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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: **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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On July 27, 2007, the petitioner filed an Immigrant Petition for Alien Worker, Form I-140. The employment-based immigrant visa petition was denied by the Director of the Texas Service Center (“the director”) on July 7, 2008, and the petitioner subsequently appealed the director’s denial decision. 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 750.

The petitioner is a contractor, seeking to permanently employ the beneficiary in the United States permanently as a gardener 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 The director determined that the petitioner had not established that it had the 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.²

The first issue is whether the petitioner had the ability to pay the beneficiary the proffered wage. 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.

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, Application for Alien 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 750, Application for Alien Employment

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 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).

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 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$16.75 per hour (\$34,840 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The record closed on June 30, 2008 with the petitioner's submission of evidence in response to the director's Notice of Intent to Deny. At that time, the petitioner's tax return for 2006 was the most recent return available.

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.

The evidence in the record of proceeding shows that the petitioner is an individual. On the Form ETA 750B, signed by the beneficiary, 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 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'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 in 2001 until July of 2007³.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco*

³ The evidence of employment of the beneficiary for the petitioner in 2007 consists of one pay stub and a check for 40 hours of work dated July 20, 2007.

Especial v. Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. Individuals must show that they can cover their existing expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In the instant case, from 2001 to 2005, the petitioner filed his taxes as married filing separately with no dependents. The petitioner's tax returns reflect the following information for the following years:

Year	Petitioner's Adjusted Gross Income
2001	(Form 1040, line 33): \$8,351
2002	(Form 1040, line 35): \$27,922
2003	(Form 1040, line 34): \$5,119
2004	(Form 1040, line 36): \$7,971
2005	(Form 1040, line 37): \$7,422

From 2001 to 2005, the petitioner's adjusted gross income fails to cover the proffered wage of \$34,840. The petitioner has not submitted his personal expenses for any of these years, but that is inconsequential here as the adjusted gross income by itself fails to cover the proffered wage. It is improbable that the petitioner could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2006, the petitioner filed his taxes as married filing jointly with two dependents. The petitioner's tax return for this year reflects the following information:

Year	Petitioner's Adjusted Gross Income
2006	(Form 1040, line 37): \$64,732

In 2006, the petitioner's adjusted gross income covers the proffered wage of \$34,840. However, the petitioner has not submitted a list of his personal expenses for this year, and thus the AAO is unable to determine whether the petitioner can sustain himself and his dependents in addition to paying the proffered wage in 2006. Although the director did not ask for this information in the Notice of Intent to Deny sent on May 29, 2008, as the petitioner did not have the adjusted gross

income to pay the proffered wage from 2001 to 2005, the AAO will not remand for a determination of the petitioner's ability to pay in 2006 considering personal expenses.

On appeal, counsel asserts that the petitioner paid wages to part-time temporary workers, as demonstrated on Schedule C of his taxes, line 36, and that beneficiary would replace these workers. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the temporary workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel also submitted on appeal a pay stub dated July 3, 2008 and two checks dated July 3, 2008 and July 18, 2008 that the petitioner paid to the beneficiary. While these checks tend to support the petitioner's statement that he has employed the beneficiary since 2007, the record does not establish that the petitioner has the ability to pay from 2001 to 2006.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income 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).⁴ USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker 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, there is nothing extraordinary in the record that would parallel the circumstances in *Sonogawa*. The petitioner has submitted a certificate from the Executive's Office of Consumer Affairs to show that he has been in business as a licensed landscaper since 1999, and submitted a copy of his initial license and a copy of the two recent

⁴ 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.

license renewals. 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 AAO does not consider renewing one's license to be a milestone achievement. 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. The petitioner has not shown unusual circumstances causing it to earn less money than it would typically have made from 2005 to 2007. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

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 shown that he has the ability to pay the proffered wage to the beneficiary. Therefore, on this basis, the appeal will be dismissed.

Additionally, in adjudicating the appeal, the AAO found that the beneficiary's claimed employment on his Form ETA 750B conflicted with a subsequent Form ETA 9089, both forms that the petitioner and the beneficiary signed under the penalty of perjury. On the Form ETA 750B, the beneficiary represented that he worked full-time as a gardener for [REDACTED] in Cuenca, Ecuador from February of 1996 through November of 1998. An employment letter from [REDACTED] was also submitted. However, on the Form ETA 9089, the beneficiary represented that he worked full-time as a bricklayer for [REDACTED] in Gualeceo, Ecuador from March 1, 1993 to November 15, 1997. An employment verification letter was also submitted. There is an overlap in the dates of employment, and so from the period from February, 1996 to November 15, 1997 the beneficiary claims to have worked full time as both a gardener and a bricklayer for two different employers. Accordingly, it appears that the beneficiary misrepresented his prior work experience in order to meet the requirements of the Form ETA 750.

The AAO also found that the evidence of record that the beneficiary worked for the petitioner is inconsistent. On the Form ETA 9089, the beneficiary represented that he started to work for the petitioner in October of 2007 as a bricklayer. However, in the beneficiary's Form G-325, Biographic Information, which he signed under penalty of perjury on July 26, 2007 and submitted in connection with the application to adjust status to lawful permanent resident status (Form I-485), he listed that he started to work for the petitioner in July of 2007 as a gardener.

On November 7, 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. 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). Therefore, the AAO will alternatively dismiss the appeal because the petitioner failed to respond to the RFE.

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.⁵

⁵ 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

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 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 to the AAO’s December 30, 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.

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.

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 certified, upon filing the Form ETA 750 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. In support of its position that the beneficiary worked as a gardener from February of 1996 to November of 1998, the petitioner submitted an employment verification letter from [REDACTED] written on letterhead and dated April 25, 2001, affirming that he employed the beneficiary from February of 1996 to November of 1998 to manage his farm.

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 in Ecuador as a gardener from February of 1996 to November of 1998. 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 gardener during the same time he states that he worked as a bricklayer, 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 1996 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)(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 and submitting a fraudulent document 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 document submitted in support of the labor certification was fraudulent. The beneficiary does not offer any testimony, or documentation to dispute that the document submitted to USCIS was false, and 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 signing the Form ETA 750, and submitting a seemingly forged or fraudulent work experience letter, 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 a falsified document, we affirm our finding 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.

Thus, because the documents do not reliably establish the beneficiary's qualifications as of the priority date, the appeal must be dismissed. For this additional reason, the petition must be denied.

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 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 750, ETA case number P-05220-91472, filed by the petitioner is invalidated.