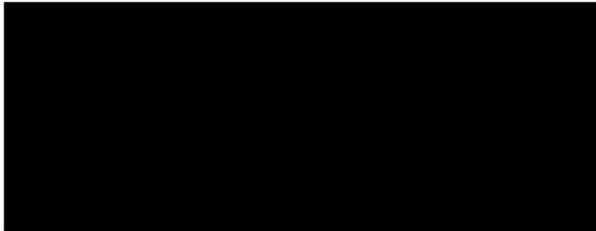


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: Office: TEXAS SERVICE CENTER

AUG 29 2012



IN RE:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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: On May 8, 2012 the director revoked the approval of the petition, found that there was fraud or willful misrepresentation involving the labor certification, and invalidated the labor certification. The May 8, 2012 decision was certified to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the May 8, 2012 decision. The AAO will also enter a separate administrative finding of material misrepresentation against the beneficiary.

1. Facts and Procedural History.

The petitioner described its business as a manufacturing company. It seeks to permanently employ the beneficiary in the United States as a maintenance manager pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The preference visa petition was initially approved by the Director, Vermont Service Center, on November 17, 2003, but on July 20, 2009 the Director, Texas Service Center (the director), reopened the matter and sent a Notice of Intent to Revoke (NOIR).

In the July 20, 2009 NOIR the director informed the petitioner that the beneficiary could not have worked as a maintenance manager at [REDACTED] in Brazil from February 1996, since the company was not registered with the Brazilian government until December 17, 1997.² This, according to the director, meant that the petitioner had submitted false documentation to verify the required work experience of the beneficiary.

In response to the director's July 20, 2009 NOIR, counsel for the beneficiary at the time [REDACTED] [REDACTED] claimed that the beneficiary initially worked for a company called [REDACTED] in February 1996 before the company became

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

² The director found the information above by searching the CNPJ database (the CNPJ database can be accessed online at <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 director indicated that the Department of State had 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.

██████████ in December 1997, ██████████ submitted the following evidence to further demonstrate the beneficiary's qualifications:

- A statement dated August 18, 2009 from ██████████ stating that the beneficiary initially worked for ██████████ ██████████ ██████████ in February 1996, that ██████████ became ██████████ on December 17, 1997, and that the beneficiary worked for his company from February 1996 to September 1999;
- A copy of the business registration (CNPJ) of ██████████ doing business as ██████████
- A copy of a document called ██████████ ██████████ was established on August 13, 1992; and
- A copy of the business registration (CNPJ) of ██████████ ██████████

The beneficiary's counsel also claimed that the beneficiary no longer worked for the petitioner and had ported to work for ██████████. Accompanying this claim was a letter dated August 25, 2009 from ██████████ stating that the beneficiary was hired on April 24, 2003 and is currently working as a maintenance manager at ██████████ earning \$19.50 per hour or \$780 per week.³

On January 9, 2012 the director issued another NOIR. This time, the director noted the following problems and inconsistencies in the record pertaining to the beneficiary's past work experience in Brazil:

- The record contains no letter of employment verifying the beneficiary's work experience in the job offered as of the priority date (the letter of employment verification dated March 9, 2001 from ██████████ was not translated into English);
- The beneficiary stated on the Form ETA 750, part B, that he worked for a company in Brazil called ██████████ from February 1996 to September 1999; however:
 - ✓ The record reflects that the beneficiary entered the U.S. on November 1, 1998 and has not left the U.S. since then, which means that the beneficiary could not have worked for ██████████ in Brazil from February 1996 to September 1999;
 - ✓ The beneficiary claimed on his ██████████ (Form G-325), which he filed in conjunction with the Application to Register for Permanent Residence or Adjust Status (Form I-485), that he worked as a general helper at ██████████ from April 1999 to September 1999; and

³ The record also contains a letter dated September 21, 2005 from ██████████ stating that the beneficiary works as a full time maintenance manager earning \$700 per week.

- ✓ The beneficiary claimed on his Form G-325 that he lived in Ft. Lauderdale, Massachusetts, and Hopkinton, Massachusetts, from November 1998 to September 1999.
- The beneficiary failed to include his last occupation abroad on the Form G-325 (Biographic Information).

The director stated that the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) requires that the petitioner submit letters from the beneficiary's former 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 beneficiary. The director advised the petitioner to submit a letter of employment verification that contains the name, title, and address of the trainer or employer, and a description of the beneficiary's experience or training. The director also asked the petitioner to resolve the inconsistencies in the record as noted above by submitting independent objective evidence to demonstrate the beneficiary's employment and work experience in Brazil.

The director also in the January 9, 2012 NOIR noted that the Form ETA 750 labor certification application and the Form I-140 petition were signed by [REDACTED]. The director asked the petitioner to provide additional background information on [REDACTED] i.e. what his job title is, what date he signed the Form ETA 750 and the Form I-140 petition. The director also requested the petitioner to submit additional evidence, i.e. copies of the in-house posting, advertisements, and other independent objective evidence, to demonstrate that the petitioner actively participated in the recruitment process and followed the U.S. Department of Labor (DOL) regulations.

Finally, the director indicated that the petitioner, based on the evidence submitted, has not established by a preponderance of the evidence that it has the ability to pay the proffered wages of the beneficiary and the other beneficiaries that the petitioner sponsored.⁴ The director requested that the petitioner provide copies of its federal tax returns, annual reports, or audited financial statements to show that the petitioner has the ability to pay the proffered wages of all of the beneficiaries from their respective priority date until each beneficiary receives his or her lawful permanent residence.

No response to the January 9, 2012 NOIR was submitted.

The director revoked the approval of the petition on May 8, 2012, finding that: (a) the petitioner failed to establish that it had the ability to continuously pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence; (b) the beneficiary did not have the requisite work experience in the job offered as of the priority date; and (c) the petition was not signed by an authorized representative of the petitioning company, and that there was fraud or willful misrepresentation involving labor certification process. Accordingly, the director invalidated the labor certification.

⁴ The director identified two other beneficiaries that the petitioner sponsored other than the beneficiary in the instant case.

The director's decisions to revoke the approval of the petition and to invalidate the labor certification are certified to the AAO for review. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

2. The Petitioner's Ability to Pay.

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, the ETA Form 750 was accepted for processing by DOL on June 28, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$17.44 per hour or \$36,275.20 per year.

To demonstrate that the petitioner has the ability to pay \$17.44 per hour or \$36,275.20 per year from June 28, 2001 and continuing until the beneficiary receives his lawful permanent residence or until he ported to another similar employment, the petitioner submitted a copy of its annual report for 2001.

The director in the January 9, 2012 NOIR stated that the petitioner's annual report for 2001 alone is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date. The director also indicated in the January 9, 2012 NOIR that the petitioner filed two other petitions, and pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is, therefore, required to establish the ability to pay the proffered wages of all of the beneficiaries it sponsored. The director advised the petitioner to submit additional evidence to show the petitioner's ability to pay. No evidence has been submitted.

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.

The record contains no evidence to show that the beneficiary was employed and paid by the petitioner. 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 full proffered wage of \$17.44 per hour or \$36,275.20 per year from June 28, 2001 until the beneficiary obtains legal permanent residence or until he ported to another similar employment pursuant to section 204(j) of the Act.⁵

The petitioner can show that it can pay \$36,275.20 per year 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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)

⁵ Section 204(j) of the Act provides relief to the alien beneficiary who changes jobs after his/her visa petition has been approved. 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).

On the subject of porting, the AAO notes that where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

(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.⁶ 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.

We decline to accept the copy of the 2001 Annual Report submitted as evidence of the petitioner's ability to pay. The director in the January 9, 2012 NOIR called into question the identity of [REDACTED] the person who signed and filed the Form ETA 750 labor certification and the Form I-140 petition. The petitioner failed to contest the director's concerns. No company representative has appeared to identify who [REDACTED] is, and whether he was authorized to sign and file the Forms ETA 750 and I-140.

In addition, the AAO questions the identity of the petitioner – whether the entity filing the Form ETA 750 and the Form I-140 petition was actually [REDACTED] the same company that is featured in the 2001 Annual Report submitted. Since the petitioner failed to provide any response to the director's January 9, 2012 NOIR, and because no evidence has been submitted to show that the petitioner has the ability to pay, the AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage of the beneficiary from the priority date and continuing until he obtains his lawful permanent residence or until he ported to another similar employment.

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

⁶ 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.

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 *Sonegawa*, 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 *Sonegawa*, 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*. Given that the petition's approval has been revoked and the fact that the petitioner failed to respond to the director's 2012 NOIR, 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.

3. The Beneficiary's Qualifications.

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, 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).

Here, the priority date is June 28, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Maintenance Manager." 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.

Whether or not the beneficiary had the requisite work experience for the proffered position as of June 28, 2001 is material in this case, since the beneficiary must qualify for the job offered in the labor certification as of that date for visa eligibility.

The director, before revoking the approval of the petition, sent two NOIRs (one was dated July 20, 2009 and the other January 9, 2012) identifying the problems in the letter of employment verification and the inconsistencies in the record pertaining to the beneficiary's work experience in Brazil. The director advised the petitioner to submit independent objective evidence to resolve the problems and inconsistencies in the record as noted above. No evidence was submitted. Such evidence, if provided, would have shed more light on the beneficiary's work experience in Brazil and his qualifications for the proffered job. We agree with the director that the petitioner has failed to establish by a preponderance of the evidence that the beneficiary has the requisite work experience in the job offered before the priority date.

4. The Invalidation of the Labor Certification.

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

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

The beneficiary claims throughout these proceedings that he worked as a maintenance manager for a company in Brazil from February 1996 to September 1999. The evidence submitted, however, does not reflect that he lived in Brazil after November 1, 1998. Further, the director requested the petitioner to submit evidence to show that the petitioner conducted good faith recruitment and that the petitioner authorized [REDACTED] to sign and file the Form ETA 750 and Form I-140 petition. The petitioner did not respond to the director's request.

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

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

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(1).

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.⁷

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

⁷ 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.

immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

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

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [she] 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 labor certification has been falsified, a finding that the petitioner did not challenge in that the petitioner did not respond to the director's NOIR dated December 6, 2011 or the Notice of Certification dated March 21, 2012.

A material issue in this case is whether the beneficiary falsified his work experience to obtain the approval of the labor certification and whether the labor certification was filed by an authorized representative of the petitioner. 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.

The director has laid out in specific details the inconsistencies in the record and requested that the petitioner submit additional evidence to resolve them. No evidence or explanation has been submitted to contest the director's statements that the beneficiary's past work experience was willfully falsified, that the petitioner failed to follow DOL recruitment requirements, and that the Form ETA 750 and Form I-140 petition were not signed and filed by an authorized

representative of the petitioner.⁸ Such evidence is material because if it were provided, it would demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date, that the petitioner conducted good faith recruitment, and that the petitioner authorized [REDACTED] to file the petition. The petitioner's failure to submit additional evidence 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)).

Based on the noted inconsistencies, and considering that both the petitioner and the beneficiary received notice of the inconsistencies and did not resolve them, and that both failed to respond, the AAO finds that both the petitioner and the beneficiary have deliberately concealed and willfully misrepresented facts about the beneficiary's past work experience.⁹ The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d).

In this case, USCIS Vermont Service Center was initially unable to make a proper investigation of the facts when determining eligibility for the benefit sought, because the petitioner shut off a line of relevant inquiry by submitting a fraudulent or falsified document. If USCIS Vermont

⁸ The record reflects that the beneficiary's counsel received notice of the inconsistencies in the dates of the beneficiary's residence and employment. The beneficiary failed to respond or to contest the director's finding of fraud.

⁹ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. See 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, see 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, see *Matter of Saritejdian*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Service Center had known the true facts, it would have denied the employer's petition, as the Form ETA 750 was falsified. In other words, the concealed facts, if known, would have resulted in the outright denial of the petition. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By submitting a fraudulent document and statement to USCIS (i.e. the letter of employment verification dated March 9, 2001 from [REDACTED] and the statement dated August 18, 2009 from [REDACTED] stating that [REDACTED] became [REDACTED] on December 17, 1997), the petitioner and the beneficiary sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. *See also Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, it is proper for USCIS to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182.

The director's decision to invalidate the certified Form ETA 750 is affirmed as evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the labor certification application, specifically relating to the beneficiary's claimed experience as a maintenance manager in Brazil between February 1996 and September 1999.

Section 205 of the Act, 8 U.S.C. § 1155, states:

The Secretary 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] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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).

For the reasons stated above, the AAO finds that the director has good and sufficient cause to revoke the approval of the petition as required by section 205 of the Act, 8 U.S.C. § 1155. The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision to revoke the previously approved petition and to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED], is affirmed.

FURTHER ORDER: The AAO finds that the petitioner and 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.

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FURTHER ORDER:

The alien employment certification, Form ETA 750, ETA case number ██████████ filed by the petitioner is invalidated.