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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**



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Date: **FEB 07 2012**

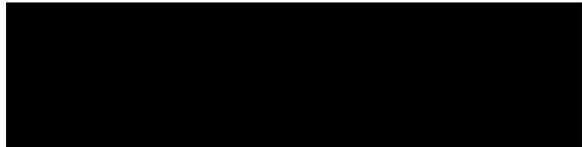
Office: TEXAS SERVICE CENTER

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The Administrative Appeals Office ("AAO") will also enter a separate administrative finding of willful misrepresentation against the beneficiary and will invalidate the alien employment certification, Form ETA 9089.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a front desk reservations manager. As required by statute, the petition is accompanied by Form ETA 9089, Application for Permanent Employment Certification, 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 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.<sup>1</sup>

As set forth in the director's October 15, 2008 denial, the single 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

The regulation 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.

<sup>1</sup> 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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, 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 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 9089 was accepted on November 9, 2006. The proffered wage as stated on the Form ETA 9089 is \$18.50 per hour (\$38,480 per year). The Form ETA 9089 states that the position requires 24 months (two years) of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$191,280, and to currently employ 7 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. It is also noted that the petitioner and the beneficiary have not signed the certified Form ETA 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified Form ETA 9089 that has been signed by the employer, beneficiary, attorney and/or agent. See 20 C.F.R. § 656.17(a)(1). On the Form ETA 9089, 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 an Form ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 9089, 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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner has submitted the following two Internal Revenue Service (IRS) Forms 1099 to support its claim that it has the ability to pay the beneficiary the proffered wage:

- In 2006, the IRS Form 1099-MISC indicates that the petitioner paid the beneficiary \$18,600;
- In 2007, the IRS Form 1099-MISC indicates that the petitioner paid the beneficiary \$38,120.

The AAO is concerned about the authenticity of these two Forms 1099-MISC. The petitioner explained that the Form 1099 for 2006 is prorated because the beneficiary started working for him from September through December of that year, and that the Form 1099-MISC for 2007 reflects a full year's salary. However, on the beneficiary's G-325, which was signed by the beneficiary under the penalty of perjury on August 7, 2007, the beneficiary did not state that he worked for the petitioner under the section entitled "Applicant's employment over the past 5 years." The beneficiary stated that he was working for Subway during this time period. The AAO also notes that the beneficiary failed to list his employment with the petitioner on the Form ETA 9089 from September 2006 as noted by the petitioner as the start date. The forms IRS 1099-MISC also spell the beneficiary's name wrong, [REDACTED], rather than [REDACTED]. In addition, on the Forms 1099, the beneficiary's social security number is represented as, '[REDACTED]' However, the petitioner did not provide the beneficiary's social security number on the Form I-140. This also creates a significant material discrepancy which is not explained in the record.

Moreover, it is unclear that the IRS Forms 1099-MISC were filed with the IRS by the petitioner or by the beneficiary. Neither of the beneficiary's 2006 or 2007 IRS Forms 1040 are signed or dated by the beneficiary or the preparer. Further, the Forms 9465 for 2006 and 2007 Installment Agreement Request are not signed or dated. Thus it cannot be concluded that the beneficiary filed the IRS Forms 1099-MISC indicating payment of wages by the petitioner.

Further, the petitioner does not submit its 2006 and 2007 tax returns, but rather submits copies of the tax returns of another corporation, [REDACTED] owned by one of the petitioner's shareholders. In response to the director's request for evidence, the petitioner submitted a copy of a loan application signed by the owners of the petitioner on September 10, 2008 indicating that in the previous year the petitioner earned no income. The assets of [REDACTED] Inc. may not be considered in determining the petitioner's ability to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The AAO is troubled by the fact that the petitioner had no income and also claimed to pay the beneficiary \$38,120 in 2007. Without the tax returns of the petitioner, the AAO cannot corroborate that the wages were paid to the beneficiary as written on the IRS Forms 1099-MISC. Particularly given the inconsistency between the beneficiary's Form G-325 employment with Subway through August, 2007, and the failure of the beneficiary to list his employment with the petitioner on the Form ETA 9089, the AAO will give little weight to the IRS Forms 1099-MISC in the analysis of this case.

*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.

Without objective evidence overcoming the inconsistencies noted, the AAO finds that the petitioner has not established that it paid the beneficiary \$18,600 in 2006 or \$38,120 in 2007.

Even were the AAO to accept that the beneficiary's wage was paid in 2007, the petitioner has not established that it paid the beneficiary the proffered wage in 2006. Counsel asserts in her brief accompanying the appeal that the petitioner has paid the beneficiary the 2006 full time salary even before the priority date, which was on November 9, 2006. Counsel argues that the beneficiary has been working for the petitioner since September 1, 2006. Counsel requests that USCIS prorate the proffered wage for the portion of the 2006 year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Therefore, the Form 1099 for 2006 is insufficient to show that the petitioner had the ability to pay the proffered wage to the beneficiary in that year.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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 (1<sup>st</sup> 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 record before the director closed on September 16, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner did not submit its 2006 or 2007 tax returns.<sup>2</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although requested by the director, the petitioner declined to provide copies of its tax returns for 2006 and 2007. The tax returns would have demonstrated the amount of

<sup>2</sup> The tax returns submitted before 2006 predated the priority date and will only be considered generally. The 2004 and 2005 tax returns indicate that the nature of the business is commercial real estate investments. The other corporation's tax returns indicate that [REDACTED] is a hotel and that it rents rooms. The identity of the petitioner as the beneficiary's employer is questionable. *Matter of Ho*, 19 I&N Dec. 582 at 591-592.

taxable income the petitioner reported to the IRS and further reveal 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).

The tax returns for 2006 and 2007 are for another company altogether, [REDACTED], Inc. Counsel requests that the AAO consider these federal income tax returns for 2006 and 2007, despite the fact that they were filed by another company, because [REDACTED], Inc. is 100% owned by the same person who owns 50% of the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> 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. In the present case, the petitioner did not submit its tax returns for 2006 and 2007. Therefore, for the years 2006 and 2007, the AAO cannot determine if the petitioner had sufficient net current assets to pay the proffered wage. As a result, the petitioner failed to meet its burden of showing that the petitioner had sufficient net assets to pay the proffered wage.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 (Reg'l Comm'r 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.

In the instant case, since the 2006 and 2007 taxes are not in the record, there is no way to determine gross receipts or wages paid. 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. The petitioner has not shown unusual circumstances in either 2006 or 2007 causing it to earn less money than would typically have been made. There is also nothing in the record about the reputation of the business. According to the Form I-140, the petitioner has been in business since 1996, has a gross annual income of \$191,280 and employs seven people. Its principal business activity listed on its tax returns is not as stated in the Form I-140. Assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage, beginning on the priority date.

Additionally, in adjudicating the appeal, the AAO found that the beneficiary's claimed employment on his Form ETA 9089 conflicted with a prior Form ETA 750B that the beneficiary had submitted and signed under the penalty of perjury. On both the Form ETA 9089 and the Form ETA 750B, the beneficiary represented that he worked full-time for the "Hotel Mandarin", but on the Form ETA 9089 he stated that he worked there from December 1, 1995 to June 30, 1998 as a Front Desk Manager. This is inconsistent with the prior Form ETA 750B, in which the beneficiary stated that he worked [REDACTED] from December, 1994 to October, 1995 as a chef. Further, on the

Form ETA 750B, the beneficiary stated that he worked at the "[REDACTED]" from December, 1995 until June, 1998, the same dates that the beneficiary represented that he worked for the "[REDACTED]" on his Form ETA 9089. Further, on both the Form ETA 9089 and the Form ETA 750B, the beneficiary represented that he worked at the "[REDACTED]" from March, 1992 to November, 1994, but on the Form ETA 9089 the beneficiary stated that he worked at the Front Desk whereas on the Form ETA 750B he stated that he worked there as an assistant chef. Further, the beneficiary had previously submitted letters from the Hotel [REDACTED], [REDACTED], and the [REDACTED] which corroborate the dates and the position set forth in the Form ETA 750B, not the Form ETA 9089. Accordingly, it appears that the beneficiary misrepresented his prior work experience in order to meet the requirements of the Form ETA 9089.

On December 22, 2011, the AAO issued a Request for Evidence and Notice of Derogatory Information ("RFE/NDI") to both the petitioner and the beneficiary, noting several inconsistencies in the record concerning the beneficiary's work experience prior to the filing date of the labor certification and requesting both the petitioner and the beneficiary to produce independent objective evidence to resolve those inconsistencies in the record and to establish that the beneficiary was qualified to perform the duties of the position. The AAO gave both the petitioner and the beneficiary 30 days to respond. No response has been received from either the petitioner or the beneficiary.

In the RFE/NDI to the petitioner, the AAO specifically alerted the petitioner that failure to respond to the RFE/NDI would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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). Due to the inconsistencies that were not rebutted, the AAO finds that the beneficiary was not qualified to perform the services of the occupation as of the filing date of the Form ETA 9089.

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

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

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the 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 willfully misrepresenting 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.<sup>4</sup>

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.

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

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

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 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 to

<sup>4</sup> 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 discovers fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with the opportunity to respond to the same.

the AAO's December 22, 2011 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 work experience amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

In this case, the petitioner stated, upon filing the Form ETA 9089 labor certification application with the DOL, that the position stated on the labor certification application required a minimum of two years of prior work experience in the job offered.

The evidence of record of the beneficiary's work experience as a front desk manager is inconsistent. The record does not contain any independent objective evidence such as pay stubs, payroll records, financial statements, or other tangible documents to corroborate the assertions that the beneficiary was employed as a front desk reservations manager for the required two years before the filing of the Form ETA 9089. Such evidence and/or explanations are material because, if they were provided, they would resolve the inconsistencies between the beneficiary's stated employment as a front desk manager during the same time he states that he worked as a chef, and would demonstrate whether the beneficiary had the requisite 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). Further, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the noted inconsistencies and the beneficiary's failure to respond, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from 1992 to 1998.

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 Department of Labor 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 Department of Labor issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. See 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. Compare 8 C.F.R. § 204.5(g) with § 204.5(1)(3)(ii)(B). The beneficiary did not establish the necessary qualifications in this case, as he did not possess two years' work experience as a gardener as of the filing date of the labor certification. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's use of forged or falsified work experience document 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, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. See *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. See *Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. See *Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

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

By misrepresenting his work experience 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 consideration of the lack of response to the AAO's NDI/RFE, neither the petitioner nor the beneficiary dispute that the work experience submitted in support of the labor certification was fraudulent. The beneficiary does not offer any testimony, or documentation to show that he has 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 them each an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, neither submitted a response.

By submitting the Form ETA 9089, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Because the beneficiary has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that he submitted falsified work experience, we find that the beneficiary has sought to procure an immigration benefit through material misrepresentation. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

Further, because we find that there was fraud or misrepresentation of a material fact involving the labor certification application, USCIS will invalidate the labor certification application. The regulation at 20 C.F.R. § 656.30(d) provides:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State 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. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Because there is no valid labor certification, there can be no Form I-140 approval. The regulations at 8 C.F.R. § 204.5(a)(2) and § 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section § 203(b)(3) of the Act be accompanied by a labor certification. As the labor certification is invalidated, the Form I-140 petition is not accompanied by a labor certification. For this additional reason, the petition must also be denied.

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 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 documentation in an effort to procure a benefit under the Act and the implementing regulations.

**FURTHER ORDER:** The alien employment certification, Form ETA 9089, ETA case number [REDACTED] filed by the petitioner is invalidated.