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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 197 52485

Office: TEXAS SERVICE CENTER

Date: JUL 30 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a separate finding of fraud.

The petitioner is a printing, copying and mounting business.¹ It seeks to employ the beneficiary permanently in the United States as an account manager (market research analyst). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's December 15, 2006 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate

¹ It is noted that an attorney who is currently on the list of suspended and expelled practitioners represents the petitioner, as maintained by the Executive Office of Immigration Review (EOIR). *See* 8 C.F.R. § 292.3; *see also* EOIR website (<http://www.usdoj.gov/eoir/profcond/chart.htm>)(as of June 16, 2009). Therefore, the AAO may not recognize counsel in this proceeding.

that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 1, 2004. The proffered wage as stated on the Form ETA 750 is \$772.00 per week (\$40,144.00 per year). The Form ETA 750 states that the position requires the completion of grade school and high school, and two years of experience in the job offered or two years of experience as a market researcher.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits various client billing statements, its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2000, 2001, 2002, 2003, 2004 and 2005, and a copy of an Interoffice Memorandum from William R. Yates, Associate Director for Operations, United States Citizenship and Immigration Services (USCIS), to Service Center Directors and other USCIS officials, entitled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, dated May 4, 2004 (Yates Memo). Other relevant evidence in the record includes the petitioner's bank statements from Manufacturers Bank dated January 1, 2006 through July 31, 2006; computer printouts detailing the IRS Forms W-2 issued in 2004 and 2005 by the petitioner; copies of the petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the first and second quarters of 2006; a copy of an agreement dated December 21, 2002, between Champion Employer Services and the petitioner regarding provision of employee-related administration services; and the petitioner's compiled financial statements for year-end 2004 and 2005.³

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 the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in January 1995, and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petitioner's ability to pay the proffered wage is reflected by the magnitude of its business and its potential for growth. Specifically, he highlights the size of the petitioner's business, the length of time the petitioner has been in business, the growth of the petitioner's business, the number of employees on the petitioner's payroll, the petitioner's total assets, the petitioner's gross income, salaries paid by the petitioner, compensation paid to the petitioner's officers, and the balances in the petitioner's bank accounts. Counsel further asserts that the beneficiary will contribute to an increase in the petitioner's profits and that, based on the Yates Memo, the petitioner has established its ability to pay the proffered wage because it has employed the beneficiary since November 2002, it has paid salaries exceeding the proffered wage from 2000 to 2005, and it has paid officer compensation in 2002, 2003 and 2004 which exceeds the proffered wage.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. On the Form ETA 750B, signed by the beneficiary on September 15, 2004, the beneficiary claimed to have worked for the petitioner as an account manager from November 2002 to the date he signed the Form ETA 750B. Computer printouts detailing the petitioner's IRS Forms W-2 issued in 2004 and 2005 show compensation received by the beneficiary from the petitioner of \$15,249.20 and \$17,179.00, respectively.

Therefore, for the years 2004 and 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2004 and 2005. Since the proffered wage is \$40,144.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$24,894.80 and \$22,965.00 in 2004 and 2005, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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

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

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on August 24, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2004 and 2005, as shown below.

- In 2004, the Form 1120S stated net income⁴ of -\$4,428.00.
- In 2005, the Form 1120S stated net income of -\$49,606.00.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$1,373.00.
- In 2005, the Form 1120S stated net current assets of -\$16,461.00.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

⁴ Ordinary income (loss) from trade or business activities as reported on Line 21.

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

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

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. He highlights compensation paid to the petitioner's officers and the balances in the petitioner's bank accounts as evidence of the petitioner's ability to pay the proffered wage. As noted by the director in her decision, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Further, the petitioner's tax returns show that the petitioner paid officer compensation of \$75,000.00 in 2004 and \$0 in 2005. The majority shareholder of the petitioner received the entire amount paid in officer compensation in 2004. The petitioner has provided no evidence to establish that its majority shareholder would have been willing or able to forgo her officer compensation in 2004.⁶ In addition, since the petitioner paid no officer compensation in 2005, the petitioner has not established that it had the continuing ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage beginning on the priority date.

Counsel further asserts on appeal that the beneficiary will contribute to an increase in the petitioner's profits. However, the beneficiary has been employed by the petitioner since 2002, and the petitioner has not established how the beneficiary increased profits during his employment.⁷ Against the

⁶ This office notes that USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

⁷ The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612, for the proposition that the petitioner's ability to pay the proffered wage is reflected by the magnitude of its business and its potential for growth. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel notes on appeal that the petitioner has been in business since 1995 and had ten employees at the time the petition was filed. It paid wages to leased employees of \$497,179, \$399,910, \$402,972 and \$400,039 in 2000, 2001, 2002 and 2003, respectively, salaries and wages to employees of \$407,359 in 2004,⁸ and wages to leased employees of \$419,474 in 2005. Thus, the AAO recognizes the longevity of the petitioner's business and its history of leasing employees. However, from 2000 to 2005, the petitioner's gross receipts fluctuated, and were \$1,090,606, \$904,698, \$907,049, \$822,697, \$922,188, and \$801,089 in 2000, 2001, 2002, 2003, 2004 and 2005, respectively. Thus, the petitioner has not established its historical growth since its incorporation in 1995. Counsel asserts that the petitioner is well-known in its field, as evidenced by its representative clients listed

⁸ Counsel asserts in his brief on appeal that the petitioner paid \$79,174 in salaries in 2004. However, this amount reflects the amounts paid to leased employees in 2004.

on the client billing statements submitted on appeal. However, the AAO cannot determine the petitioner's reputation solely based a representative list of its clients. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses in 2004 or 2005. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, although not raised in the director's denial, this office finds that there is an issue related to the position's minimum qualifications. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). The petitioner has listed different educational requirements on Form ETA 750, and on Form I-129, in a filing related to the beneficiary's nonimmigrant status for what appears to be the same position.

On October 4, 2002, the petitioner filed a Petition for a Nonimmigrant Worker, Form I-129, for an account manager pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petition was approved by the director on November 25, 2002.⁹

⁹ The regulations related to the H-1B nonimmigrant category at 8 C.F.R. § 214.2(C)(ii)(4) provide that a specialty occupation:

Means an occupation which requires theoretical and practical application of a body of highly specialized and practical knowledge of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which required the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

For the position to qualify as an H-1B position, under 8 C.F.R. § 214.2(C)(iii)(A) the position must meet one of the following criteria:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

The I-129 letter of support provided the following job description for the position of account manager:

██████ meets with clients [sic] management in order to assess their requirements pertaining to their human resource requirements and project planning. He shall evaluate the requirements and participate in the planning and development of strategies to achieve these results. He shall apply his expertise in analysis, business organization, operations, management and logistics in order to meet client's objectives within the budget, time frame and reflecting client priorities. ██████ shall then participate in the implementation of the accepted strategic plans. In addition, he will monitor and evaluate the performance of staff assigned to client accounts and serve as liaison to identify both actual and potential problem situations at various client sites. Having targeted these problem areas, he shall utilize his discretionary authority to implement solutions and direct and supervise client's employees and staff to rectify the problems. Specifically, the duties are as follows: Develop work plan to conduct planning assignments. Evaluate existing markets and perform industry competitor analysis. Identify prospective markets and develop strategies to maximize penetration. Implement strategies decided upon by management. Develop strategic partnerships.

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- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
 - (3) the employer normally requires a degree or its equivalent for the position; or
 - (4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The beneficiary must establish that he or she holds a U.S. baccalaureate degree or higher required by the specialty from an accredited college or university; holds a foreign degree equivalent to a U.S. baccalaureate or higher degree required by the specialty; holds an unrestricted state license, registration, or certification required by the specialty; or has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. 8 C.F.R. § 214.2(C)(iii)(B).

Further, the I-129 letter of support specifically noted the following education requirement: “a related Bachelor’s Degree or its equivalent in Business or related.” The pay rate offered for the account manager position was listed as \$772.00 per week. On September 12, 2005, the petitioner filed a Form I-129 petition to extend the beneficiary’s H-1B status in the same position of account manager. The petition was approved on October 6, 2005.

On November 1, 2004, the petitioner filed a labor certification on behalf of the same beneficiary for the position of account manager. The ETA 750 listed a pay rate of \$772.00 per week (\$40,144.00 per year).

Further, the job description on the ETA 750 read as follows:

Analyze and evaluate the market. Find ways to penetrate new markets and increase sales to current ones. He/She will: Meet with clients management in order to assess their requirements pertaining to their human resource requirements and project planning. Evaluate the requirements and participate in the planning and development of strategies to achieve these results. Apply his expertise in analysis, business organization, operations, management and logistics in order to meet client’s objectives within the budget, time frame and reflecting client priorities. Participate in the implementation of the accepted strategic plans. Monitor and evaluate the performance of staff assigned to client accounts and serve as liaison to identify both actual and potential problem situations at various client sites. Having targeted these problem areas, she/he shall utilize his discretionary authority to implement solutions and direct and supervise client’s employees and staff to rectify the problems. Develop work plan to conduct planning assignments; evaluate existing markets and perform industry competitor analysis; identify prospective markets and develop strategies to maximize penetration; implement strategies decided upon by management; develop strategic partnership.

The position description is materially identical to the position description for the H-1B position of account manager and the pay rates are the same. Since the ETA 750 position appears to be the same position as the I-129 H-1B position, this would be expected. However, this office notes that the ETA 750 listed the following educational requirements:

- 14. Education
 - Grade School c
 - High School c
 - College blank
 - College Degree Required none needed
 - Major Field of Study n/a

The position certified did not require a college degree, and specifically did not require a bachelor's degree or its equivalent in business or a related field as listed in the H-1B petition.

The AAO acting director issued a Notice of Derogatory Information (NDI) on April 14, 2009, and requested that the petitioner explain discrepancies within the record and provide any evidence that would distinguish the positions from one another. The AAO noted that the discrepancy between the baccalaureate degree requirement in the H-1B petition, and the absence of any college degree requirement for the position in the instant petition, calls into doubt the veracity of the position requirements and the bona fides of the position.¹⁰ The AAO also stated:

In signing the instant Form I-140 and the Form I-129, you certified under penalty of perjury that, in each case, the petition and the evidence submitted with it were all "true and correct." Accordingly, unless you can resolve the inconsistent information provided in these three filings with independent objective evidence, the AAO intends to dismiss the appeal and enter a formal finding of fraud into the record, and will recommend that USCIS revoke the approval of the Form I-129 petitions. The AAO may also invalidate the labor certification based on fraud or willful misrepresentation. See 20 C.F.R. § 656.31(d). While you may withdraw the appeal, withdrawal will not prevent a finding that you have engaged in fraud and the willful misrepresentation of material facts.

If the position required a bachelor's degree, the petitioner should have listed the degree on the ETA 750. If the petitioner were willing to advertise and hire a qualified candidate without a bachelor's degree, then the position truly does not require one. The petitioner has failed to set forth any criteria to show that the I-129 H-1B position is different than, or distinguishable from, the Form ETA 750 position.¹¹ We, therefore, conclude that the positions are the same.

Section 212(a)(6)(C) of the Act provides:

Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

By filing the instant petition and the Forms I-129 for the same position, but with differing requirements, the petitioner has sought to procure a benefit provided under the Act through fraud and

¹⁰ 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

¹¹ 8 C.F.R. 214.2(h)(11)(B) provides that the director may revoke an H-1B petition at any time, even after the expiration of the petition.

willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the H-1B position and the proffered position are the same, the AAO affirms our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹² 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 with a finding of fraud.

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

¹² When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.