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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

B6

Date: SEP 28 2011

Office: TEXAS SERVICE CENTER FILE:

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director of the Vermont Service Center on February 28, 2003. The Director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on March 24, 2009, and the petitioner subsequently appealed the director’s decision to revoke the approval of the petition. The petition is now before the Administrative Appeals Office on appeal. 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.

In adjudicating the appeal, the AAO finds that the petitioning business has been dissolved as of May 31, 2007. On April 28, 2010, the AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE) to the petitioner, stating, among other things, that if the petitioner has been dissolved, the petition is moot, since there is no active business, and no legitimate job offer exists. Additionally, even if the appeal could be otherwise sustained, the petition’s approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer’s business in an employment-based preference case.

In response to the AAO’s NDI/RFE, counsel for the petitioner confirms that the petitioner has indeed been dissolved but asserts that the petition should not be dismissed as moot since the beneficiary has ported to work for another employer doing a similar job, after the Form I-140 petition was approved. Specifically, counsel states that section 204(j) of the Immigration and Nationality Act (“the Act”) permits an individual I-140 beneficiary to pursue adjustment of status despite the fact that she no longer works for the petitioning employer if she is employed in the same or a similar position with a different employer, and if her application for adjustment of status has been pending for more than 180 days. In this case, counsel asserts that the beneficiary’s application for adjustment of status has now been pending for more than 180 days.

In the instant proceeding, the record reflects that the petition was received on July 1, 2002, and it was approved on February 28, 2003. Soon thereafter, the beneficiary filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on May 19, 2003.

The evidence submitted in response to the AAO’s NDI/RFE shows that the beneficiary worked for the following companies from 1998 to 2009:

<u>Year(s)</u>	<u>Employer</u>	<u>Evidence of Record</u>
1998-2001	Calla Lily Caterers (the petitioner)	Paystubs
2002-2003	CDR Group Inc. ¹	Paystubs

¹ [REDACTED] Human Resources Generalist, stated in her letter dated February 12, 2009 that the beneficiary started to work for [REDACTED] as a cook on September 17, 2003. However, a review of the various copies of the paystubs and Forms W-2 submitted reveals that the beneficiary worked for a company called “CDR Group Inc” from 2002 to part of 2003. No concrete evidence, i.e. paystubs or other evidence, was submitted to demonstrate that the

2004	GEI-Mass Inc	W-2
2005	Commonwealth Maintenance	W-2
	Guckenheimer Enterprises Inc	W-2
2006	JHL LLC d/b/a Choice Catering	W-2
	Commonwealth Maintenance	W-2
2007	Guckenheimer Enterprises Inc	W-2
2008	Unknown	No evidence
2009	Masa Restaurant Group Inc	W-2

Section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (“AC21”) (Public Law 106-313), section 204(j) of the Act, 8 U.S.C. §1154(j) 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 adjudicated 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.²

Based on the stated facts above and the evidence submitted, we accept counsel’s assertion that the appeal should not be dismissed as moot, as the beneficiary “ported” to a new employer 180 days after filing the Form I-485 petition (on May 19, 2003) and prior to the dissolution of the original petitioner (on May 31, 2007). Moreover, since the beneficiary ported to a new employer well before the petitioning company was dissolved, the dissolution of the petitioner is not material to the outcome of these proceedings.³

Nevertheless, the appeal shall be dismissed as the AAO finds that the director’s decision to revoke the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act. Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her

beneficiary did work for Guckenheimer starting in September 2003.

² This is often called “porting.”

³ In response to the AAO’s NDI/RFE, counsel also states that the beneficiary has continued working in the same or a similar occupational classification as the job for which the petition was filed. As the AAO finds that the director’s revocation of the approval of the petition was valid, the beneficiary’s porting to a new employer was thus invalid, as discussed above. The AAO will not address whether the port was additionally invalid based on whether the jobs are in the same or a similar classification as the employment originally petitioned for.

under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Additionally, in cases where the underlying I-140 approval was not valid to begin with, such as in cases of fraud or willful misrepresentation, or where the I-140 was approved in error by USCIS because either the petitioner or the beneficiary did not qualify for the preference classification sought, a revocation under section 205 will negate any claim to section 204(j) portability.

In a case pertaining to the revocation of approval 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.* In the current matter, the appellant may not shield the beneficiary from the revocation of approval of the Form I-140 simply because the beneficiary ported to another employer, in that an alien may not port from an invalid petition.⁴

For these reasons, counsel’s contention that the petition remained valid as the beneficiary ported to another employer pursuant to section 204(j) of the Act is not persuasive, and cannot be accepted.

Further, the AAO finds that the beneficiary has knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

⁴ 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 adjudicating the appeal, the AAO observed that the record lacked conclusive evidence as to whether or not the beneficiary qualified to perform the duties of the position – whether she worked as a cook for at least two years in Brazil as she claimed in part B of the Form ETA 750. On April 28, 2010, the AAO alerted both the petitioner and the beneficiary to this issue in the NDI/RFE. The AAO afforded the petitioner and the beneficiary 30 days to respond.

On April 28, 2010, 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). We indicated in the NDI/RFE that the work experience letter submitted along with the petition and the approved labor certification was inconsistent with other information in the record.⁵

Neither the beneficiary nor the petitioner submitted any evidence in response to this request. Such evidence, if provided, would have shed more light into the beneficiary's work experience in Brazil and her qualification for the proffered job.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 17, 2001 (the priority date) is material in this case, and USCIS could not have approved the petition, or sustained the appeal, before it determined whether the beneficiary qualifies for the job offered in the labor certification.

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

⁵ We noted in the NDI/RFE that the beneficiary failed to list her employment in Brazil with Bar e Restaurante Gege on her Form G-325, Biographic Information. The AAO requested the beneficiary and the petitioner to provide pay stubs, tax documents, or other evidence of payments made to her by the claimed Brazilian employer.

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other “appropriate action.” DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to an alien’s eligibility for the requested immigration benefit or that alien’s subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or by willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁶

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:

⁶ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

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

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that much of the petitioner's documentation with respect to the beneficiary's qualifications has been falsified, a finding that neither the petitioner nor the beneficiary challenges in that neither responded materially to the AAO's April 28, 2010 NDI/RFE.

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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 17, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of dishes." The DOL determined that the job description above is consistent with the DOT

job code 313.364-014, Cook (Hotel and Restaurant).⁷ Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on December 19, 2000, she represented that she worked 40 hours a week at Bar E Restaurante Gege as a cook from April 1995 to September 1997. The Form ETA 750 was approved by the DOL on April 26, 2002.

Submitted along with the petition and the approved labor certification was a letter dated February 1, 2001 from Bar e Restaurante Gege (Gege Bar & Restaurant) generally stating that the beneficiary worked as cook at Gege Bar & Restaurant from April 1995 to September 1997. In response to the director's Notice of Intent to Revoke (NOIR), the beneficiary stated in her letter dated February 25, 2009, "Please note this restaurant [referring to the restaurant where she used to work, Bar e Restaurante Gege] is no longer in operation and [the] author of the letter, [REDACTED] – ME has since then relocated to Portugal.

The record also contains an affidavit dated January 26, 2009 from [REDACTED] in which he stated that he and his wife at the time started a restaurant business without registering it with the local government to avoid paying high taxes, and further attested to the beneficiary's employment at his restaurant during the period before the business was registered in 2001.⁸

As noted earlier, the AAO, before issuing this decision, specifically requested the beneficiary to provide independent objective evidence to show that she worked as a cook in Brazil from April 1995 to September 1997. The beneficiary failed to respond or to submit such evidence. Such evidence is material because, if it were provided, it would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the AAO notes that the letter dated February 1, 2001 from Bar e Restaurante Gege does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), in that it does not have a description of the training received or the experience of the beneficiary. Merely stating that the beneficiary was a cook without further explaining her job duties and responsibilities is not sufficient in this proceeding. Further, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of*

⁷ The DOT job code can be found online at: <http://www.occupationalinfo.org> (last accessed August 17, 2011).

⁸ This affidavit was issued in response to the director's Notice of Intent to Revoke dated January 26, 2009 where the director found that Bar e Restaurante Gege was not registered with the Brazilian authorities until February 7, 2000.

Soffici, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In addition, the AAO finds, as noted earlier by the director in the Notice of Intent to Revoke (NOIR) dated January 26, 2009, that Bar e Restaurante Gege was not registered with the Brazilian government until February 7, 2000,⁹ and that the beneficiary could not have worked there from April 1995 to September 1997.

According to the Form ETA 750B and the letter dated February 1, 2001 from [REDACTED] the restaurant where the beneficiary claimed she used to work in Brazil was located in the city of Coronel Fabriciano, Minas Gerais. Based on the information stated above, we find that it is not likely that the beneficiary lived in Governador Valaderes, Minas Gerais, and worked in Coronel Fabriciano, Minas Gerais, between April 1995 and September 1997.¹⁰

Based on the noted inconsistencies and the beneficiary's failure to respond, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about her prior work experience from April 1995 to 1997.

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 she met the petitioner's minimum work experience requirements. Compare 8 C.F.R. § 204.5(g) with § 204.5(1)(1)(3)(ii)(B). The beneficiary did not establish the necessary qualifications in this case, as she does not possess two years' work experience as a cook. On the true facts, the beneficiary

⁹ The director found this information by searching the CNPJ database (<http://www.receita.fazenda.gov.br/>). CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

¹⁰ The distance between the city of Coronel Fabriciano, Minas Gerais, and Governador Valaderes, Minas Gerais, is about 103 km (roughly 64 miles).

is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of her credentials was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, she 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 by submitting fraudulent or falsified documents. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C*.

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

In response to the AAO RFE/NDI neither the petitioner nor the beneficiary dispute that the work experience documents submitted in support of the labor certification were fraudulent. The beneficiary does not offer any testimony or documentation to dispute that the documents submitted to USCIS were false, and that she does have the required work experience.

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

By signing the Form ETA 750, and submitting a forged or fraudulent work experience letter and affidavit, 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 she 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.

Moreover, the appeal, even if it were not moot, is currently not approvable because the record does not contain sufficient evidence to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date. 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).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 17, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.¹¹

To show that the petitioner has the continuing ability to pay \$12.57 per hour or \$22,877.40 per year from April 17, 2001, the petitioner submitted copies of the following evidence:

- A letter dated October 15, 2001 addressed to the Immigration and Naturalization Service Vermont Service Center and signed by [REDACTED] stating that the petitioner employed over 400 employees in 2000, that the business, over the period of seven years, had been successful, that the gross sales in the last seven years had consistently reached or exceeded \$3 million, that the gross sales in the year 2000 were over \$5.2 million, that the total income for the year 2000 was \$3.64 million, that the

¹¹ 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 Memo indicates that full-time means at least 35 hours 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).

employees wages for the year 2000 were over \$2.03 million, and that the petitioning business would not produce its tax return since it was privately held;

- Forms W-2 issued to the beneficiary by the petitioner for 2001;
- Forms W-2 issued to various employees of the petitioner.¹²

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.

Based on the Forms W-2 submitted, the petitioner paid the beneficiary \$13,098.81 in 2001 (\$9,778.59 less than the proffered wage).

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the following amounts: \$9,778.59 in 2001 and the full proffered wage of \$22,877.40 from 2002 thereon until the beneficiary received lawful permanent residence, or until the beneficiary ported to work for another employer in a similar job in March 2002, assuming that section 204(j) of the Act applies in this instant proceeding.¹³

¹² There are 309 Forms W-2 submitted.

¹³ Section 204(j) of the Act provides relief to the alien beneficiary who changes jobs after his (her) visa petition has been approved. More specifically, this section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007). As noted above, section 204(j) benefits do not accrue to an alien for whom the petition's approval has been revoked.

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains no evidence showing the petitioner’s net income or net current assets from 2001. On April 28, 2010 the AAO issued an NDI/RFE requesting the petitioner to submit copies of the Forms W-2 issued to the beneficiary for the years 2001 through 2009. The AAO also requested the petitioner to submit copies of the business’ federal tax returns, annual reports, or audited financial statements for the years 2001 through 2009.

However, no evidence such as copies of the business’ federal tax returns, annual reports, or audited financial statements for any year during the qualifying period has been submitted. Due to this lack of evidence, the AAO cannot find that the petitioner has the continuing ability to pay the proffered wage from the priority date.

The letter dated October 15, 2001, from [REDACTED] stating that the company employed more than 400 workers in 2000 by itself is not acceptable as evidence of the petitioner’s ability to pay.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. That regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.)

Given the record as a whole and the fact that the petitioner has dissolved and is no longer in business, and that the petition’s approval has been revoked, USCIS need not exercise its discretion to accept the letter from [REDACTED]. As noted earlier, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiary it is seeking to employ.

¹⁴ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Finally, 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. 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.

Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonogawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the relevant evidence, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

The appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate

review on a *de novo* basis). The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed with a finding of 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 P2001-MA-01313626, filed by the petitioner is invalidated.