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



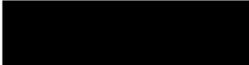
U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: MAR 09 2011

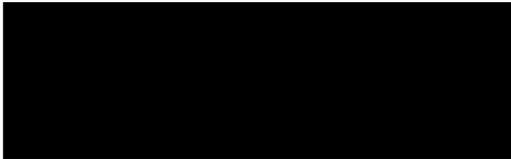
IN RE: Petitioner:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

cc: IGNACIO SAUCEDO-SAUCEDO
13651 MONTEVISTA AVE.
CHINO, CA 91710

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The visa petition is now before the Administrative Appeals Office (AAO) on appeal. On August 2, 2010, this office provided the petitioner with a notice of derogatory information and notice of intent to dismiss (NDI/NOID) 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 misrepresentation. The AAO will also enter a separate administrative finding of willful misrepresentation against the beneficiary and will invalidate the alien employment certification, Form ETA 750.

The petitioner is a cleaning products manufacturing company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic 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 conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In the August 2, 2010 NDI/NOID, the AAO specifically informed the petitioner of its reasons for finding the experience letter fraudulent and allowed the petitioner 45 days in which to provide verifiable evidence of the beneficiary's experience prior to the priority date of December 13, 1999. More than 45 days have passed and the petitioner has failed to respond to this office's request for proof of the beneficiary's experience. Thus, the appeal will be dismissed as abandoned.

As set forth in the director's April 10, 2008 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 from the priority date in 1999 to the present.

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 December 13, 1999. The proffered wage as stated on the Form ETA 750 is \$16.22 per hour or \$33,737.60 per year.

The evidence in the record of proceeding does not show how the petitioner is structured. On the petition, the petitioner claimed to have been established in 1999, and to currently employ 134 workers. The AAO is unable to determine the petitioner's fiscal year as no tax returns were submitted to the record. On the Form ETA 750B, signed by the beneficiary on November 30, 1999, the beneficiary claimed to have worked for the petitioner from May 1993 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 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, Wage and Tax Statements, for 1999 through 2005 show compensation received from the petitioner, as shown in the table below.

- In 1999, the Form W-2 stated compensation of \$22,703.57.
- In 2000, the Form W-2 stated compensation of \$21,820.64.
- In 2001, the Form W-2 stated compensation of \$25,462.73.
- In 2003, the Form W-2 stated compensation of \$24,947.63.
- In 2004, the Form W-2 stated compensation of \$26,539.70.

- In 2005, the Form W-2 stated compensation of \$26,129.97.¹

Therefore, for the years 1999 through 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 1999 through 2005. Since the proffered wage is \$33,737.60 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 \$11,034.03, \$11,916.96, \$8,274.87, \$9,399.01, \$8,789.97, \$7,197.90, and \$7,607.63 in 1999 through 2005, respectively. In 2006, the petitioner must establish that it can pay the difference of \$26,489.21 between the wages paid to the beneficiary of \$7,248.39 (based on the payroll records) and the proffered wage of \$33,737.60, and must establish that it can pay the entire proffered wage of \$33,737.60 in 2007 and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

¹ The AAO notes that the petitioner has submitted pay records for the beneficiary through April 5, 2006 that show that the beneficiary was compensated \$7,248.39 from January 2006 through April 5, 2006.

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 118. “[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).

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. Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) line 17e* (2004-2005) line 18* (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 27, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

As the petitioner failed to submit copies of its federal income tax returns, the AAO is unable to determine whether the petitioner is structured as a “C” corporation or an “S” corporation, and is unable to determine the petitioner’s net income for the pertinent years (1999 to the present).

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.² A corporation’s year-end 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

²According 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.

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. However, as the petitioner failed to submit copies of its federal income tax returns, the AAO is unable to determine its net current assets, and the petitioner has not established its continuing ability to pay the proffered wage from the priority date of December 13, 1999.

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.

On appeal, counsel claims that the director rejected the petitioner's statement from its CFO stating that it employs over 130 employees. Counsel further claims that the director is "not given unbridled discretion as to whether to consider this information." Counsel states that "the permissive portion of this section refers to whether or not the employer may be requested to provide other information."

The AAO does not agree with counsel. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director **may** accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The regulation specifically states what forms the evidence of ability to pay must take. In addition, it only states that if a prospective employer employs 100 or more workers, then the director may accept a statement from a financial officer of the organization. The regulation, in no way, requires the director to accept a statement from a financial officer. Further, USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In his NOID, dated December 4, 2007, the director specifically requested:

Therefore, please submit a copy of the petitioner's annual report, U.S. tax return (including Schedule L), or a third-part audited financial statement for years 1999, 2000, 2001, 2001, 2003, 2004, 2005, and 2006.

Please submit a copy of all Forms W-2 (wage-earning statement) which the petitioner has issued to the beneficiary for 2006. If he/she was paid less than the certified wage for any of the years that the labor certification has been

pending please submit documentary evidence to establish that the petitioner had the ability to pay the difference.

Also, please submit a copy of the beneficiary's three (3) most recent pay vouchers. The voucher that you provide must identify both the beneficiary and his/her employer by name, and specify the beneficiary's gross/net pay; income received year-to-date, income tax deductions withheld, and the length of the pay period.³

The petitioner had previously submitted copies of Forms W-2 issued on behalf of the beneficiary, but failed to submit the additional requested evidence. The director denied the visa petition on April 10, 2008.

Even though specifically requested, the petitioner has continuously failed to provide the required documentation either in response to the director's NOID or on appeal. The petitioner's failure to submit these documents cannot be excused. 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 continuing ability to pay the proffered wage from the priority date of December 13, 1999.

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.

³ The director noted that the California Service Center made the same request of the petitioner in 2003, and subsequently denied the petition because of the petitioner's failure to submit the required documentation.

In the instant case, the petitioner was established in 1999. The record of proceeding does not contain enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth.⁴ There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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 letter submitted to document the beneficiary's experience. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The AAO noted the following in its NDI/NOID:

On the ETA Form 750B, the beneficiary listed his employment experience as having been employed by the petitioner from May 1993 to the present (November 30, 1999, when the ETA Form 750B was signed by the beneficiary) as a maintenance mechanic. The beneficiary further listed his employment experience as having been employed by IRESA, Calzada Del Obrero N° 1837-A, Guadalajara, Jalisco, Mexico, 10821, from April 1984 to June 1986 as a maintenance mechanic.

On December 4, 2007, the director issued a notice of intent to deny (NOID) informing the petitioner that the experience letter submitted from IRESA had been determined to be fraudulent by the Service and that the petitioner was obligated to submit evidence that the beneficiary had obtained the two years of experience required by the certified labor certification as a maintenance mechanic before the priority date was established (December 13, 1999).

⁴ The petitioner has submitted a copy of a catalog of products with order policy and copies of the California Business Portal at [REDACTED] (accessed on May 27, 2008) and the Mississippi Secretary of State Business Services at the website <https://secure.sos.state.ms.us/busserv/corp/> [REDACTED] (accessed on May 27, 2008) that shows that the petitioner is incorporated in both the states of California and Mississippi.

In response, the petitioner submitted a letter, dated December 24, 2007, from [REDACTED] from May 1987 to December 1989.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides that:

(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.

In the instant case, the letter, dated December 24, 2007, submitted by [REDACTED] as evidence of the beneficiary's experience states:

The undersigned hereby verifies that [the beneficiary] worked for me from May of 1987 to December 1989, working 40 hours per week as an automotive mechanic.

His duties working for me were as follows:

[The beneficiary] dismantled and re-mounted vehicle tires to repair them and/or replace them. He assisted in providing maintenance on vehicles related to tire rotations, brake service, battery changes, oil/filter changes, windshield wiper replacement, carburetor and sparkplug service. He assisted in providing service and general maintenance to tools and equipment. He helped with the sweeping and cleaning of the work area.

This experience letter does not meet the requirements of 8 C.F.R. § 204.5(1)(3) as the duties do not show how they relate to or are the same as the duties required by the petitioner,⁶ and the letter does not list the title of the author of

⁵ The AAO notes that the beneficiary did not list this company as a prior employer either on the ETA Form 750B or on a prior filed Form G325A, Biographic Information, dated October 22, 2002. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

⁶ The job duties listed on the ETA Form 750A are:

the letter.⁷ Therefore, the letter is insufficient to demonstrate that the beneficiary has two years of full-time experience in the position offered, and the petitioner has failed to adequately document that the beneficiary has the required experience to meet the terms of the certified labor certification.

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

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.

* * *

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.

In view of the inconsistencies in the record,⁸ the AAO conducted its own investigation. The results show that a prior Form I-140, Immigrant Petition for Alien Worker, [REDACTED] was denied as the petitioner did not establish its continuing ability to pay the proffered wage. A second Form I-140 [REDACTED], was originally approved by the Service on March 2, 2006. However, in conjunction with the adjudication of Form I-485, Application to Register Permanent Residence or Adjust Status, U.S. Citizenship and Immigration Services (USCIS) requested an in-person interview with the beneficiary at which time the beneficiary indicated that his employment with [REDACTED] related to only cleaning the shop and did not include the claimed repair work. Based upon this admission, the interviewing officer recommended that USCIS revoke the approval of the I-140, and on November 15, 2006, USCIS moved to revoke the said approval by notifying the petitioner of its intent. The petitioner was afforded thirty days to refute the

Inspect, repair and maintain functional parts of mechanical equipment and machinery, such as engines, motors, pumps and compressors. Inspect defective equipment and diagnose malfunctions, using motor analyzers, pressure gauges, chassis charts, and factory manuals. Disassemble and overhaul internal combustion engines, pumps, pump power units, generators, front and rear ends, tighten bolts and screws, and reassemble equipment using hand tools and hoist. Operate equipment to test its functioning, check batteries, change oil, lubricate equipment and machinery.

⁷ While the author's last name is the same as the company's name, the AAO will not assume the author is the owner of the entity.

⁸ Additional inconsistencies will be explained subsequently in the notice of derogatory information/notice of intent to dismiss.

derogatory information, but it failed to do so. USCIS revoked the approval of the I-140 on July 23, 2007.

The current Form I-140 was received by USCIS on September 4, 2007 and contained a copy of the previously certified ETA Form 750 and a copy of the previously identified fraudulent employment letter from [REDACTED]. On December 4, 2007, the director issued a NOID informing the petitioner that it had not established its continuing ability to pay the proffered wage and that the evidence in the record did not establish that the beneficiary met the two-year experience requirement of the certified labor certification.

In response, the petitioner submitted an employment verification letter, dated December 24, 2007, from [REDACTED] stating that the beneficiary was employed by it from May 1987 to December 1989. This employment had not been previously listed with any of the Forms I-140 or with any supporting documentation. The AAO also notes that the new letter from [REDACTED] appears to be fraudulent in that it is written on the same stock of paper as the previously submitted fraudulent letter from [REDACTED], and the letter contains the same closing sentence as the previous letter from [REDACTED]: "Therefore, I have no problem in giving him this recommendation for all the legal purposes convenient to him." It appears that the letter from [REDACTED] was authored by the same individual that authored the letter from [REDACTED].

The AAO does not agree with the director's acceptance of the employment letter from [REDACTED] as evidence that the beneficiary meets the two year experience requirement of the certified labor certification. In addition to the previously-mentioned similarities with the employment letter with [REDACTED] the duties described in the [REDACTED] letter are those for an auto mechanic, not a maintenance mechanic and not those duties listed on the ETA Form 750.

On March 11, 2010, in an attempt to verify the beneficiary's employment with [REDACTED], this office contacted [REDACTED] who confirmed the beneficiary's employment with [REDACTED] from 1987 through 1989. However, the website maintained by the California Secretary of State, <http://kepler.sos.ca.gov>, [REDACTED] (accessed on July 26, 2007), shows that [REDACTED] did not come into service until April 21, 2003, fourteen years after the beneficiary's purported employment with the company. Again, see *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The investigation conducted by the AAO further found that while the petitioner claims that it has employed the beneficiary in the position of maintenance mechanic since May 1993, the beneficiary's marriage license

lists the beneficiary's employment as forkleaf (presumed to be forklift) driver. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Another issue revealed during the AAO's investigation is that the beneficiary has been paid by the petitioner under two listed Social Security Numbers (SSN). Wage and Tax Statements (Forms W-2) for years 1999, 2000, and 2002 through 2005 report the beneficiary's SSN as [REDACTED]. Public databases report this SSN to be non-existent. In filing Form 1040, Individual Income Tax Return, for the corresponding years, the beneficiary filed using Tax Identification Number [REDACTED]. The beneficiary's 2006 Form W-2 reported earnings using SSN [REDACTED].⁹ Public databases confirm this SSN was issued in California between August 2006 and November 2006.

Misuse of another individual's social security number is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on an individual's Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Social Security Act made it a felony to *willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(8) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on February 7, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Identity Theft and Assumption Deterrence Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of*

⁹ The Form I-140 also listed this SSN for the beneficiary.

identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.

Violations of the Identity Theft and Assumption Deterrence Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C.A. § 1324a(a)(2). Employers who violate the Immigration Reform and Control Act of 1986 (IRCA) are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). Therefore, in the present case, with the filing of a Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary may be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

[Misrepresentation] 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.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of December 13, 1999 (the priority date) is material in this case, and USCIS could not have approved the petition, or sustained the appeal, before it determined that the petition in this case is free of fraud or material misrepresentation about the beneficiary's qualification for the job offered in the labor certification.

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 by willfully misrepresenting a 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.¹⁰

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, or after the petition is automatically revoked, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having "sought to procure" an immigrant visa by fraud or willful misrepresentation of a material fact. See section 212(a)(6)(C) of the Act.

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

¹⁰ 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 an opportunity to respond to the same.

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

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that much of the petitioner's documentation with respect to the beneficiary's qualifications has been falsified, a finding that neither the petitioner nor the beneficiary challenges in that neither responded materially to the AAO's August 2, 2010 NDI/NOID.

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 two years of experience for the position offered. Submitting false documents 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.

In this case, the beneficiary certified, upon signing the Form ETA 750, part B, with the DOL that he qualified for the position stated on the labor certification application through his employment with [REDACTED]. On the certified Form ETA 750B, the beneficiary claimed to have been employed by [REDACTED] as a maintenance mechanic from April 1984 to June 1986. The documents submitted

to support that the beneficiary qualified for the proffered position are the letter from [REDACTED] Company and a letter from [REDACTED].¹¹

As noted earlier, the AAO, before issuing this decision, specifically informed the petitioner that the letter from [REDACTED] was found to be fraudulent and that the AAO would not accept the beneficiary's letter from [REDACTED] as the duties described in the [REDACTED] letter are those for an auto mechanic, not a maintenance mechanic. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The AAO further informed the petitioner that the letter from [REDACTED] appears to be fraudulent in that it is written on the same stock of paper as the previously submitted fraudulent letter from [REDACTED] and the letter contains the same closing sentence as the previous letter from [REDACTED]. The petitioner failed to respond or to submit any evidence that would refute the AAO's claims or to clarify the beneficiary's work experience. Such evidence is material because, if it were provided, it would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The petitioner's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14).

Additionally, 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)).

Based on the noted inconsistencies and the petitioner's and beneficiary's failure to respond, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from 1984 through 1989.

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

¹¹ Again, the AAO notes that the beneficiary did not list this company as a prior employer either on the ETA Form 750B or on a prior filed Form G325A, Biographic Information, dated October 22, 2002.

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 forged or falsified work experience documents shuts off a line of relevant inquiry in these proceedings. Before the DOL, 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, the DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. See *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. See *Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. See *Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

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

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

As there is no response to the AAO's NDI/NOID, neither the petitioner nor the beneficiary dispute that the work experience documents submitted in support of the labor certification were fraudulent and the beneficiary's work history was misrepresented. The beneficiary does not offer any testimony or documentation to dispute that the documents submitted to USCIS were false, that the beneficiary's work history was misrepresented, and that he does have the required work experience.

Further, the AAO notes that the beneficiary's use of social security numbers that do not belong to him constitutes a material misrepresentation to a government official, specifically an officer of the Internal Revenue Service.¹² See *Matter of Y - G*, 20 I&N Dec. 794, 797 (BIA 1994). By filing a Form W-2 with the Internal Revenue Service using social security numbers that were not his, allowed the beneficiary to obtain a benefit under the Immigration and Nationality Act,

¹² The AAO notes that the beneficiary used the social security number [REDACTED] in 2007 when applying for an employment authorization card.

namely, employment. As the beneficiary obtained employment through a misrepresentation (providing a false social security number), which he would not have obtained on the true facts (that he was not authorized to work), the petitioner is able to partially show an ability to pay the beneficiary (through paying the beneficiary a wage based on a false social security number), which is a material element of an I-140 petition and a condition precedent for the approval of an I-485. Thus, the beneficiary sought to obtain an immigration benefit (an approved immigrant visa petition and adjustment of status) through his employment, a benefit that he would not obtain if his fraud (employment based on the social security number) had been known or revealed at the time to legacy INS or ICE, which would have issued a Notice of Suspect Document to the employer regarding the beneficiary's use of a false social security number, and would have required the petitioner to cease employment of the beneficiary. *See Matter of S - & B- C -*, 9 I&N Dec. 436, 447 (A.G. 1961).

As noted above, it is proper for the AAO to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to the petitioner to allow the petitioner or beneficiary an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, neither submitted a response.

By signing the Form ETA 750, and submitting forged or fraudulent work experience letters and misrepresenting his work experience, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the beneficiary has failed to provide independent and objective evidence to overcome our finding that he submitted falsified documents and misrepresented his work experience, we affirm our material misrepresentation finding. In addition, the AAO finds that the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation by the use of social security numbers that do not belong to him. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

The petitioner failed to respond to the NDI/NOID. 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 misrepresentation.¹³ This finding of misrepresentation 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 beneficiary's fraudulent misrepresentation regarding his experience for the proffered position.

¹³ *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.

ORDER: The appeal is dismissed with a finding of willful misrepresentation of a material fact against the beneficiary.

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

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number [REDACTED] filed by the petitioner is invalidated.