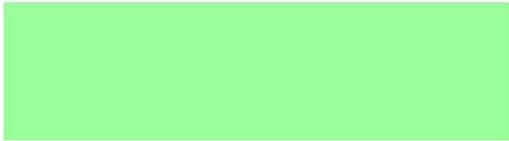


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

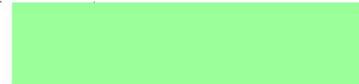


U.S. Citizenship  
and Immigration  
Services

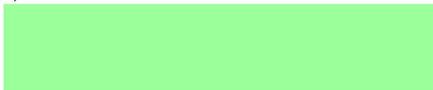
(b)(6)



Date: **AUG 22 2013** Office: TEXAS SERVICE CENTER

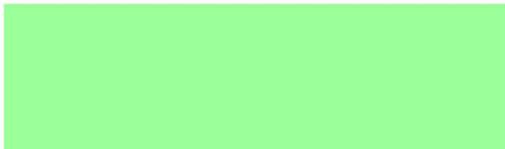


IN RE: Petitioner:  
Beneficiary:



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 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn in part and the appeal will be dismissed.

The petitioner is a construction company. It seeks to permanently employ the beneficiary in the United States as a segmental paver. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 22, 2010. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of experience stated on the labor certification because the employment letter was inconsistent with a previously submitted ETA Form 9089 and offer letter.<sup>2</sup> The director found that the evidence submitted by the petitioner failed to overcome the inconsistencies in the record, finding that the beneficiary committed material misrepresentation on the Form ETA 9089. The director denied the petition and invalidated the labor certification on March 4, 2013.

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

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>3</sup> On appeal, counsel submits the Form I-290B, Notice of Appeal or Motion and copies of regulations and case law.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The ETA Form 9089 and offer letter were submitted in connection with a Form I-140 immigrant petition filed on the beneficiary's behalf in 2007.

<sup>3</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 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 beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (2). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Not Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification states that the beneficiary qualifies for the proffered position based on experience as a segmental paver with [REDACTED] from February 28, 2005 until June 12, 2009. The only other experience listed is experience gained with the petitioner in the proffered position beginning April 23, 2010.<sup>4</sup> The beneficiary signed the labor certification

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<sup>4</sup> The certified ETA Form 9089, clearly indicates at J.21 that the beneficiary’s experience with the

under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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

The record contains an experience letter, dated February 1, 2011, from [REDACTED] letterhead stating that the company employed the beneficiary as a segmental paver from February 28, 2005 until June 12, 2009. However, the letter does not provide the signatory's position/title, a description of the beneficiary's duties or state whether the beneficiary was employed full-time. The letter also conflicts with an ETA Form 9089 the beneficiary signed and an offer letter submitted in connection with a Form I-140 petition filed on his behalf in 2007. The ETA Form 9089, signed on December 12, 2006, indicates that the beneficiary was employed by [REDACTED] from February 2, 1993 until June 30, 1995 and there was no other employment listed. An offer letter, dated October 15, 2007, from [REDACTED] president, on [REDACTED] letterhead, states that the company will hire the beneficiary upon approval of the Form I-140 immigrant petition, implying that the beneficiary was not yet employed by [REDACTED] on October 15, 2007. It is incumbent upon a petitioner to resolve the inconsistencies in the record concerning the beneficiary's experience by independent objective evidence and any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to a Notice of Intent to Deny (NOID) issued by the director, the petitioner submitted a letter from petitioner's former counsel,<sup>5</sup> dated September 5, 2012, in which she states that she accidentally wrote the name [REDACTED] on the 2011 experience letter from [REDACTED] due to error. The petitioner also submitted a new experience letter, dated September 5, 2012, from [REDACTED] letterhead stating that the company employed the beneficiary as a segmental paver from February 28, 2005 until June 12, 2009. However, the second letter does not provide the signatory's position/title, a description of the beneficiary's duties or state whether the beneficiary was employed full-time. This letter also conflicts with the ETA Form 9089 the beneficiary signed and the offer letter submitted in connection

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employer in a position substantially comparable to the job opportunity requested cannot be used to qualify the beneficiary for the certified position. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position only if the position was not substantially comparable. Representations made on the ETA Form 9089 that is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the employer is only in a position substantially comparable to the job opportunity and cannot, therefore be used to qualify the beneficiary for the certified position.

[REDACTED]

with a Form I-140 petition filed on his behalf in 2007, as noted above. The ETA Form 9089, signed on December 12, 2006, indicates that the beneficiary was employed by [REDACTED], in Ecuador from February 2, 1993 until June 30, 1995 and there was no other employment listed. An offer letter, dated October 15, 2007, from [REDACTED] letterhead, states that the company will hire the beneficiary upon approval of the Form I-140 immigrant petition, implying that [REDACTED] did not yet employ the beneficiary on October 15, 2007.<sup>6</sup> See *Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, counsel contends that the director applied the incorrect burden of proof by misapplying the “preponderance of the evidence” standard and submits a copy of the regulations and of *Matter of Sun*, 12 I&N Dec. 800 (BIA 1968). *Matter of Sun* does not speak to the petitioner’s burden of proof in seeking a benefit under Act. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

On appeal, counsel contends that the director incorrectly concluded that the beneficiary provided false information and committed misrepresentation of a material fact because the instant ETA Form 9089 is correct and true. Counsel contends that the omission of the beneficiary’s experience with [REDACTED] on the 2007 ETA Form 9089 was a careless mistake rather than a deliberate misrepresentation and that the documentation submitted in response to the NOID conclusively proved that the beneficiary was employed by [REDACTED] from February 28, 2005 until June 12, 2009. The AAO finds that the documentation submitted below was not sufficiently independent and objective evidence of the beneficiary’s employment by [REDACTED] in view of the noted inconsistencies in the ETA Form 9089 and offer letter. As such the petitioner has failed to provide independent objective evidence sufficient to overcome the inconsistencies in the record. *Matter of Ho*, 19 I&N Dec. at 591-92. Any future filings should provide certified tax returns for [REDACTED] and the beneficiary, as well as certified Forms W-2 for the beneficiary during the period in question.<sup>7</sup> Thus the AAO finds that the beneficiary was not qualified to perform the duties of the proffered position as of the priority date.

The 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

<sup>6</sup> It is also noted that company records reflect that [REDACTED] is not the president of [REDACTED]

<sup>7</sup> Public records indicate that the Social Security Number (SSN) under which the wages were paid is linked to multiple individuals. In any future filings, the petitioner should provide evidence that the Social Security Administration (SSA) issued the SSN listed on the Forms W-2 to the beneficiary.

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>8</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

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<sup>8</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 later 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 opportunity to respond to the same.

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 the documentation submitted by the petitioner is not independent and objective evidence of the beneficiary's employment by [REDACTED] in view of the noted inconsistencies. Thus, the petitioner has not established that the beneficiary is qualified for the position. Nevertheless, the evidence does not establish that the beneficiary made a willful misrepresentation of a material fact by stating that he was employed by [REDACTED] from February 28, 2005 until June 12, 2009.

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 24 months of experience for the position offered. 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 beneficiary certified, upon completing and signing the Form ETA 9089 labor certification application that he qualified for the position (that he had, at least 24 months of work experience in the job offered) before the priority date. The beneficiary maintained that he was employed by [REDACTED] from February 28, 2005 until June 12, 2009, even though he did not list such employment on the 2007 ETA Form 9089.

Based on the noted inconsistencies and the beneficiary's failure to provide independent objective evidence to overcome those inconsistencies, the AAO finds that the beneficiary is not qualified as a

segmental paver as of the priority date. Nevertheless, upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). As such, the AAO finds that the record does not contain sufficient evidence of fraud or misrepresentation and withdraws the director's finding. The director's invalidation of the labor certification will be cancelled and the validity of the labor certification will be reinstated.<sup>9</sup>

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

As the evidence does not reflect fraud involving the labor certification, the director erroneously invalidated the ETA Form 9089, Application for Permanent Employment Certification (labor certification) in this case.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence, 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on September 12, 2012 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2011 federal income tax return was the most recent return available. However, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner for 2011.

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<sup>9</sup> The regulation at 20 C.F.R. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS 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 the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. In any future filings, the petitioner should submit its IRS tax returns and any IRS Forms W-2 issued to the beneficiary from 2011 through the date of the filing.

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.

**FURTHER ORDER:** The AAO withdraws the director's finding that the beneficiary knowingly misrepresented a material fact by submitting fraudulent documents and misrepresenting his experience 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] is reinstated.