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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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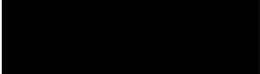


U.S. Citizenship
and Immigration
Services

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DATE: Office: NEBRASKA 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

DISCUSSION: The preference visa petition¹ was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed with a separate finding of willful misrepresentation and the labor certification application will be invalidated.

The petitioner is an engineering firm.² It seeks to employ the beneficiary permanently in the United States as a mechanic pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's April 29, 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. A new issue raised for the first time on appeal concerning eligibility for benefits under section 204(j) of the Act will also be addressed. In addition, numerous inconsistencies among the evidence and representations made and ambiguities in the record of proceeding have caused the AAO to examine whether the petitioner has demonstrated that it is more likely than not to offer full-time, permanent employment to the beneficiary. Finally, the numerous inconsistencies and misrepresentations contained in the record of proceeding will be addressed.

Petitioner's Ability to Pay

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

¹ This is the second immigrant petition filed by the instant petitioner on behalf of the instant beneficiary based on the same underlying labor certification. The previous petition [REDACTED] was filed on August 21, 2002 with the California Service Center. The director of the California Service Center denied the petition on March 19, 2003 based on a determination that the petitioner did not have the continuing ability to pay the proffered wage. No further action was taken on that petition.

² On the Form ETA 750, Application for Alien Employment Certification (Form ETA 750) filed by the petitioner on behalf of the instant beneficiary on August 11, 1998, the petitioner claimed that it is an auto shop. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 11, 1998. The proffered wage as stated on the Form ETA 750 is \$18.53 per hour (\$38,542.40 per year). The Form ETA 750 states that the position requires two years of experience in a related occupation of mechanic.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

On the petition, the petitioner claimed to have been established in June 1978, to have a gross annual income of \$2,575,021, a net annual income of \$779,443 and 28 employees. On the Form ETA 750B, signed by the beneficiary on April 29, 1998, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 Sonegawa*, 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 submitted the following:

- IRS Forms W-2, Wage and Tax Statements (W-2 Form) issued by [REDACTED] (Federal employer identification number: [REDACTED] to [REDACTED] (identified with Social Security Number: [REDACTED]) for 1998 through 2007;
- Form 1099-MISC issued by [REDACTED] (FEIN: [REDACTED]) to [REDACTED] (SSN: [REDACTED]) for 2006 and 2007;
- Paystubs issued by [REDACTED] to the instant beneficiary from February 4, 2008 to March 4, 2008;
- Internal Revenue Service (IRS) transcripts of W-2 Forms issued by [REDACTED] to the beneficiary for 2008 and 2009;
- Form 1099-MISC issued by [REDACTED] for 2008 to the instant beneficiary, [REDACTED], (SSN: [REDACTED]).

The record does not contain any documentary evidence showing that [REDACTED] or [REDACTED] is the same business entity as the petitioner or is a successor-in-interest or predecessor of the petitioner in this matter. Wages paid by employers other than the petitioning entity cannot be used to establish the petitioner's ability to pay the proffered wage. Additionally, the evidence of wages paid to [REDACTED] or [REDACTED] cannot be attributed to the beneficiary, [REDACTED]. The record contains W-2 forms issued by the petitioner (FEIN: [REDACTED]) to [REDACTED] (SSN: [REDACTED]) for 1998 through 2007 and Social Security Administration (SSA) Statements for [REDACTED] for 1989-2007. In general, wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary. Therefore, W-2 forms, 1099 forms and paystubs issued by entities other than the petitioner, or issued to a person other than the instant beneficiary, cannot be considered as evidence that the petitioner paid a full or partial proffered wage to the beneficiary.

The petitioner's Form DE6, California Employment Development Department (EDD) Quarterly Wage and Withholding Report for 2001 and 2002 do not show that the petitioner paid any compensation to the instant beneficiary, [REDACTED] during 2001 and 2002. The SSA

Statement for [REDACTED] for 2008-2009 shows that the beneficiary received taxed social security earnings of \$83,421 in 2008 and \$72,465 in 2009. However, the record does not contain any documentary evidence showing that any portion of the social security earnings were from the petitioner for these two years. Instead, the IRS transcripts of Form W-2 and Form 1099-MISC for 2008 and 2009 show that the beneficiary was paid \$71,029 in 2008 and \$70,080 in 2009 by [REDACTED], and \$27,190 by [REDACTED] in 2008. Therefore, the petitioner failed to demonstrate with documentary evidence that it paid the instant beneficiary any compensation for his services in the proffered position from the priority date in 1998 to the present, and thus, failed to establish its continuing ability to pay the beneficiary the proffered wage through an examination of wages actually paid to the instant beneficiary for all relevant years.

The beneficiary of the labor certification application and instant immigrant petition stated that he has used his brother's identity since 1998. In a written statement, dated January 17, 2003, the beneficiary states in pertinent part that:

I took the identity of my brother, [REDACTED] in 1998 when he returned to Mexico. My brother [REDACTED] had a valid Social Security number, and since I was looking to work to be able to support myself I assumed his name and Social Security number to help me get work.

When I began working at [REDACTED], I used my brother's name and have continued to use that name until recently when I was informed that it had to be corrected in order that my papers can be approved by your office.

See Affidavit of Identity, dated January 17, 2003, from [REDACTED] in the record of proceeding. In his decision denying the I-140 petition in this matter, the director of the Nebraska Service Center noted that the beneficiary used a social security number that belongs to [REDACTED], thereby rendering the W-2 statements on the record not credible, and noted that such action is a violation of federal law. Thus, the W-2 Forms issued in the name of [REDACTED] are not credible evidence and will not be considered as evidence of the petitioner's ability to pay.⁴

⁴ This office notes that the petitioner signed the Form ETA 750 on April 29, 1998 and declared under penalty of perjury that the information provided on that form is true and correct. On that form, the petitioner identified the beneficiary as [REDACTED]. The beneficiary completed and signed the Form 750B as [REDACTED] on April 29, 1998, and the petitioner submitted the Form ETA 750 to the DOL on August 11, 1998. The evidence in the record clearly shows that the petitioner knew the beneficiary as [REDACTED] at least from April 1998 when the Form ETA 750 was prepared and filed. The petitioner's statement dated January 17, 2003 that she knew the beneficiary as [REDACTED] from early 1998 until January 2003 is not supported by the evidence and is a false statement. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhail 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).

Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the full proffered wage of \$38,542.40 per year for 1998 through the present.

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 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).

The evidence in the record shows that the petitioner is structured as a C corporation. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, or IRS transcripts of the tax returns for 1998 through 2007. According to the tax returns in the record, the petitioner's fiscal year runs from June 1 to May 31. Since the priority date in this matter falls on August 11, 1998, the petitioner's tax return for its fiscal year of 1998 is the tax return for the year of the priority date. These tax returns demonstrate the petitioner's net income as shown in the table below.

- In the fiscal year of 1998, the Form 1120 states net income⁵ of (\$240).
- In the fiscal year of 1999, the Form 1120 states net income of \$654.
- In the fiscal year of 2000, the Form 1120 states net income of \$8,373.
- In the fiscal year of 2001, the Form 1120 states net income of \$43,342.
- In the fiscal year of 2002, the transcripts of Form 1120 state net income of \$51,892.⁶
- In the fiscal year of 2003, the transcripts of Form 1120 state net income of (\$126,630).
- In the fiscal year of 2004, the transcripts of Form 1120 state net income of (\$20,451).
- In the fiscal year of 2005, the transcripts of Form 1120 state net income of \$0.
- In the fiscal year of 2006, the transcripts of Form 1120 state net income of \$0.
- In the fiscal year of 2007, the transcripts of Form 1120 state net income of (\$32,703).

Therefore, for the years 2001 and 2002, the petitioner had sufficient net income to pay the instant beneficiary the full proffered wage of \$38,542.40 per year. The petitioner did not have sufficient net income to pay the beneficiary the proffered wage for 1998 through 2000, and 2003 through 2007.

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 assets. The petitioner's total assets

⁵ For a C corporation, USCIS considers net income to be the figure for taxable income before net operation loss deduction and special deductions on line 28 of the Form 1120.

⁶ The AAO considers the balance between total income and total deductions on the IRS transcripts as the taxable income before net operation loss deduction and special deductions for 2002 through 2009 since the transcripts for these years do not reflect the figures on line 28 of the Form 1120.

include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 1998 through 2000 as shown in the table below.

- In the fiscal year of 1998, the Form 1120 stated net current assets of \$10,567.
- In the fiscal year of 1999, the Form 1120 stated net current assets of \$825.
- In the fiscal year of 2000, the Form 1120 stated net current assets of \$27,904.

For the years 1998 through 2000, the petitioner did not have sufficient net current assets to pay the proffered wage, and thus, the petitioner failed to establish its ability to pay the proffered wage for these years. The transcripts of Form 1120 in the record do not reflect the petitioner's current assets and current liabilities; therefore, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the full proffered wage to pay the instant beneficiary for years 2003 through 2007.

The record before this office closed on March 1, 2011 with the receipt of the petitioner's submissions in response to the AAO's notice of derogatory information and request for evidence (RFE) issued on December 28, 2010. As of that date, the petitioner's federal tax returns for its fiscal years 2003 through 2009 should have been available. However, the petitioner did not submit its tax returns for these years, or provide an explanation of why the tax returns were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may request additional evidence in appropriate cases. Although specifically and clearly requested by this office, the petitioner did not provide copies of its tax returns for 2003 through 2009. The tax returns would have demonstrated the amount of taxable income and

⁷According 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.

net current assets the petitioner reported to the IRS and demonstrate its ability to pay the proffered wage. 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, from the date the Form ETA 750 was accepted for processing by the DOL in 1998, the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, and its net income or net current assets from the priority date to the present except for 2001 and 2002. The portion of the director's decision finding that the petitioner demonstrated ability to pay the proffered wage in 2005 and 2006 will be withdrawn.

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.

The petitioner has never yielded sufficient profits to hire and pay the beneficiary during the relevant ten years from 1998 to 2007, with the exception of 2001 and 2002. The petitioner claimed to employ 28 employees on the I-140 immigrant petition; however, its tax returns show that it paid salaries and wages of \$95,541 in 1998, \$76,158 in 1999, \$60,780 in 2000 and \$44,982 in 2001. This raises questions as to whether the petitioner actually employs or employed 28 workers or, if so, whether it pays its employees at minimum wage levels. Again, the petitioner's failure to provide federal tax returns for 2003 through 2009 makes it impossible for the AAO to determine whether this trend continued with respect to significantly low wages paid. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that eight years out of ten years were uncharacteristically

unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the predecessor and the petitioner 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 to the present. Accordingly, the petition cannot be approved and the director's decision that the petitioner has not demonstrated a continuous ability to pay the proffered wage from the priority date through the present must be affirmed. The director's finding that the petitioner demonstrated ability to pay the proffered wage in 2005 and 2006 will be withdrawn.

Eligibility for Section 204(j) Portability

In response to the AAO's RFE issued on July 19, 2010, counsel asserts for the first time that the beneficiary in the instant case meets the requirements of portability under section 204(j) of the Act, and is eligible to port to new, same or similar, employment with [REDACTED]. To support this claim, counsel submits a job offer letter dated September 21, 2010 signed by [REDACTED] stating that the company intends to employ [REDACTED] in the position of mechanic on a full time, permanent basis, at a salary of \$25.00 per hour. As discussed in detail below, the beneficiary in the instant matter is not eligible for benefits under section 204(j) of the Act because he is not the beneficiary of an approved I-140 immigrant petition.

a. Procedural history

In the instant matter, the labor certification application was filed on August 11, 1998 and DOL certified it on December 31, 2001. The petition's priority date is the date the labor certification application was accepted by DOL. See 8 C.F.R. § 204.5(d). Based on the certification of the Form ETA 750, the petitioner filed a Form I-140 petition [REDACTED] on August 21, 2002, which was denied on March 19, 2003. The petitioner filed the instant petition on May 30, 2003, based upon the underlying labor certification. On August 17, 2007, the beneficiary filed his I-485 adjustment of status application. On April 29, 2008, the director denied the petition. In adjudicating the subsequent appeal, the AAO issued an RFE on July 19, 2010 inquiring, in part, into the *bona fides* of the job offer. In response, counsel submits a job offer letter dated September 21, 2010 from [REDACTED] offering the beneficiary what is claims is a same or similar position as the proffered position under the same conditions of the certified Form ETA 750. Counsel for the first time on appeal, requests that the AAO apply section 204(j) of the Act and allow the beneficiary to pursue lawful permanent resident status through [REDACTED] based on the labor certificated filed by the petitioner and porting the beneficiary's job to the new employer under AC21.

b. Law

Section 204(a)(1)(F) of the Act provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B),

1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification.”

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), states:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that –

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Finally, with respect to an alien beneficiary of an approved third-preference petition who seeks to consular process, section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C), provides:

An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section [212(a)(5)(A)] of this title.

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, USCIS published an interim rule allowing for the concurrent filing of Form I-140 petitions and Form I-485 petitions, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140 petition. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter filed his Form I-485 petition on August 17, 2007, but the petitioner filed the Form I-140 petition on May 30, 2003.

USCIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, USCIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

c. History of AC21

To understand the law underlying this case, it is helpful to examine section 106(c) of AC21 and its relation to the long standing adjustment-of-status process provided for at section 245(a) of the

Act. *See generally Lee v. USCIS*, 592 F.3d 612, 614 (4th Cir., 2010) (discussing the history of the adjustment of status process and its interplay with other statutory provisions).

At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if USCIS did not process the adjustment application within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at *10, *23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains unadjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

d. Legal analysis – validity of the instant I-140 for Section 204(j) portability

As the record shows, both underlying Forms I-140 in this matter have been denied. It is useful to review the interpretation of "valid" relating to Form I-140s before embarking on a similar analysis for labor certifications.

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "shall remain valid" with respect to a new job if the individual changes jobs or employers. The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition

must be “valid” to begin with if it is to “*remain* valid with respect to a new job.” Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). See also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now 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 . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).⁸

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an

⁸ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” See section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.⁹

⁹ Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions. In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff’s argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff’s interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status.

In this matter, the I-140 petition was denied because the petitioner failed to establish its continuing ability to pay the proffered wage and because of false statements made by both the petitioner and the beneficiary with respect to the beneficiary's identity and employment history. The petitioner failed to provide any evidence on appeal to overcome the denial. Thus, the I-140 cannot be, and never has been approved. The beneficiary therefore does not have a valid immigrant visa petition approved on his behalf to be eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2). Furthermore, the petitioner has not established that the beneficiary has a valid I-140 petition to port his job to the new employer under the portability provisions of AC21 after an adjustment application has been pending for 180 days because the underlying I-140 petition was never approved and will not be approved on appeal. The portability provisions of AC21 simply do not apply when a petition is denied.

Employment History

Beyond the director's decision, the AAO has identified additional grounds of ineligibility and will discuss this issue. 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).

a. Lack of a bona fide job offer

As previously discussed, counsel submitted a job offer letter from a new employer in response to the AAO's RFE dated July 19, 2010, seeking application of the portability provision of section 204(j) of the Act and thereby alerting the AAO to the fact that the beneficiary no longer intends to accept the original job offer from the original petitioner, [REDACTED]. The job offer letter, dated September 21, 2010 from [REDACTED] the president of [REDACTED]. [REDACTED] states in pertinent part that:

This is a formal offer of employment for [the beneficiary]. [REDACTED] is offering [the beneficiary] full time employment as a Mechanic with our company. In this position, [the beneficiary] will earn \$25.00 per hour, 40 hours per week, on a full-time and permanent basis.

The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act.” In addition, the DOL regulation at 20 C.F.R. § 656.3¹⁰ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In determining whether there is an “employee-employer relationship,” the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term “employee,” courts should conclude “that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter “*Clackamas*”).

The record does not contain any evidence showing whether the beneficiary accepted the job offer from [REDACTED] although the record reflects that [REDACTED] worked on a part-time basis for the company since approximately 1998. At the same time, the record does not reflect any evidence as to whether [REDACTED] intends to employ the beneficiary in accordance with the terms of the labor certification application on a permanent, full time basis to counter the

¹⁰ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

September 21, 2010 [REDACTED] letter and counsel's statements regarding application of section 204(j) of the Act. Therefore, it is unclear that the petitioner intends to be the beneficiary's employer or that a bona fide offer of employment even exists at this point.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. Although the job offer extended by the petitioner to the beneficiary may have been realistic and bona fide when the underlying labor certification application was filed with DOL, the AAO finds that [REDACTED] job offer no longer exists as a result of counsel's attempt to invoke section 204(j) of the Act on the basis of an offer of same or similar employment with [REDACTED]. As the request for section 204(j) portability was made by [REDACTED] counsel, [REDACTED] in response to a request for evidence issued by the AAO to [REDACTED] [REDACTED] is likely aware of the [REDACTED] offer of employment to the beneficiary.¹¹ Thus, the AAO must interpret the portability request and the offer of new employment to mean that the [REDACTED] offer of employment is no longer viable. The AAO finds that the petitioner no longer offers permanent, full time employment to the beneficiary in accordance with the terms and conditions set forth on the labor certification application.

b. Misrepresentation

During the adjudication of the instant appeal, information has come to light that indicates that the petitioner and beneficiary willfully concealed or misrepresented material facts concerning the beneficiary's employment history from DOL and USCIS on Forms ETA-750 and I-140 so that the petitioner and beneficiary might obtain immigration benefits. On December 28, 2010, the AAO issued a notice of derogatory information and request for evidence granting the petitioner 66 days to submit evidence to rebut the grounds for ineligibility. The petitioner's response, received on March 1, 2011, is insufficient to overcome the AAO's findings.

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

¹¹ The response to the request for evidence is filed on behalf of [REDACTED] and contains copies of the company's federal tax returns from 1998 – 2008. Thus, it is logical to conclude that [REDACTED] authorized all representations made in this submission, including the request for section 204(j) portability.

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).¹² Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible." A willful misrepresentation of a material fact occurs is one which "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- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

As an issue of fact that is material to eligibility for the requested immigration benefit, 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).

The petitioner and beneficiary signed Form ETA 750 on April 29, 1998 and declared under penalty of perjury that the information provided is true and correct; the petitioner filed this form with DOL on August 11, 1998. Form ETA 750B reflects that the beneficiary was unemployed from January 1997 to the present (i.e. April 29, 1998 when the form was signed). With the petitioner's response to the DOL's notice of finding, the beneficiary submitted a statement dated February 4, 1999 alleging that: "I was unemployed from April 1998 until August 1998. I traveled to Mexico and visited family and friends." The beneficiary did not provide his employment information for the period after August 1998.

On January 17, 2003, the beneficiary stated that he "has been working under the name of [REDACTED] since 1998." The beneficiary also stated in detail that: "When I began working at [REDACTED] I used my brother's name and have continued to use that name until [REDACTED]"

¹² Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting 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.

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, 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.

recently.” See Affidavit of Identity, dated January 17, 2003, from [REDACTED]. On the same day, a representative of the petitioner stated that she has personally known [REDACTED] since early 1998 when the beneficiary began working with his company. See the letter addressed to USCIS California Service Center, dated January 17, 2003 from [REDACTED] Supervisor at [REDACTED] in the record of proceeding.

On Form G-325A, Biographic Information, signed by the beneficiary on August 14, 2007 under warning that “severe penalties are provided by law for knowingly and willfully falsifying or concealing a material fact,” the beneficiary provided more inconsistent information about his employment history. Concerning his employment in the United States, the beneficiary represented that he was working as a mechanic for [REDACTED] in Salinas, California from March 1997 to the present time, and that he worked for the petitioner in Gilroy, CA from January 1997 to February 2007. The Form ETA 750, however, does not support these statements. The Form ETA 750 states that the beneficiary was unemployed from January 1997 to August 1998.

Furthermore, the beneficiary provides inconsistent information regarding his employment history abroad. The beneficiary listed on Form G-325A his last occupation abroad as follows: [REDACTED] mechanic, from March 1985 to January 1995. However, on the Form ETA 750B, the beneficiary stated that he worked as a mechanic for [REDACTED] in Jalisco from February 1983 to October 1986 and for [REDACTED] in Jalisco, Mexico from November 1986 to January 1995. In item 11 of the Form ETA 750B, the beneficiary also claimed that he attended C.B.T.A. (High School) in Jalisco, Mexico from September 1980 to June 1983.

The record does not contain any reasonable explanation as to how the beneficiary worked as a mechanic for [REDACTED] while still attending high school during the period from February 1983 to June 1983. Moreover, the petitioner failed to submit independent objective evidence to verify whether the beneficiary worked as a mechanic for [REDACTED] or for [REDACTED] during the period from March 1985 to November 1985. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: “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.” The petitioner in this matter did not submit any independent objective evidence to resolve the inconsistencies despite the AAO’s specific request in its RFE.

The beneficiary’s qualifications and the bona fides of the job offer are material facts relevant to eligibility for approval of an immigrant petition. The petitioner failed to establish that its job offer to the beneficiary was realistic at the time of filing the labor certification and has remained to the present as evidenced by its failure to demonstrate ability to pay the proffered wage, the unsupported claim of eligibility for benefits under section 204(j) of the Act, and extensive conflicting information in the record of proceeding concerning the beneficiary’s past, current, and future employment.. By concealment of the beneficiary’s employment history with the petitioner’s business and former employers, DOL did not have accurate information concerning the bona fides of the job offer or the alien’s background during the labor certification process. The test of the U.S. labor market and other procedural and substantive aspects of the labor

certification adjudication could not have been properly completed because of that concealment of the beneficiary's role and employment history at the petitioner's business.

c. Beneficiary's qualifications

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

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is August 11, 1998, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).¹³

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and item 14 reflects that the proffered position requires two years of experience in the related occupation of mechanic.

With the initial filing, counsel submitted a letter dated May 5, 1998 from [REDACTED] Administrative Director of [REDACTED] in Mexico, as evidence to establish the beneficiary's requisite two years of experience for the proffered position. The letter is from the beneficiary's alleged former employer, and includes the name, title, address of the writer, as well as a description of duties the beneficiary performed during his employment with this company. However, this letter reveals additional inconsistencies with the beneficiary's statements on the Form ETA 750 and Form G-325A. While this letter describes the beneficiary's job duties as a mechanic for a construction equipment company, the beneficiary

¹³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

states on the Form ETA 750B that he worked as a mechanic for moving company. The job description in this letter is clearly copied verbatim from the job duties the beneficiary described on the Form ETA 750B for a different former employer, [REDACTED] from February 1983 to October 1986. Furthermore, this letter purports to verify the beneficiary's employment with this company from November 1986 to January 1995, however, the beneficiary lists his last occupation abroad as follows: [REDACTED] Mexico, Mechanic, from March 1985 to January 1995. 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). Therefore, the AAO finds that this letter cannot be considered as primary evidence of the beneficiary's qualifying experience without independent objective evidence, such as the corporate documents and personnel records of the company, the beneficiary's tax records or documentation showing his salary income from that company, etc. because of derogatory and inconsistent information provided by the petitioner and the beneficiary regarding the beneficiary's identity and employment history. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record does not contain independent objective evidence, and therefore, the AAO finds that petitioner failed to establish the beneficiary's qualifying experience with regulatory-prescribed evidence.

Finding of misrepresentation and invalidation of the labor certification application.

A Form ETA 750 is subject to invalidation by USCIS if it is determined that a willful misrepresentation of a material fact was made in the labor certification application. See 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

The beneficiary's qualifications and the existence of a bona fide job offer are material facts relevant to eligibility for approval of a labor certification application and an immigrant petition. The petitioner has failed to establish that the job offer to the beneficiary is realistic.

The AAO finds that by concealing his employment history in the United States and abroad and providing false statements about the beneficiary's employment with the petitioner, the petitioner and beneficiary have sought to procure an immigration benefit through willful misrepresentation of material facts. Any finding of willful misrepresentation as a result shall be considered in any future proceeding where admissibility is an issue. Accordingly, we will invalidate the Form ETA 750 [REDACTED] pursuant to 20 C.F.R. § 656.30(d).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER:

The appeal is dismissed. The director's decision is affirmed and the petition remains denied. The AAO finds that the petitioner willfully misled DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's fraudulent misrepresentation.

FURTHER ORDER:

The AAO finds that the beneficiary knowingly misrepresented a material fact about his qualifications for the proffered position in an effort to procure a benefit under the Act and the implementing regulations.