(b)(6)

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

DATE: MAY 29 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 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, Nebraska Service Center, revoked the approval of the employment-based immigrant visa petition and invalidated the labor certification based on a finding of fraud and willful misrepresentation for submitting a false experience letter. You appealed this decision to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition's approval will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

In her April 26, 2011 revocation, the director determined that the beneficiary's experience letter was fraudulent and that the petitioner and the beneficiary willfully misrepresented a material fact in order to obtain an immigration benefit. The director revoked the approval of the petition and invalidated the labor certification.

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

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *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]

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.

On July 28, 2006, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary as a head cook pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[2] On February 12, 2007, the director approved

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[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." Section 203(b)(3)(A)(i) of the Act also provides for the granting of preference classification to: "Qualified immigrants who are capable, at the time of petitioning for

the petition. On April 30, 2010, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition and invalidate the labor certification for fraud or willful misrepresentation based on the beneficiary's experience following an investigation into the beneficiary's claimed experience as a cook at the in India. The petitioner was provided with a copy of the investigative report and a copy of the response. The petitioner's response was received by the director on May 27, 2010. On April 26, 2011, the director revoked the petition.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the DOL. The priority date of the petition is April 14, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

A 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)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). S*ee also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany* 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).

The required education, training, experience and skills for the offered position are set forth at Part H 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 required.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.

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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."

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

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

H.7. Alternate field of study: None.
H.8. Alternate combination of education and experience: None.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: Not accepted.
H.14. Specific skills or other requirements: Blank.

On the ETA Form 9089, signed under penalty of perjury, the beneficiary listed his relevant experience as a head cook (Indian) with India, from May 27, 1991 to April 2, 1996.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

A copy of an experience letter was submitted from the , India, dated May 12, 1997. The experience letter states that the beneficiary worked as a cook in the hotel's restaurant from May 1991 to April 1996 and is signed by Managing Director.

An investigation was initiated into the beneficiary's claimed prior experience. The Hotel Drona was contacted to confirm the authenticity of the claimed experience.

In response to the investigation, the responded with the following:

> Sir: I have to inform you that this is a fake document. This letter is not related and not issued with a Government of Uttaranchal undertaking.

In its Notice of Intent to Revoke (NOIR) dated April 30, 2010, the director specifically informed the petitioner that an investigation had been conducted by the New Delhi INS (now USCIS) into the beneficiary's work experience. The investigation concluded that the experience letter was fraudulent

based on a statement by the administrative officer of the in which he states that the letter was not issued by the and that there was never a managing director by the name of the signatory of the experience letter. A copy of the investigative report and a copy of the letter were provided.

The petitioner in his response to the director's NOIR, submitted a declaration from the petitioner's owner, a declaration from the beneficiary, a declaration from the beneficiary's mother, the beneficiary's Form 1040 individual income tax returns for 2007, 2008, and 2009; the beneficiary's Forms W-2 for 2007, 2008, and 2009; and paycheck stubs for the periods January 1, 2010 to January 31, 2010 and April 1, 2010 to April 31, 2010.

In his declaration, the petitioner's owner states that the beneficiary's level of performance was consistent with the beneficiary's representations that he had been employed as a professional cook. The petitioner further states in his declaration that the beneficiary informed him that "he had over 6 years of experience as an Indian cook." However, in the beneficiary's declaration, he states that that he has five years of experience with the 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 on 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. Additionally, the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel argues that the revocation of the petition violates due process because vital information crucial to questioning its findings was withheld including the identity of the officers conducting the investigation and the witness. Additionally, counsel contends that pursuant to the USCIS Adjudicator's Field Manual (AFM) Section 11.1(k),[3] 8 C.F.R. § 103.2(b)(16), and *Matter of*

[3] It is emphasized that USCIS internal memoranda and manuals do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"). The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Tahsir, 16 I&N Dec. 56 (BIA 1976), the petitioner has a right to the investigative report without redaction of the officers' or witness' names.

The regulation at 8 C.F.R. § 103.2(b)(16)(1) states:

> (i) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The director properly advised the petitioner of the derogatory information and provided it with a copy of the letter. The petitioner was afforded the opportunity to respond and rebut the information and potential finding of fraud and misrepresentation. Despite this opportunity, no independent, objective evidence was submitted to overcome the findings of the consular investigation. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). "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." Further, "it is incumbent on 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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Moreover, USCIS is not required to produce the officer who interviewed the witness or provide an opportunity for cross examination of witnesses. Under the Administrative Procedure Act (APA), an agency is not required to conduct a full-blown judicial style hearing unless the organic statute governing agency adjudication specifies a hearing "on the record." *See U.S. v. Florida East Coast Railway*, 410 U.S. 224, 241 (1973); *see also Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989). An agency adjudication not requiring a hearing "on the record," is styled an "informal adjudication." *See City of West Chicago v. Nuclear Regulatory Commission*, 701 F.2d 632, 641 (7th Cir. 1983); *see also Chemical Waste Management*, 873 F.2d at 1479. Agencies are not required to provide any specific set of procedures when engaging in informal adjudication; they are only required to provide an explanation for an action taken through informal adjudication. *See PBGC v. LTV Corp.*, 396 U.S. 633, 653-54 (1990).

Immigrant visa petition proceedings are informal adjudications, governed only by the Act, which does not require USCIS or AAO to conduct a hearing on the record. *See* 204(b) of the Act. As a

result, AAO proceedings are only governed by section 6 of the APA, which does not require the agency to provide for cross examination. *See* 5 U.S.C. § 555(a).

Counsel also argues that the director's decision violated substantive due process. An alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004). As the director afforded the beneficiary an opportunity to rebut the adverse information prior to entering a decision of the beneficiary's misrepresentation, counsel cannot assert that the beneficiary has been substantially prejudiced.

Counsel argues in his brief that the witness's statement is not probative because it fails to declare why the experience letter is fraudulent. The witness stated that the letter was not related to, and was not issued by, the hotel. As stated above, the petitioner was afforded the opportunity to rebut the evidence in response to the director's NOIR. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has failed to overcome this burden.

Counsel asserts that the witness's statement violates USCIS regulations because it does not bear a certificate of translation pursuant to 8 C.F.R. § 103.2(b)(3). The regulation applies to documents submitted to USCIS. Thus, counsel's assertion is without merit.

Therefore, given the content of the Consular investigation, and the documents provided by the petitioner in response which failed to provide independent, objective evidence to confirm the beneficiary's experience, we cannot conclude that the petitioner has overcome the conclusion of the Consular investigation.

The record also contains discrepancies regarding the dates of the beneficiary's work experience. The labor certification filed with the current petition, the beneficiary's declaration dated May 12, 2010, and the Form G-325A dated July 20, 2007, state that the beneficiary worked for the petitioner beginning in April 1999 with no breaks in employment. However, the Form ETA 750B submitted with a previous I-140 petition filed on March 10, 2001, states that the beneficiary was unemployed from May 1996 to the present. The beneficiary signed the Form 750B under penalty of perjury on July 14, 2000. Additionally, the beneficiary also states in his declaration that he decided to visit the United States in 1997 and he was asked to provide proof that he was employed in India. According to the beneficiary's declaration, he requested an employment letter from his supervisor, [redacted] at the [redacted] The beneficiary further states that he believes the letter was part of the documents that he brought with him to the U.S. Consulate to obtain his visa. The information in the record shows the beneficiary's last day of employment at the [redacted] as April 2, 1996, well before the beneficiary decided to visit the United States in 1997. There is nothing in the record to reconcile these inconsistencies. 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 on 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.

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.[4]

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[4] 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 the

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. 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 experience for the position offered. Submitting a false experience letter amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. 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.

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 Department of Labor 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 Department of Labor 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

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opportunity to respond.

he met the petitioner's minimum education requirements. *Compare* 8 C.F.R. § 204.5(g) *with* § 204.5(1)(l)(3)(ii)(C). The beneficiary could not establish the necessary qualifications in this case, as he did not possess 24 months of experience in the job offered as required by 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 is 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 use of a forged or falsified experience letter 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 Department of Labor 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 Department of Labor 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. *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 experience and submitting a fraudulent experience letter to USCIS and making misrepresentations to the Department of Labor, the beneficiary sought to procure a benefit provided under the Act through fraud and 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.

Beyond the decision of the director,[5] the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage

[5] The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[6] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petitioner submitted copies of the beneficiary's Forms W-2 for the years 2007, 2008, and 2009, as well as copies of the beneficiary's Forms 1040 Individual Tax Return for the years 2007, 2008, and 2009. Additionally, the petitioner submitted copies of two paychecks issued to the beneficiary by the petitioner for March 7, 2010 and April 7, 2010. The record, however, does not contain a copy of the Form W-2 issued to the beneficiary for 2006 or copies of the petitioner's federal tax return, its annual report, or its audited financial statement for 2006, the year containing the prirority date. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. This issue must be addressed with any further filings.

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 that the petitioner and beneficiary willfully misrepresented a material fact. The appeal remains revoked and and the labor certification application

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[6] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

remains invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's and the beneficiary's willful misrepresentation.