

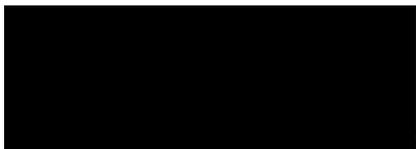
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B 6

DATE: Office: TEXAS SERVICE CENTER

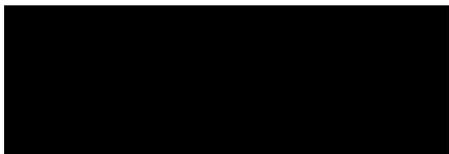
FILE: 

MAY 04 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

[REDACTED]

Page 2

cc:

[REDACTED]

DISCUSSION: The petitioner filed an immigrant petition for alien worker, Form I-140, on July 12, 2002. The employment-based immigrant visa petition was initially approved by the Vermont Service Center director on March 19, 2003. The director of the Texas Service Center, however, revoked the approval of the immigrant petition on June 2, 2009, and the petitioner subsequently appealed the director's decision. On December 10, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to both the petitioner and the beneficiary. The petitioner timely responded. The appeal will be dismissed. 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 an individual doing business as a drywall installation business. The business seeks to employ the beneficiary permanently in the United States as a drywall installer pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. The director revoked the approval of the visa petition based on the petitioner's noncompliance with the United States Department of Labor (DOL) procedures in obtaining the approval of the labor certification.

On appeal, counsel for the petitioner contends that the director's decision to revoke the previously approved petition was erroneous, because it was not based on good and sufficient cause, as required by 8 U.S.C. § 1155.² The record shows that the appeal is timely and makes a specific allegation of error in law or fact.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal to the AAO, counsel for the petitioner asserts that the director improperly revoked the petition. The revocation, according to counsel, was solely based upon an alleged failure to follow recruitment requirements and was not supported by any tangible evidence in the record. Further, counsel states that the fact that the DOL approved the labor certification shows that the petitioner and the beneficiary conformed to and met all of the DOL's requirements. Counsel also indicates that the director's notice of intent to revoke (NOIR) contained vague information relating to the petitioner in the instant case. Specifically, counsel states that the director's NOIR did not provide a clear explanation of the grounds for the proposed revocation and did not request the petitioner to produce specific evidence to overcome the grounds of revocation. The director's decision to

¹ 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.

² Title 8 of the U.S. Code section 1155, Section 205 of the Immigration and Nationality Act (the Act), states, "The Secretary of Homeland Security may revoke the approval of the petition for what he deems to be good and sufficient cause."

revoke the previously approved petition, according to counsel, was not based on good and sufficient cause and was not in accordance with 8 U.S.C. § 1155.

The record shows that on March 31, 2009, the director issued a NOIR, informing the petitioner of the existence of fraudulent information in numerous other immigrant visa petitions filed by the petitioner's prior counsel of record, [REDACTED]. Because of these other petitions and because [REDACTED] also filed the petition in the instant case, the director was legitimately concerned about the *bona fides* of the employment verification letter submitted to establish the beneficiary's work experience as a drywall applicator, and the validity of the labor certification process. The AAO finds that the director had good and sufficient cause to initiate revocation proceedings. The director had legitimate concerns about the authenticity of the information in the current record of proceeding relating to the beneficiary's experience as a drywall applicator and about the petitioner's compliance with recruitment procedures. The director clearly requested information needed to render a final decision on the revocation, and gave the petitioner adequate notice of the deficiencies in order to prepare a meaningful response.³

Counsel for the petitioner responded to the NOIR, opposing the proposed revocation. In response to the director's NOIR, the petitioner submitted a letter and an affidavit. In its letter, the petitioner indicated that it intended to continue the employment of the beneficiary. In the affidavit, the petitioner described its recruitment efforts and affirmed the beneficiary's prior work experience in Brazil. Submitted along with the letter and affidavit are copies of the advertisement in the *Cape Cod Times* and a letter from [REDACTED] attesting to the beneficiary's employment as a plasterer in Brazil from December 5, 1992 to September 15, 1995.

Upon receiving the response from the petitioner's counsel and additional evidence from the petitioner, the director revoked the approval of the petition, finding that the petitioner failed to establish that it complied with the labor certification requirements. The director did not make a finding about the beneficiary's qualifications.⁴

Upon review, the AAO found that the immigrant petition may not be approved, as issues relating to the beneficiary's credibility and questions concerning his past work experience in Brazil are not yet resolved. In adjudicating the appeal, the AAO found several inconsistencies in the record pertaining to the beneficiary's past work experience as a drywall applicator or a plasterer in Brazil. On December 10, 2010, the AAO outlined these inconsistencies in the record and advised both the petitioner and the beneficiary to respond. The AAO sent both the petitioner and the beneficiary an NDI/RFE in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the NDI/RFE, the AAO specifically indicated that the beneficiary claimed he worked as a

³ The director requested that the petitioner submit, within 33 days, credible evidence to show that the petitioning organization attempted to recruit U.S. employees as claimed in the labor certification application; and clear and concise evidence demonstrating that the beneficiary had the required experience before the priority date.

⁴ The director left open the issue involving the beneficiary's work experience in Brazil.

drywall applicator at a place called [REDACTED] from January 1989 to June 1991 on the Form ETA 750, part B. However, the record contains no letter of employment from [REDACTED]. Submitted along with the Form I-140 petition was a letter dated June 10, 2002 from a company called [REDACTED] which stated that the beneficiary worked as a “drywall applicator (stonemason)” from December 5, 1992 to September 15, 1995.

In his March 31, 2009 NOIR, the director advised the petitioner to produce additional evidence to confirm that the beneficiary had the requisite two years’ work experience in the job offered prior to April 30, 2001. In response to the director’s NOIR, the petitioner, among other things, produced a letter dated April 13, 2009 from [REDACTED] which states that the beneficiary worked for [REDACTED] as a “plaster (mason)” from December 5, 1992 to September 15, 1995.

Before issuing this decision, the AAO sent both the petitioner and the beneficiary an NDI/RFE, notifying both of them of several inconsistencies in the record concerning the beneficiary’s work experience prior to the filing date of the labor certification. On January 10, 2011, the AAO received a response from counsel and additional evidence pertaining to the beneficiary’s work experience in Brazil. In his response, counsel contends that the AAO must first rule on the issue of whether the director has properly revoked the approval of the visa petition before it can proceed to reexamine or re-adjudicate the validity of the immigrant visa petition.

In the NDI/RFE, the AAO specifically advised the petitioner and the beneficiary to explain why the beneficiary did not list any of his employment in Brazil on his Biographic Information, Form G-325. On that particular form, the beneficiary also did not appear to have lived in the city where he claimed he worked as a drywall applicator or a plasterer from 1989 to 1995.⁵ The AAO also noted that the beneficiary failed to list his employment with [REDACTED] on the Form ETA 750B. The AAO requested the petitioner and the beneficiary to produce additional evidence to show where the beneficiary worked and lived between 1989 and 1995. Such evidence has not been submitted. Neither has any explanation been provided as to why such evidence cannot be submitted.

In response to the AAO’s NDI/RFE, counsel, as a preliminary matter, expresses his objection for the re-adjudication or reexamination of the entire visa petition and labor certification application by the AAO. He states:

The reexamination of the entire visa application, without first ruling on the validity of the NOIR puts the cart before the horse. The AAO must first rule on the issue of whether the [the director’s] NOIR was properly issued before it can proceed to a reexamination of the validity of the visa.

⁵ Both [REDACTED] and [REDACTED], where the beneficiary claimed to have worked from 1989 to 1995, are located in Vila Velha, ES, Brazil. The beneficiary, however, claimed on the Form G-325 that he lived in Vila Velha, ES, Brazil, only from 1996 to December 1997.

Citing *In re Estime*, 19 I&N Dec. 450 (BIA 1987) and *In re Arias*, 19 I&N Dec. 568, 570 (BIA 1988), counsel maintains that the law is clear that where a NOIR is improperly issued, the revocation is improper and must be reversed.

As noted above, the director had good and sufficient cause to institute revocation proceedings given the likelihood of fraud in the instant matter, and properly issued the NOIR, specifically requesting evidence of the beneficiary's qualifications and the petitioner's compliance with the DOL requirements during the labor certification process. The AAO has *de novo* authority to review the matter properly forwarded by the director. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Therefore, it is appropriate for the AAO to reexamine the validity of the visa petition and the labor certification at this stage of the proceeding, including the beneficiary's qualifications for the position.⁶

In response to the AAO's NDI/RFE, counsel also indicates that the beneficiary's failure to include his last employment abroad on his Form G-325 and the Form ETA 750B was a mere oversight.

Counsel states that the AAO acted arbitrarily and capriciously in rejecting the letters from [REDACTED] as proof of the beneficiary's employment in Brazil. The beneficiary's employment with [REDACTED] was already disclosed prior to the Form I-140 petition approval, according to counsel. Counsel also claims that the AAO has made no finding about the credibility of the witness.

Counsel, however, fails to address the fact that the beneficiary stated on his Form G-325 that he lived in Vila Velha, ES, from 1996 to December 1997. He gives no explanation of the inconsistency between this period and the dates of the beneficiary's claimed employment in Vila Velha from 1991 to 1995. Counsel also fails to provide a reasonable explanation for the beneficiary to have neglected to list a relevant employment on the Form ETA 750B, other than oversight. Given the inconsistencies in the record about the work and residence of the beneficiary in Brazil from 1991 to 1995, the petitioner and the beneficiary were requested to provide objective independent evidence resolving the inconsistencies. Neither the petitioner nor the beneficiary submitted objective independent evidence in response to the AAO's NDI/RFE. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In the NDI/RFE, the AAO specifically warned both the petitioner and the beneficiary:

⁶ The DOL's certification of the Form ETA 750 does not supersede USCIS' review and evaluation of the petitioner's eligibility for the benefit, including a determination of whether or not the beneficiary is qualified for the proffered position, under section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

Unless you can resolve the problems as noted above, the AAO intends to dismiss the appeal and may find fraud or willful misrepresentation against you. The AAO may also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).⁷

...

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).

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 30, 2001 (the priority date) is material in this case, as the petition cannot be approved without a determination that the beneficiary qualified for the job offered in the labor certification. As the beneficiary is not qualified, the approval of the petition must be revoked.

The material issue remaining in this case is whether the beneficiary has willfully misrepresented his qualifications to obtain an immigration benefit.

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

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the

⁷ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

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. at 591-592.

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.⁸

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:

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

⁸ 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.

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.

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 petitioner on part A of the Form ETA 750 set forth the minimum education, training, and experience that an applicant must have for the position as a drywall applicator; it indicated on item number 14 that the applicant must have, at least, two years of experience in the job offered to qualify for the position. To show that he qualified for the proffered position, the beneficiary claimed on part B of the Form ETA 750 that he worked as a full-time drywall applicator in Brazil at [REDACTED] from January 1989 to June 1991. 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. The labor certification application was approved by the DOL on May 22, 2002.

As noted earlier, the AAO found several inconsistencies in the record regarding where the beneficiary worked and lived between 1989 and 1995. Before issuing this decision, the AAO specifically requested the petitioner and the beneficiary to provide independent objective evidence to resolve the inconsistencies in the record. The petitioner did not submit any independent objective evidence. The record contains no independent objective evidence such as

payroll records, accounting records, pay vouchers, or a copy of a government issued identification document to demonstrate where the beneficiary lived and worked between 1989 and 1995 and whether he worked as a drywall applicator or a plasterer from 1992 to 1995. Such evidence is material because, if it were provided, would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The beneficiary'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).

Based on the noted inconsistencies and the beneficiary's failure to submit independent objective evidence, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from 1989 to 1995.

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)(3)(ii)(B). The beneficiary did not establish the necessary qualifications in this case, as he does not possess two years' work experience. 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.

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-*.

As noted above, it is proper for the AAO to make a finding of fraud or willful misrepresentation pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. The AAO specifically issued the notice to the beneficiary to afford him an opportunity to respond or submit independent objective evidence to overcome the alleged misrepresentation. As noted, no such evidence has been submitted.

By signing the Form ETA 750 and submitting forged or fraudulent work experience documents, 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, fully and persuasively, our finding that he submitted falsified documents, we affirm our material misrepresentation finding. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

Beyond the decision of the director, the AAO finds that the petitioner has not established that it has the ability to pay the proffered wage beginning from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted above, the petitioner filed the labor certification application (Form ETA 750) for the beneficiary with the DOL on April 30, 2001. The rate of pay or the proffered wage set forth by the DOL is \$16.22 per hour or \$29,520.40 per year (based on a 35-hour work per week).⁹

⁹ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours

In response to the AAO's NDI/RFE, the petitioner submits copies of the following evidence to demonstrate that it has the ability to pay \$16.22 per hour or \$29,520.40 per year beginning on April 30, 2001:

- The beneficiary's Forms 1099-MISC for 2001-2009; and
- [REDACTED] individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for 2001 and 2002.

The tax returns submitted show that the petitioner is structured as a sole proprietorship. [REDACTED] is the sole proprietor of the business.

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 petitioner has submitted evidence to show that it paid the beneficiary as a non-employee between 2001 and 2009. Specifically, the Forms 1099-MISC submitted show that the beneficiary received the following compensation from the petitioner:

- In 2001, the beneficiary received \$22,950 (\$6,570.40 less than the proffered wage).
- In 2002, the beneficiary received \$20,040 (\$9,480.40 less than the proffered wage).
- In 2003, the beneficiary received \$30,531 (exceeds the proffered wage).
- In 2004, the beneficiary received \$34,004 (exceeds the proffered wage).
- In 2005, the beneficiary received \$34,340 (exceeds the proffered wage).
- In 2006, the beneficiary received \$34,961 (exceeds the proffered wage).
- In 2007, the beneficiary received \$40,330 (exceeds the proffered wage).

or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

- In 2008, the beneficiary received \$52,166 (exceeds the proffered wage).
- In 2009, the beneficiary received \$39,191 (exceeds the proffered wage).

The 1099-Misc submitted is *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of \$29,520.40 per year for the years 2003 through 2009, but not for 2001 and 2002. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage in 2001 and 2002, the petitioner must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$6,570.40 in 2001 and \$9,480.40 in 2002. The petitioner can pay the difference between the two wages through its net income or net current assets.

If the petitioner chooses to pay the difference through its net income, USCIS will 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).

The petitioner, as noted earlier, is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

Based on the tax returns submitted, the petitioner in this case had two dependent children in 2001 and 2002.¹⁰ His adjusted gross income (AGI) in 2001 and 2002 was \$51,976 and \$55,913,

¹⁰ [REDACTED] filed his individual taxes as the head of household with two dependent children in 2001 and 2002.

respectively. Thus, the petitioner's AGI in each of those years is higher than the amount needed to pay the remainder of the beneficiary's wage – \$6,570.40 in 2001 and \$9,480.40 in 2002.

Nevertheless, the AAO cannot positively conclude that the petitioner could pay the remainder of the beneficiary's wage in 2001 and 2002 as the record contains no evidence showing the petitioner's monthly or annual recurring household expenses. Without further information or evidence of the petitioner's monthly or annual household expenses, this office cannot determine whether the petitioner has that ability.¹¹ As the appeal will be dismissed on other grounds, and as the petitioner has not had the opportunity to submit household expenses, the AAO will not make a finding that the petitioner does not have the ability to pay the proffered wage from the priority date.

The approval of the petition will be revoked for the above stated reasons. 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 and the approval of the petition is revoked, 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.

¹¹ The AAO did not send notice to the petitioner that his household expenses must be submitted in order to calculate the proffered wage. As the appeal will be dismissed, the AAO will not send a request to the petitioner to establish his household expenses.