



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 26 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner: [REDACTED]
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:

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: On June 15, 2007, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center (NSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the NSC director (the director) on June 25, 2007. The director, however, revoked the approval of the immigrant petition on October 3, 2012, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as an oil distribution and jobber services business. It seeks to permanently employ the beneficiary in the United States as a database administrator. 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).¹

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 February 15, 2007. *See* 8 C.F.R. § 204.5(d).

On October 3, 2012, the director revoked the petition's approval based upon the determination that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date and had misrepresented his experience on the labor certification. The director noted that the petitioner's response to the Notice of Intent to Revoke (NOIR) issued on August 27, 2012 was insufficient to overcome the noted inconsistencies in the record. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

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 On appeal, counsel submits a brief and no additional evidence.

¹ 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.

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 8 C.F.R. § 103.2(a)(1). The record in the instant case

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. See section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR dated August 27, 2012, the director wrote:

You indicated in our support letter that the beneficiary worked for [REDACTED] Inc. from May 2002 to March 2006 as a database administrator. The beneficiary . . . declared in the ETA 9089 . . . that he worked for [REDACTED] from May 3, 2002 to March 31, 2006 as a database administrator. The beneficiary also declared, in an ETA 750, that he worked for [REDACTED] Inc. from December 2003 to March

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).

2004 as a programmer analyst. The beneficiary misrepresented his employment with [REDACTED] or both. In any event the misrepresentation is sufficient cause for revocation of the approval . . .

The director advised the petitioner in the NOIR that the instant case involved misrepresentation of the beneficiary qualifying experience. The director specifically asked the petitioner to submit additional evidence to overcome the above-referenced inconsistencies.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out specific evidence or information relating to the misrepresentation of the beneficiary’s qualifying experience on the labor certification,³ that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

As set forth in the director’s NOIR and notice of revocation (NOR), the issue in this case is whether or not the beneficiary misrepresented his experience on the labor certification and whether he possesses the minimum required experience on the labor certification. 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 (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 *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).

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

³ The petitioner’s address remains unchanged.

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: Bachelor's degree in engineering.⁴
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: computer science.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a database administrator with () from January 1, 1991 until April 30, 2002; a database administrator with () New Jersey, from May 3, 2002 until March 31, 2006; and a database administrator with the petitioner in () Georgia from April 1, 2006 until July 2, 2007. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury on June 11, 2007.

The regulation at 8 C.F.R. § 204.5(l)(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 June 16, 1995, from an unknown individual, proprietor, on () letterhead stating that the company employed the beneficiary to independently develop software for the computerization of the businesses operations. However, the letter does not state the title of the beneficiary's position, provide the name of the signatory, describe the beneficiary's duties in detail, or specify the dates of employment or if the job was full-time. Further, the letter is inconsistent with information on the ETA Form 9089, multiple Form G-325As, Biographical Information Sheets (Form G-325A), the beneficiary's resume, other experience letters, letters describing the beneficiary's qualifying experience and a Form ETA 750, Application for Alien Employment

⁴ The director did not question whether the beneficiary possessed the minimum educational requirements for the proffered position. The AAO does not find anything in the record to contradict this finding.

Certification (labor certification) filed in association with another Form I-140 immigrant petition filed on the beneficiary's behalf. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The ETA Form 9089 states that the beneficiary was employed by GNFC Ltd. from January 1, 1991 until April 30, 2002 as a database administrator; the beneficiary indicated on a Form G-325A, Biographical Information Sheet (Form G-325A) submitted in association with a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), dated October 25, 2004, that he was employed as a manager with GNFC Ltd. from September 1984 until May 2004. In a second Form G-325A in the record, dated June 28, 2007, the beneficiary stated that he was employed as a manager with [REDACTED] from September 1984 until May 2002. On a Form ETA 750 in the record, dated March 1, 2004, the beneficiary stated that he was employed as a programmer analyst with [REDACTED] from January 1991 until September 2003. An undated resume for the beneficiary submitted on appeal, states that the beneficiary was employed by [REDACTED] from 1984 until 2002, specifically, as a technical development lead with [REDACTED] from 1991 until 2000.

An experience letter from [REDACTED] chief manager, on [REDACTED] letterhead states that the company employed the beneficiary as a manager with the information systems department for the implementation of operations & maintenance packages since 1995 until November 8, 2000, the date on which the letter is signed. However, the letter does not sufficiently specify the dates of employment or state if the job was full-time and the description contained therein reflects the team's responsibilities and does not describe the beneficiary's actual job duties. The dates of employment and job title of the beneficiary indicated on this letter from Mr. [REDACTED] are inconsistent with the documents in the record outlined above. Moreover, the letter from Mr. [REDACTED] is inconsistent with the letter from [REDACTED]⁵. The record also contains an experience letter from [REDACTED] chief manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a manager-group leader from November 2000 until December 18, 2001, the date on which the letter was signed. However, the letter is inconsistent with information outlined above on the ETA Form 9089, multiple Forms G-325A, the beneficiary's resume, and a Form ETA 750 in regard to the beneficiary's position and dates of employment. Further, the letterhead of the first experience letter from [REDACTED] does not match the second experience letter from [REDACTED].

Finally, in a letter, dated June 26, 2007, accompanying a Form I-129, Petition for Nonimmigrant Worker (Form I-129), and a letter, dated June 12, 2007, accompanying the instant Form I-140 petition, the petitioner sets forth the beneficiary's qualifying experience with [REDACTED] as: a database administrator from January 1991 until April 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

⁵ While the termination dates of employment with [REDACTED] may be explained by the date on which the experience letter was signed, the varying position titles, start dates and employer, are not.

Regarding the beneficiary's claimed experience with Intech the record contains an experience letter, dated January 8, 2004, from [REDACTED], president, on [REDACTED] letterhead indicating the company employed the beneficiary as a programmer analyst from May 2002 until December 2003. However, the letter is inconsistent with the information outlined above on the ETA Form 9089, Forms G-325A and a Form ETA 750 in regard to the beneficiary's dates of employment, position and employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. Finally, even if the AAO were to consider the letter from [REDACTED] to be credible, it would only account for 17 months of relevant experience.

In addition, the record contains an experience letter from [REDACTED] Corporation letterhead stating that the company employed the beneficiary as a programmer-analyst from March 2009 until November 25, 2009, the date on which the letter was signed. However, the letter does not provide a detailed description of the beneficiary's job duties and the referenced experience occurred after the priority date. Moreover, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. at 49.

In response to the director's RFE, the petitioner submitted a sworn affidavit from the beneficiary in which he stated that he did not willfully misrepresent his qualifying experience with [REDACTED] because his experience with Intech was inadvertently presented as lasting from May 3, 2002 until March 31, 2006 on the ETA 9089 due to a clerical error by an administrative assistant. The beneficiary insists that he was employed by [REDACTED] from December 2003 until January 2006, rather than with Intech. However, as discussed above, there are inconsistencies within all of the documentation presented by the petitioner and beneficiary, not only in regard to the beneficiary's employment with [REDACTED]. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. at 591-592. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

To support the beneficiary's assertions that this misrepresentation was not willful, the petitioner submitted the beneficiary's resume, an offer of employment from [REDACTED] dated January 10, 2004, and an approval notice for the beneficiary's nonimmigrant status extension with [REDACTED] from March 26, 2003 until January 2006. However, the beneficiary's disavowal of participation in fraud cannot be sustained in light of his admission of willingly signing documentation which contained incorrect information. *See Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396

F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993). To allow the beneficiary to absolve himself of responsibility by simply claiming that he had no knowledge or participation in a matter where he provided all the supporting documents and signed a blank document would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

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 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.⁶

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 the documentation submitted below and on appeal is not sufficiently independent and objective evidence of the beneficiary’s employment as a database administrator with [REDACTED] in view of the noted inconsistencies and self-serving statements and that the beneficiary made a willful misrepresentation of a material fact by stating that he was employed as a database administrator with [REDACTED] from January 1, 1991 until April 30, 2002 and as a database administrator with Intech from May 3, 2002 until March 31, 2006.

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 (2) years of experience for the position offered. The Attorney General has held that a misrepresentation made in connection

⁶ It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

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 ETA Form 9089 labor certification application that he qualified for the position (that he had, at least two (2) years of work experience in the job offered or as an assistant manager) before the priority date. The beneficiary maintained in his affidavit that he was employed as database administrator from January 1, 1991 until April 30, 2002 with [REDACTED] from May 3, 2002 until he started working for Cybersoftec on December 15, 2003, even though: (1) he stated in Forms G-325A under penalty of perjury that he was employed as a manager, rather than a database administrator, with [REDACTED] from September 1984 until May 2002 or May 2004; (2) he stated on Forms G-325A under penalty of perjury that he was employed as a programmer analyst, rather than a database administrator, by [REDACTED] from May 2002 until January 2004 and with [REDACTED] from either January 2004 or May 2004; (3) he stated on Form ETA 750 that he was employed by [REDACTED] as a programmer analyst, not a database administrator, from January 1991 until September 2003 and from December 2003 until the ETA Form 750 was executed on March 1, 2004, respectively; (4) and he stated on the instant ETA Form 9089 that he was employed by [REDACTED] from May 3, 2002 until March 31, 2006.

On appeal, counsel contends that the labor certification only required two (2) years of experience in the proffered position and that the beneficiary has submitted sufficient evidence that he obtained such experience with [REDACTED]. As discussed above, the petitioner has failed to provide independent objective evidence sufficient to establish that the beneficiary was employed as a database administrator with [REDACTED] during *any* portion of the period he claims to have been employed. *Matter of Ho*, 19 I&N Dec. at 591-92.

Based on the noted inconsistencies, the petitioner's failure to provide independent, objective evidence to overcome the inconsistencies, the AAO finds that the beneficiary has deliberately concealed and misrepresented facts about his prior work experience from 1984 until the priority date of the labor certification.

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 does not have the necessary qualifications in this case, as he did not possess two (2) years of work experience as a database administrator 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 false statements about his prior employment shut off a line of relevant inquiry in these proceedings. Before the Department of Labor, 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 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.

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 director specifically issued notice to both the petitioner and the beneficiary to allow the beneficiary an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, the response was insufficient to overcome the noted inconsistencies.

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.

Further, the AAO affirms the director's finding of fraud and misrepresentation involving the labor certification. 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.

As the evidence reflects fraud involving the labor certification, the AAO will invalidate the ETA Form 9089 labor certification in this case.

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

The record before the director closed on September 25, 2012 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's 2011 federal income tax return was the most recent return available. However, the record does not contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2007 through 2011. 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.

Additionally, according to USCIS records, the petitioner has filed another I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to

pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

The petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 knowingly misrepresented a material fact in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, ETA Form 9089, ETA case number [REDACTED] is invalidated.