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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAR 03 2010**

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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:

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On November 17, 2009, this office provided the petitioner with a notice of derogatory information and request for evidence (NDI/RFE) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The appeal will be dismissed with a separate finding of fraud. The labor certification application will also be invalidated based on the petitioner's fraudulent misrepresentation regarding the minimum requirements for the proffered position.

The petitioner is a solid-state laser manufacturer. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a labor certification approved by the Department of Labor (DOL) accompanied the petition. 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. Therefore, the director denied the petition.

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).

On November 17, 2009, this office notified the petitioner that according to the records at the website maintained by the California Secretary of State, the petitioner has been suspended in the State of California. *See* <http://kepler.sos.ca.gov/cbs.aspx> (accessed February 5, 2010).

This office also notified the petitioner that if it is currently dissolved, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a realistic and *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) 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. *See Id.*

This office allowed the petitioner 30 days in which to provide evidence that the petitioner remains in operation as an active business. More than 30 days have passed and the petitioner has failed to respond to this office's request for proof that the petitioner remains in operation as an active business. Thus, the appeal will be dismissed as abandoned.<sup>1</sup>

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<sup>1</sup> Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an

Further, as set forth in the director's January 7, 2009 denial, an 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. The director determined that the petitioner had not established its ability to pay the proffered wage in 2003.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on September 16, 2002. The proffered wage as stated on the Form ETA 750 is \$78,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30 of the following year. On the Form ETA 750B, signed by the beneficiary on September 13, 2002, the beneficiary claimed to have worked for the petitioner from April 2001 to the date he signed the Form ETA 750B.

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

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approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's IRS Forms W-2 for 2002, 2003, 2004, 2005, 2006 and 2007 show compensation received from the petitioner, as shown in the table below.<sup>2</sup>

- In 2002, the Form W-2 stated compensation of [REDACTED]
- In 2003, the Form W-2 stated compensation of [REDACTED]
- In 2004, the Form W-2 stated compensation of [REDACTED]
- In 2005, the Form W-2 stated compensation of [REDACTED]
- In 2006, the Form W-2 stated compensation of [REDACTED]
- In 2007, the Form W-2 stated compensation of [REDACTED]

Therefore, for the years 2002, 2003, 2004, 2005, 2006, 2007 and 2008, 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 2002, 2003, 2004, 2005, 2006 and 2007. Since the proffered wage is [REDACTED] 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 [REDACTED] [REDACTED] and [REDACTED] in 2002, 2003, 2004, 2005, 2006 and 2007, respectively. The petitioner must establish that it can pay the full proffered wage in 2008.

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<sup>2</sup> The petitioner's fiscal year runs from July 1 to June 30 of each year, and the beneficiary's IRS Forms W-2 cover the period from January 1 to December 31 of each year. Regardless of whether the petitioner is credited with paying the beneficiary's wages during the fiscal year or calendar year, the petitioner has not paid the beneficiary the full proffered wage during any relevant period. However, for this appeal, we will credit the petitioner with having paid the beneficiary the wages listed on his 2002 Form W-2 in the petitioner's 2002 fiscal year, the wages listed on his 2003 Form W-2 in the petitioner's 2003 fiscal year, the wages listed on his 2004 Form W-2 in the petitioner's 2004 fiscal year, the wages listed on his 2005 Form W-2 in the petitioner's 2005 fiscal year, the wages listed on his 2006 Form W-2 in the petitioner's 2006 fiscal year, and the wages listed on his 2007 Form W-2 in the petitioner's 2007 fiscal year.

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 (1<sup>st</sup> 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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 AAO noted the following in its NDI/RFE:

Further, please provide complete copies of your organization's federal income tax returns, annual reports or audited financial statements for tax years 2006, 2007 and 2008. In addition, you submitted your amended 2003 federal income tax return on appeal. Because you have amended your tax return in the middle of the proceedings, USCIS requires an IRS-certified copy to corroborate the assertion that the amended return was actually processed by the IRS.<sup>3</sup> Your amended return simply indicates that it was received by the IRS-the return is not a certified copy. Please submit an IRS-certified copy of your amended 2003 IRS Form 1120, U.S. Corporation Income Tax Return.

The petitioner failed to respond to the NDI/RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not established its ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2003<sup>4</sup> and 2007, and the full proffered wage in 2008.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2002, 2004, 2005 and 2006, as shown in the table below.

- In 2002, the Form 1120 stated net income of -\$ [REDACTED]
- In 2004, the Form 1120 stated net income of -\$ [REDACTED]
- In 2005, the Form 1120 stated net income of -\$ [REDACTED]
- In 2006, the Form 1120 stated net income of -\$ [REDACTED]

Therefore, for the years 2002, 2004, 2005 and 2006, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end

<sup>3</sup> A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

<sup>4</sup> As noted by the director, the petitioner's net income of -\$ [REDACTED] and its net current assets of [REDACTED] were not sufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2003.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist

current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2004, 2005 and 2006, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of [REDACTED]
- In 2004, the Form 1120 stated net current assets of [REDACTED]
- In 2005, the Form 1120 stated net current assets of [REDACTED]
- In 2006, the Form 1120 stated net current assets of [REDACTED]

Therefore, for the years 2002, 2004, 2005 and 2006, the petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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, except for 2002, 2004, 2005 and 2006.

As noted by the director, counsel's reliance on the balances in the petitioner's bank accounts 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.

In addition, the guaranty of a shareholder to pay the proffered wage cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the

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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.

governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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.

In the instant case, the petitioner was established in 1999 and is no longer an active business. The petitioner’s gross receipts decreased each year from 2002 to 2005. The petitioner claimed to employ only four employees on the petition. It has not established the occurrence of any uncharacteristic business expenditures or losses,<sup>6</sup> or its reputation within its industry. 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.

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

Further, beyond the decision of the director, we find that there is an issue related to the position’s minimum qualifications. An application or petition that fails to comply with the technical

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<sup>6</sup> The petitioner claimed in response to the director’s request for evidence that 2003 was an extremely difficult year and that the industrial sector was in a big downturn. However, 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 several Forms I-129, Petition for a Nonimmigrant Worker, in filings related to the beneficiary's nonimmigrant status, for what appears to be the same position.<sup>7</sup> The AAO noted the following in its NDI/RFE:

Further, on September 12, 2000, you filed a Petition for a Nonimmigrant Worker, Form I-129, for a laser mechanical engineer pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petition (WAC-00-262-55205) was approved by the director.<sup>8</sup>

In a letter of support provided in response to the director's request for evidence dated March 23, 2004, the petitioner provided the following job description for the position of laser mechanical engineer:

- 1) High stability and high precision laser mechanical components and subsystems design (40% of time): In the most case, a design project is given by the company's R&D group for certain product or product improvement. The Laser mechanical Engineer has to design the requirement of laser mechanical components and subsystem by using AutoCAD or SolidWorks computer software. All components and subsystem must be analyzed in terms of thermal and vibration stability before sending out to machine shop for making.
- 2) Implementation of the designed components and designed subsystems (40% of time). To implement and test the laser mechanical components and subsystems is an important procedure of laser engineering.
- 3) **Documentation (20%)**. Like all other design engineers, the Laser Mechanical Engineer should be able to document his/her designs and experimental results in a clear and good order.

Further, the letter of support specifically noted the following education requirements: "The position requires a BSME or equivalent and must be experienced with mechanical designs for laser/optical systems."

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<sup>7</sup> The petitioner stated in a letter dated September 26, 2008, that "the underlying position of the labor certification and I-140 petition and the position of the H1B petition for [the beneficiary] are one and the same."

<sup>8</sup> The petitioner filed three additional Form I-129 petitions to extend the H-1B status of the beneficiary. WAC-03-258-52911 was approved by the director on June 2, 2004, WAC-06-268-53989 was approved by the director on October 25, 2006, and WAC-08-098-50913 was approved by the director on April 25, 2008.

The pay rate offered for the laser mechanical engineer position on the most recent Form I-129 was listed as \$68,000 per year.<sup>9</sup>

The petitioner filed a labor certification on behalf of the same beneficiary for the position of optomechanical engineer. The ETA 750 was filed on September 16, 2002, and listed a pay rate of \$78,000 per year.

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

Design opto-mechanical parts for laser/optical systems and integrating the mechanical systems for our major OEM accounts; design and build complete mechanical components to meet engineering and manufacturing requirements.

The position description is similar to the position description for the H-1B position of laser mechanical engineer.<sup>10</sup> Since the ETA 750 position appears to be the same position as the I-129 H-1B position, this would be expected. However, we note that the ETA 750 listed the following education, training and experience requirements:

14.	Education	
	Grade School	yes
	High School	yes
	College	yes
	College Degree Required	BS or equivalent
	Major Field of Study	mechanical engineering
	Training	----
	Experience	
	Job Offered	3 years
	Related occupation	3 years
	Related occupation (specify)	opto-mechanical designs for laser/optical systems*

<sup>9</sup> The beneficiary's IRS Forms W-2 issued by the petitioner indicate that he was paid \$ [REDACTED] and [REDACTED] in 2002, 2003, 2004, 2005 and 2006, respectively.

<sup>10</sup> On Form ETA 750B, the beneficiary described his H-1B position of "optomechanical engineer" as:

Design opto-mechanical parts of the company's high power 532mm green laser and high power 355mm UV laser by using [REDACTED] software tool package. Design opto-mechanical parts for laser/optical systems and integrating the mechanical systems for our major OEM accounts; design and build complete mechanical components to meet engineering and manufacturing requirements.

\*B.S. in mechanical engineering with 3 years experience, or associates degree in mechanical engineering with 5 years experience in opto-mechanical designs.

Item 15 states: must be familiar with AutoCAD computer design tool.

Under these requirements, there exists a discrepancy between the baccalaureate degree requirement in the H-1B petition, and the alternative requirement for the position in the instant petition of an associate's degree in mechanical engineering with five years experience in opto-mechanical designs, which calls into doubt the veracity of the position requirements and the bona fides of the position.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

You filed the Form ETA 750, Application for Alien Employment Certification, which supports the instant Form I-140 petition. As an alternative requirement to a bachelor's degree in mechanical engineering with three years experience, you will accept an applicant with an associates degree in mechanical engineering with five years experience in opto-mechanical designs. Your previous Form I-129 filing for the same position indicated that the position required the minimum of a baccalaureate degree. The duties listed for the Form I-140 and Form I-129 positions are nearly identical. Further, the rate of pay for the ETA 750 position, which allows for less than a bachelor's degree, is higher than the position petitioned for on Form I-129 with an education requirement of a bachelor's degree. Please explain the positions' differing educational requirements. If appropriate, please provide any evidence that would distinguish these positions from one another. Please explain the discrepancy in the prevailing wage offered for the same position in light of the differing educational requirements.

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 two 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 petition. 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.

The petitioner failed to respond to the NDI/RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). We therefore make a finding of fraud.<sup>11</sup> This finding of fraud shall be considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation regarding the minimum requirements for the proffered position. The beneficiary's underlying H-1B status may also be revoked.<sup>12</sup>

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<sup>11</sup> *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

<sup>12</sup> 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. The regulation related to the H-1B nonimmigrant category at 8 C.F.R. § 214.2(h)(4)(ii) provides 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(H)(4)(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;
- (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;

Finally, beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The AAO noted the following in its NDI/RFE:

An issue in this case is whether your organization has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as you have set forth in your Form ETA 750, Application for Alien Employment Certification, that is, whether the beneficiary has a bachelor of science degree in mechanical engineering with three years of experience in the proffered job or three years of experience in opto-mechanical designs for laser/optical systems, or alternatively, whether the beneficiary has an associates degree in mechanical engineering with five years experience in opto-mechanical designs.

At the outset, we emphasize that federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

On the Form ETA 750B, the alien represents that he obtained a certificate of graduation in mechanical engineering after completing three years of education at Beijing Science and Technology University from September 1973 to July 1976. The record contains the beneficiary's Certificate of Graduation indicating that he graduated from the Beijing Science and Technology University in July 1976 with a

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- (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(H)(4)(iii)(C).

major in metallurgical mechanics. Please provide the beneficiary's transcripts from the Beijing Science and Technology University.

The record also contains an evaluation dated October 6, 2000, from [REDACTED] [REDACTED] which states that the beneficiary's education at the Beijing Science and Technology University is equivalent to three years of university level credit in metallurgy from an accredited college or university in the United States. The evaluation further states that the beneficiary's education at the Beijing Science and Technology University, combined with his 24 years of work experience, is the equivalent of a bachelor's degree in mechanical engineering technologies from an accredited college or university in the United States.

If your organization is attempting to qualify the beneficiary under the first alternative requirement of a bachelor of science degree in mechanical engineering with three years of experience in the proffered job or three years of experience in opto-mechanical designs for laser/optical systems, your organization did not specify on the Form ETA 750 that that minimum academic requirement might be met through a combination of a lesser degree and a quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of a degree that is individually less than a four-year U.S. bachelor's degree or its foreign equivalent and a quantifiable amount of work experience when it oversaw the petitioner's labor market test.<sup>13</sup>

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<sup>13</sup> The U.S. Department of Labor (DOL) has provided the following field guidance: when the Form ETA 750 indicates, for example, that a "bachelor's degree in computer science" is required, and the beneficiary has a four-year bachelor's degree in computer science from the University of Florence, "there is no requirement that the employer include 'or equivalent' after the degree requirement" on the Form ETA 750 or in its advertisement and recruitment efforts. *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Further, where the Form ETA 750 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent", "we understand [equivalent] to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). Where the Form ETA 750 indicates, for example, that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative [to the degree] in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). State Employment Security Agencies (SESAs) should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From

If your organization is attempting to qualify the beneficiary under the second alternative requirement of an associate's degree in mechanical engineering with five years experience in opto-mechanical designs, your organization has not established that the beneficiary's education at the Beijing Science and Technology University is equivalent to an associate's degree.

On Form ETA 750, Part A, Item 21, DOL requested information that describes "efforts to recruit U.S. workers and the results," "specify[ing] sources of the recruitment by name." This item requests recruitment information in order to allow DOL to determine whether your organization put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii)<sup>14</sup> or 20 C.F.R. §§ 656.21(j)(1)(i)-(iv),<sup>15</sup> depending on

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██████████ Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to ██████████ (March 9, 1993). Finally, DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

<sup>14</sup> The regulation at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) states the following (for the reduction in recruitment process permitting the employer to advertise and recruit without the supervision of DOL):

If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:

- (i) This documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:
  - (A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade or technical schools; labor unions; and/or development or promotion from within the employer's organization;
  - (B) Identify each recruitment source by name;
  - (C) Give the number of U.S. workers responding to the employer's recruitment;
  - (D) Give the number of interviews conducted with U.S. workers;
  - (E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and
  - (F) Specify the wages and working conditions offered to the U.S. workers; and

whether or not the Form ETA 750 was submitted under a supervised or unsupervised advertising or recruitment process.<sup>16</sup>

The AAO requests that your organization provide probative evidence that it provided, *at the time it submitted to the Department of Labor DOL its ETA Form ETA 750 application and attachments*, the requisite “signed, detailed written report” of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. § 656.21(b) or (j).<sup>17</sup> Specifically, this office requests a complete copy of the Form ETA 750 as certified by the DOL including any

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(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

<sup>15</sup> The regulation at 20 C.F.R. § 656.21(j)(1) states the following (for a traditional submission of a Form ETA 750 and directed recruitment by the local state workforce agency):

The employer shall provide to the local office a written report of the results of all the employer’s post-application recruitment efforts during the 30-day recruitment period; except that for job opportunities advertised in professional and trade, or ethnic publications, the written report shall be provided no less than 30 calendar days from the date of the publication of the employer’s advertisement. The report of recruitment results shall:

- (i) Identify each recruitment source by name;
- (ii) State the number of U.S. workers responding to the employer’s recruitment;
- (iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and
- (iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

<sup>16</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

<sup>17</sup> Under DOL’s regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). Your submission of the evidence requested therefore may help demonstrate that your organization did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.

documentation that both reflects and summarizes your organization's recruitment efforts.<sup>18</sup> USCIS must be in receipt of the complete Form ETA 750 as certified by the DOL, including any attachments which the DOL incorporated into that form, before the petition may be approved. *See* section 203(b)(3)(C) of the Act; *see also* 8 C.F.R. § 204.5(a)(2)(which mandates that the Form I-140 be accompanied by the individual labor certification *as certified by the DOL*)(emphasis added). We also ask that you please provide a copy of all supporting documents summarizing your organization's recruitment efforts, as previously presented to DOL.

The petitioner failed to respond to the NDI/RFE. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.<sup>19</sup> 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 misled DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

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<sup>18</sup> For example, advertisements, posting notices, results of recruitment report, correspondence to DOL, etc.

<sup>19</sup> 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.