

(b)(6)

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

[Redacted]

DATE: FEB 14 2013

OFFICE: TEXAS SERVICE CENTER

FILE

[Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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 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, with a separate administrative finding of willful misrepresentation of a material fact against the beneficiary. The labor certification will also be invalidated based on the beneficiary's willful misrepresentation.

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.¹

The petitioner is a metal crafting business. It seeks to employ the beneficiary permanently in the United States as a welding supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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. On appeal, the AAO has identified two additional issues, whether or not the petitioner established that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date and whether or not the beneficiary willfully misrepresented his work experience.

The record shows that the appeal is properly filed, timely, 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.

On May 3, 2012, this office issued the petitioner a Notice of Intent to Dismiss and Notice of Derogatory Information and Request for Evidence (Notice) notifying the petitioner of derogatory information, the AAO's intent to dismiss the appeal, the AAO's intent to enter a finding of willful misrepresentation, and requesting additional evidence. This office allowed the petitioner 30 days in which to provide evidence to overcome the derogatory information and to provide the requested evidence. The petitioner timely responded. For the reasons discussed below, the appeal will be dismissed and the labor certification application will be invalidated.

On May 3, 2012, this office also issued the beneficiary a Notice of Intent to Dismiss and Notice of Derogatory Information. This office allowed the beneficiary 30 days in which to provide evidence to overcome the derogatory information. The petitioner's timely response indicated that it was on behalf of the beneficiary as well. For the reasons discussed below, the AAO will enter a separate administrative finding of willful misrepresentation of a material fact against the beneficiary.

¹The 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).

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.

Continuing Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, 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 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 February 22, 2001. The proffered wage as stated on the Form ETA 750 is \$18.16 per hour or \$37,772.80 per year. The Form ETA 750 states that the position requires three years of experience as a welding supervisor.

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. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on February 18, 2001, the beneficiary claimed to have worked for the petitioner from January 1997 until the time he signed the labor certification.²

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

² He also listed experience as a welding supervisor with [REDACTED] from June 1991 until June 1994.

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 indicates in its May 17, 2012 response to the Notice that the beneficiary has never been issued an Internal Revenue Service (IRS) Form W-2 because the beneficiary "has never been on the books as a legal salaried employee." The record contains no other evidence that the petitioner paid the beneficiary wages, such as IRS Forms 1099 or copies of paychecks. Therefore, the petitioner has not established that it employed and paid the beneficiary any wages from the priority date onward.

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 Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 23, 2008 with the director's receipt of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 income tax return was the most recent return available for the director to review. The petitioner has submitted its 2008, 2010, and 2011 tax returns³ in response to the Notice. The petitioner's tax returns demonstrate its net income for 2001 through 2011, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$3,462.
- In 2002, the Form 1120 stated net income of \$13,879.
- In 2003, the Form 1120 stated net income of -\$44,046.
- In 2004, the Form 1120 stated net income of -\$2,017.
- In 2005, the Form 1120 stated net income of \$14,194.
- In 2006, the Form 1120 stated net income of \$71,785.
- In 2007, the Form 1120 stated net income of -\$67,723.
- In 2008, the Form 1120 stated net income of \$2,308.
- In 2009, the petitioner did not submit any regulatory-prescribed evidence.
- In 2010, the Form 1120 stated net income of \$25,001.
- In 2011, the Form 1120 stated net income of \$13,761.

³Although the petitioner also submitted a copy of a 2009 tax return, it is not the petitioner's return.

Therefore, for the years 2001 through 2005 and the years 2007 through 2011, the petitioner did not establish that it had sufficient net income to pay the proffered wage. The petitioner established that it had sufficient net income in 2006 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.⁴ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2011, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$73,851.
- In 2002, the Form 1120 stated net current assets of \$83,210.
- In 2003, the Form 1120 stated net current assets of \$56,304.
- In 2004, the Form 1120 stated net current assets of \$60,564.
- In 2005, the Form 1120 stated net current assets of -\$45,431.
- In 2007, the Form 1120 stated net current assets of -\$42,333.
- In 2008, the Form 1120 stated net current assets of -\$25,342.
- In 2009, the petitioner did not submit any regulatory-prescribed evidence.
- In 2010, the Form 1120 stated net current assets of -\$45,875.
- In 2011, the Form 1120 stated net current assets of -\$47,771.

Therefore, for the years 2005, 2007, 2008, 2009, 2010 and 2011, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. The petitioner established that it had sufficient net current assets in 2001, 2002, 2003 and 2004 to pay the proffered wage.

Therefore, from the date the Form ETA 750 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.

On appeal, counsel asserts that in 2005 and 2007, the petitioner's business was interrupted by construction on the petitioner's premises and that the petitioner expended monies to pay for the

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

construction. In support of these assertions, counsel submitted copies of work permits, invoices, credit card statements, and two cancelled checks. In the Notice, this office stated that the tax returns were not consistent with counsel's assertions. In its response to the Notice, the petitioner stated that "[s]ince our [f]ederal [t]axes from 2008-2011 do not show sufficient income or assets to support our petition...there is no benefit for us to respond to the allegations of how these temporary construction costs inhibited our income in 2005 and 2007." Therefore, the petitioner has not provided evidence to support counsel's assertions regarding its ability to pay the proffered wage in 2005 and 2007. Further, the petitioner has not made any other assertions regarding its ability to pay the proffered wage in 2005, 2007, 2008, 2009, 2010, and 2011.

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 750 was accepted for processing by the DOL.

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, the petitioner has not demonstrated a sustained historical growth in sales. The record does not contain any evidence of the petitioner's reputation within its industry. Although counsel asserted uncharacteristic business expenditures in 2005 and 2007, the petitioner did not submit evidence substantiating those expenses. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service. Thus, 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beneficiary's Qualifications: Experience

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), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

EDUCATION

Grade School: 0 years.

High School: 0 years.

College: 0 years.

College Degree Required: None.

Major Field of Study: Not Applicable.

TRAINING: None Required.

EXPERIENCE: Three (3) years in the job offered of welding supervisor.

OTHER SPECIAL REQUIREMENTS: Must be fluent in Spanish.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a welding supervisor with [REDACTED] from June 1991 until June 1994.⁵ The beneficiary also lists experience working with the petitioner as a welding supervisor from January 1997 to the date he signed the labor certification on February 18, 2001. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

⁵ Based on the beneficiary's birthdate, he would have been 15 years old when he started working as a welding supervisor with [REDACTED]. The record contains no evidence of the beneficiary's experience as a welder prior to becoming a welding supervisor. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The AAO's Notice stated the following regarding the beneficiary's experience:

In this case, the labor certification requires an applicant to have three (3) years of experience in the job offered of welding supervisor. The beneficiary set forth his credentials on the labor certification at Part B, question 15b as working for [REDACTED] as a welding supervisor from June 1991 until June 1994.⁶

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(1) provides in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letters(s) from current or former employer(s) or trainers(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

Submitted with the petition was an employment verification letter dated September 29, 2006, from the president of [REDACTED]

⁶The beneficiary also stated that he worked for the petitioner as a welding supervisor from January 1997 until he signed the labor certification on February 18, 2001.

The letter states the beneficiary was employed as a “full time salaried welding supervisor with our company from June 1, 1991 through June 30, 1994.”

USCIS obtained information confirming that the beneficiary was physically present in the United States on June 1, 1994; therefore, he could not have been working in Ecuador at the same time. Additionally, the name and address of the employer are inconsistent as listed on Form ETA 750B of the labor certification and the employment verification letter.

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.

These inconsistencies raise doubts about the authenticity of the letter documenting the beneficiary’s experience. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Unless your organization can resolve the inconsistent information with independent, objective evidence, the AAO intends to dismiss the appeal and enter a finding of willful misrepresentation into the record. The AAO may also invalidate the labor certification based on willful misrepresentation. See 20 C.F.R. § 656.30(d). While your organization may withdraw the appeal, withdrawal will not prevent a finding that your organization has engaged in the willful misrepresentation of material facts.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she “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.” See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).⁷

⁷ The term “willfully” in the statute has been interpreted to mean “knowingly and intentionally,” as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position

Based on the foregoing, the AAO intends to enter a finding of willful misrepresentation and invalidate the labor certification unless the petitioner submits independent, objective evidence to overcome these findings.

In response to the Notice, the petitioner submitted a second letter from [REDACTED]. This second letter is dated May 18, 2012 and is from [REDACTED] the general manager of [REDACTED] on printed company letterhead stating that its previous letter was written from recollection without referencing the actual payroll records. [REDACTED] states that he is writing this second letter after checking payroll records which indicate the beneficiary's dates of employment were from May 1, 1991 until May 7, 1994. However, the payroll records were not included with the letter, and it is unclear how [REDACTED] knew that [REDACTED], who wrote the first letter as General Manager of [REDACTED] wrote the letter from his "recollection."

Further, evidence created after the petitioner and beneficiary were put on notice of deficiencies in the record is not considered independent, objective evidence of the beneficiary's employment. Independent, objective evidence is that which was in existence at the time of the Notice, such as payroll records, paychecks and/or tax records evidencing the beneficiary's employment with [REDACTED]. Therefore, the second letter from [REDACTED] which was created after the AAO's Notice, will not be considered as independent, objective evidence of the beneficiary's employment.

Thus, the petitioner has not established 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.

Further, the petitioner's response to the Notice does not address the beneficiary's willful misrepresentation on the labor certification that he worked as a welding supervisor for [REDACTED] in Ecuador from June 1991 until June 1994.

offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. See 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, see 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, see *Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

A material issue in this case is whether the beneficiary has the required experience for the position offered. Misrepresenting work experience on the labor certification application 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-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

The alien beneficiary does not deny that he misrepresented work experience on the labor certification application to establish that he was qualified for the petitioner's job opportunity. In actual fact, the beneficiary did not work as a welding supervisor for [REDACTED] in Ecuador from June 1991 until June 1994. 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 beneficiary's work experience as a welding supervisor with [REDACTED] as stated on the labor certification, from June 1991 until June 1994, is not true. The beneficiary left Ecuador on May 11, 1994 and was in the United States on June 1, 1994.

On the true facts, the beneficiary is inadmissible. 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 misrepresentation on the labor certification application shut 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 based on represented employment as a welding supervisor with [REDACTED] from June 1991 to June 1994. 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 signing the labor certification application and listing false information on the Form ETA 750 that would lead to a positive determination that the beneficiary had the required experience for the proffered position, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Thus, we find that the beneficiary willfully misrepresented a material fact on the labor certification application. This finding of willful misrepresentation of a material fact shall be considered in any future proceeding where admissibility is an issue.

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.

We also invalidate the labor certification based on the beneficiary's willful misrepresentation of a material fact on the labor certification application.⁸

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

⁸ The regulation at 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation states:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).⁹

⁹ The AAO's Notice stated the following regarding the petitioner's signature on the Form I-140:

A review of the record reveals your organization president's signature on the petition and his signature on the Form G-28 accompanying the appeal are visibly different. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Submit evidence that your organization's president executed both the petition and the Form G-28 that accompanies the appeal.

In response to the AAO's Notice, the petitioner's President, [REDACTED] stated that at the time of the I-140 filing, he was out of town and gave permission for his son, [REDACTED] to sign the petition. However, it is not clear that [REDACTED] was an employee or officer of the petitioner when he signed the Form I-140 visa petition. The regulations do not permit any individual who is not the petitioner to sign Form I-140 on behalf of a United States employer.

The regulation at 8 C.F.R. § 204.5(c) provides:

Filing petition. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

The regulation at 8 C.F.R. § 204.5(a)(1) provides that a petition is properly filed if it is accepted for processing under the provisions of 8 C.F.R. § 103. The regulation at 8 C.F.R. § 103.2(a)(2) provides:

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the BCIS is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

There is no regulatory provision that waives the signature requirement for a petitioning U.S. employer or that permits a petitioning U.S. employer to designate another person to sign the petition

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage. Further, the petitioner has failed to demonstrate that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Accordingly, 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 finds that the beneficiary willfully misrepresented a material fact on the labor certification application in an effort to procure a benefit under the Act and the implementing regulations. Further, based on 20 C.F.R. § 656.31(d), the labor certification application, Form ETA 750, ETA case number P-05136-14765, filed by the petitioner is invalidated.

on behalf of the U.S. employer. The petition has not been properly filed because the petitioning U.S. employer did not sign the petition. The signature line on the Form I-140 for the petitioner provides that the petitioner is certifying, "under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct." To be valid, 28 U.S.C. § 1746 requires that declarations be "subscribed" by the declarant "as true under penalty of perjury." *Id.* In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: "Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury." 18 U.S.C. § 1621. The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration "for" another. Without the petitioner's actual signature as declarant, the declaration is completely robbed of any evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).