer in a position substantially comparable to the job opportunity requested cannot be used to qualify the beneficiary for the certified position. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position only if the position was not substantially comparable. Representations made on the ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the employer is only in a position substantially comparable to the job opportunity and cannot, therefore be used to qualify the beneficiary for the certified position.

[4] The Forms W-2 were new printouts and not copies of the original Forms W-2 that would have been issued to the beneficiary and there was no other independent evidence to substantiate payment of these wages.

objective evidence sufficient to overcome the inconsistencies in the record. The AAO advised the petitioner that in any future filings it should provide certified tax transcripts verifying that the beneficiary was paid sufficient wages to account for full time employment during the period in question.

On motion, counsel submits a copy of the beneficiary's Social Security Card (SSC) verifying that the Social Security Number (SSN) listed on the IRS Forms W-2 and other documentation belongs to the beneficiary.[5] On motion, counsel submits responses to the beneficiary's inquiry to the IRS for certified individual tax returns and attached IRS Forms W-2 for 2005 through 2007. The IRS responded that it was unable to provide certified returns for 2005 because this return has been destroyed. The IRS provided certified copies of the beneficiary's 2006 and 2007 federal tax returns and IRS Forms W-2 indicating that the beneficiary received $10,000.00 in 2006 and $2,800.00 in 2007 from Counsel also submits FICA statements certified by the Ft. Lauderdale, Florida Social Security Administration (SSA) Field Office confirming that the beneficiary received $10,400.00 in 2005, $10,000.00 in 2006 and $2,800.00 in 2007 from

It is noted that the certified federal tax returns state that the beneficiary was employed as a cashier in 2006 and as a sales clerk in 2007 and that the IRS Wage and Income Transcripts state that the beneficary was at least a part-time student in 2005. The certified tax returns, IRS Forms W-2 and FICA statements are inconsistent with the qualifying experience claimed by the beneficiary on the Form ETA 9089 labor certification and the experience letters submitted with the Form I-140 petition. The certified tax returns, IRS Forms W-2 and FICA statements reflect that the beneficiary did not receive sufficient income from to reflect full-time employment or employment in the position of an assistant manager or marketing assistant, rather than as a cashier or sales clerk. They are also inconsistent in that the beneficiary clearly states that he was employed as a cashier or sales clerk, rather than as an assistant manager and marketing assistant. *Matter of Ho*, 19 I&N Dec. at 591-92.

The documents on motion provide independent, objective proof that the beneficiary received $10,400.00 in 2005, $10,000.00 in 2006 and $2,800.00 in 2007 from . However, they do not provide independent, objective proof that the beneficary was employed full-time as an assistant manager/marketing assistant at rather than on a part-time basis as a cashier/sales clerk, especially in light of the amount of compensation the beneficiary received, the beneficiary's claimed education, and positions listed on the federal tax returns during the same period of time. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, there is no independent, objective proof that the beneficiary was employed between 2003 and 2005 as claimed on the labor certification. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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[5] Information in publically available credit checks revealed that the SSN had been associated with multiple individuals.

The material issue remains whether the beneficiary has willfully misrepresented his qualifications to obtain an immigration benefit. As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[6]

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien

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[6] It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

inadmissible for having "sought to procure" an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

> After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that the documentation submitted below and on motion is not sufficiently independent and objective evidence of the beneficiary's employment by for a period of at least 24 months in the proferred position. In view of the noted inconsistencies the AAO finds that the beneficiary made a willful misrepresentation of a material fact by stating that he was employed by from March 10, 2003 until April 30, 2007. Moreover, he made a willful misrepresentation of a material fact by stating that he was employed full-time from 2005 through 2007 by in the proferred position, rather than part-time and/or as a cashier or sales clerk.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, 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 has the required 24 months of experience for the position offered. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

> (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

In this case, the beneficiary certified, upon completing and signing the Form ETA 9089 labor certification application that he qualified for the position (that he had, at least 24 months of work experience in the job offered) before the priority date. The beneficiary maintained that he was employed by from March 10, 2003, until April 30, 2007, even though he stated in the Form G-325 under penalty of perjury that he was unemployed for the five years prior to May 9, 2005, that he stated on his federal tax returns that he was employed as a cashier/sales clerk and the IRS and SSA documentation in the record reflect that he received compensation incongruent with full-time employment or employment in the proffered position.

On appeal, counsel contended that the director erred in invalidating the labor certification because the beneficiary did not engage in willful misrepresentation of a material fact involving the labor certification. Counsel asserted that the beneficiary was unaware that he had signed a document stating that he was "unemployed" in 2005 and that he was ignorant and naïve in the information provided by his prior attorney. On motion, counsel contends that the AAO's decision is arbitrary and capricious because the information on the Form G-325A to which the AAO refers was a mistake, is not corroborated by other evidence and was prepared by an attorney with a history of suspension for professional negligence. In support of her contentions, counsel submits copies of documentation reflecting that the attorney who prepared the referenced Form G-325A was suspended on October 1, 2002 for failing to provide competent representation of a juvenile defendant following entry of a plea agreement. Counsel also submits an affidavit from the beneficiary in which he states that he mistakenly trusted his attorney to complete the Form G-325A correctly, and that, even if he had properly reviewed the information on the Form G-325A he would have believed the question to pertain only to authorized employment.[7]

Although the beneficiary claims that his former counsel was incompetent, in this matter, the beneficiary did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

(1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,

(2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

(3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

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[7] The beneficiary states that he did not obtain work authorization until 2005; however, USCIS records indicate that the beneficiary was issued work authorization valid from September 21, 2001 until September 21, 2002 and from February 28, 2004 until February 28, 2005, which is inconsistent with his claim that he would not have listed the employment because it was not authorized.

Further, the beneficiary's disavowal of participation in fraud cannot be sustained in light of his admission of willingly signing the document. Specifically, his failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. *See Hanna v. Gonzales,* 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente,* 982 F.2d 156, 159 (5th Cir. 1993). To allow the beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed the document would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

On appeal and on motion counsel contends that the labor certification only required 24 months of experience in the proffered position and that the beneficiary has submitted sufficient evidence to overcome the inconsistencies in the record in reference to the fact that he was employed by for at least 24 months. As discussed above, the petitioner has failed to provide independent objective evidence sufficient to establish that the beneficiary was employed full-time in the qualifying position he claims to have been employed in by The AAO therefore finds that the director was justified in invalidating the labor certification.

Based on the noted inconsistencies and the beneficiary's failure to provide independent objective evidence to overcome those inconsistencies, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from March 10, 2003 until April 30, 2007.

On the true facts, the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the DOL issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. *Compare* 8 C.F.R. § 204.5(g) *with* § 204.5(1)(l)(3)(ii)(B). The beneficiary does not have the necessary qualifications in this case, as he did not possess 24

months of work experience as a marketing assistant as of the filing date of the labor certification. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's false statements about his prior employment shut off a line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By misrepresenting his work experience and making misrepresentations to the DOL, the beneficiary sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The director specifically issued notice to both the petitioner and the beneficiary to allow the beneficiary an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, the response was insufficient to overcome the noted inconsistencies.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The AAO affirms the director's finding of fraud and misrepresentation involving the labor certification. The AAO also affirms the director's invalidation of the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides:

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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 the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As the evidence reflects fraud involving the labor certification, the director appropriately invalidated the ETA Form 9089, Application for Permanent Employment Certification (labor certification) in this case.

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 motion to reopen and the motion reconsider are granted. Upon reopening and reconsideration, the AAO's decision, dated February 1, 2013, is affirmed. The petition will remain denied.

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

**FURTHER ORDER:** The alien employment certification, Form ETA 9089, ETA case number [redacted] is invalidated.