



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 15 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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:** The Director, Nebraska Service Center (director), denied the preference visa petition. After granting the petitioner's motion to reopen and reconsider, the director again denied the petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner provides information technology consulting and staffing services. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

The director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the visa petition's priority date. The director denied the petition accordingly.

The AAO has jurisdiction over this appeal pursuant to the regulation at 8 C.F.R. § 103.5(a)(6) (the AAO has appellate jurisdiction over a decision on a motion where the original decision was appealable to the AAO).

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.

As set forth in the director's most recent denial of June 26, 2012, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner also contests the director's finding that it made a material misrepresentation by submitting false documents in support of the petition.<sup>1</sup>

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

---

<sup>1</sup> The director's material misrepresentation finding was not a ground for denying the petition. However, as the petitioner raises the issue on appeal, the AAO will address this issue below.

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 that any office within the DOL's employment system accepted the labor certification for processing. *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 the Form ETA 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 7, 2004. The proffered wage, as stated on the Form ETA 750, is \$39.30 per hour for a 40-hour work week (or \$81,774 per year). The Form ETA 750 states that the position requires a Bachelor's degree in engineering, computer science or "the equivalent," plus two years of full-time experience in the job offered or in "[a]ny position in Software Development or Software Testing."

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>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on April 13, 1995<sup>3</sup> and to employ 35 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, which the beneficiary signed on February 16, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the approved ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l

---

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The petitioner's Articles of Incorporation and records of the California Secretary of State's office show that the petitioner was incorporated on September 26, 2001. *See* <http://kepler.sos.ca.gov/> (accessed April 9, 2013). In the absence of evidence establishing that the petitioner conducted business before its date of incorporation, the AAO finds that the petitioner was established upon its incorporation on September 26, 2001.

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. USCIS will also consider the totality of the circumstances affecting the magnitude of the petitioner's business. *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 submitted U.S. Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for the beneficiary from 2004 through 2011. The W-2 forms show that the petitioner paid the beneficiary the following amounts: \$42,747.50 in 2004; \$48,100 in 2005; \$55,800 in 2006; \$60,125 in 2007; \$60,000 in 2008; \$60,000 in 2009; \$64,209.84 in 2010; and \$75,686.40 in 2011.<sup>4</sup> Because none of these amounts equal or exceed the annual proffered wage of \$81,774, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2004 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 figures reflected on the petitioner's federal income tax returns. If the net income figures meet or exceed the annual proffered wage (or the difference between the proffered wage and the amount the petitioner paid the beneficiary), then the petitioner is expected to be able to pay the proffered wage in the relevant years.

USCIS considers the net income figures reflected on the petitioner's federal tax returns without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for

---

<sup>4</sup> The beneficiary's wage amounts, as reported in copies of California Quarterly Wage and Withholding Reports that the petitioner submitted, total less than the annual wage amounts on his IRS W-2 forms for the corresponding years of 2009 through 2011. The beneficiary could have worked for the petitioner in states other than California during those years. The record, however, does not explain the wage discrepancies. The petitioner provided copies of various wage reports from other states, but those reports did not indicate that the beneficiary worked in those states. The wage discrepancies cast doubt on the reliability of the W-2 forms that the petitioner provided. *See Matter of Ho*, 19 I&N Dec. 582, 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition). The petitioner must submit independent, objective evidence to resolve inconsistencies in the record. *Id.*, at 591-92.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid, rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 31, 2012, with his receipt of the petitioner's submissions in response to his request for evidence (RFE). The petitioner's 2011 tax return is therefore the most recent return in the record. The petitioner's tax returns demonstrate its annual net

income, as stated on IRS Form 1120S, U.S. Income Tax Return for an S Corporation,<sup>5</sup> as follows: \$41,459 in 2004<sup>6</sup>; \$225,029 in 2005; \$54,925 in 2006; \$201,986 in 2007; \$201,341 in 2008; \$144,019 in 2009; \$19,787 in 2010; and \$221,915 in 2011.

The differences between the annual proffered wage and the amounts the petitioner paid the beneficiary are: \$39,026.50 in 2004; \$33,674 in 2005; \$25,974 in 2006; \$21,649 in 2007; \$21,774 in 2008; \$21,774 in 2009; \$17,564.16 in 2010; and \$6,087.60 in 2011. Therefore, for the years 2004 through 2011, the petitioner appears to have sufficient net income to pay the differences between the proffered wage and the amounts the petitioner paid the beneficiary.

As the director previously informed the petitioner, however, USCIS records show that the petitioner has filed at least 238 visa petitions since 2004, including 205 I-129 nonimmigrant work visa petitions and 32 other I-140 petitions. The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the April 7, 2004 priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

In response to the director's August 30, 2010 RFE, the petitioner provided information about 22 other I-140 petitions it filed after April 7, 2004. Of these 22 petitions, the petitioner said it withdrew four, while the beneficiaries of five of the other I-140 petitions chose to obtain lawful permanent resident status with other employers. *See* section 204(j) of the Act, 8 U.S.C. § 1154(j) (an I-140 petition for an adjustment of status applicant, whose application stays unadjudicated for 180 days, remains valid for a new job if the applicant changes jobs or employers but continues to work in the same or similar occupation for which the petition was filed).

The petitioner calculated the total proffered wages of the remaining 13 I-140 beneficiaries for each year from 2004 to 2009. The petitioner submitted copies of its IRS W-2 forms for the 13 beneficiaries and subtracted the wages it paid to the beneficiaries during those years. The petitioner determined that it must show an ability to pay the following annual amounts, reflecting the

---

<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 8, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income deductions shown on its Schedules K for 2005 and 2006, the petitioner's net income is found on Schedule K of its 2005 and 2006 tax returns.

<sup>6</sup> The petitioner's tax returns show that it did not elect to become an S corporation until 2005. Its net income for 2004 is therefore reflected on line 28 of IRS Form 1120, U.S. Corporation Income Tax Return.

differences between the total proffered wages and the wages paid to the beneficiaries: \$64,573.76 in 2004; \$201,611.74 in 2005; \$29,994.71 in 2006; \$328,364.96 in 2007; \$350,818.39 in 2008; and \$370,244.30 in 2009. The petitioner asserts that its annual net income and/or net current asset<sup>7</sup> amounts for those years represent sufficient available funds to pay those annual amounts.

The AAO disagrees, however, with the petitioner's calculations and conclusions. First, the AAO finds that the petitioner did not use the correct figures for its 2005 net income and net current asset amounts, and for its 2006 net income amount. As indicated previously, an S corporation can adjust its net income received from sources other than a trade or business on Schedule K of its federal tax return. When calculating its annual net income amounts, the petitioner did not use the adjusted net income figures on Schedules K of its 2005 and 2006 tax returns. Also, the petitioner neglected to include \$25,000 of "[o]ther current assets," as shown on line 6 of its 2005 Schedule L, when it calculated its net current assets for 2005.

Also, in three of the six years (2004, 2007 and 2008), the petitioner combines its net income and net current assets to demonstrate available funds to pay the annual amounts. The AAO rejects these combinations because net income and net current assets are not cumulative. The AAO views net income and net current assets as two different methods of demonstrating a petitioner's ability to pay the proffered wage - one retrospective; and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after the payment of all expenses during the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of the petitioner's assets that will become cash within a relatively short period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its annual net current assets during each month of the coming year. Given the retrospective nature of net income and the prospective nature of net current assets, the AAO disagrees that a combination of the figures meaningfully illustrates the petitioner's ability to pay the proffered wage during a single tax year. Moreover, the combination of net income and net current assets "double-counts" certain figures, such as cash on hand, and, in the case of a petitioner who reports taxes pursuant to the accrual accounting method, accounts receivable.

---

<sup>7</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's year-end 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 show annual year-end net current assets of: \$28,776 in 2004; \$307,788 in 2005; \$291,705 in 2006; \$212,374 in 2007; \$285,730 in 2008; \$443,004 in 2009; \$355,333 in 2010; and \$446,849 in 2011.

In addition, in calculating the annual differences between proffered wages and wages paid to the 13 beneficiaries, the petitioner “prorated” the proffered wages in the years of the priority dates of their corresponding petitions. Counsel argues that, because the petitioner is not obligated to show its ability to pay the proffered wages before their relevant petition priority dates, the proffered wages should be prorated to include only the portions that occurred after the priority dates of their corresponding petitions.

The AAO, however, will not allow the petitioner to use income generated over 12 months to demonstrate its ability to pay proffered wages of less than 12 months, just as it would not allow the petitioner to use income generated over 24 months to demonstrate its ability to pay an annual proffered wage. USCIS will prorate proffered wages only if the record contains evidence of net income and/or wage payments, such as monthly income statements or pay stubs, occurring after the relevant priority dates. Here, the petitioner has not submitted evidence that it received the relevant net income or paid the wages of relevant beneficiaries after the corresponding petition priority dates.

Eliminating the prorated proffered wages, the AAO calculates that the petitioner must demonstrate its ability to pay the following annual amounts for the 13 identified beneficiaries: \$212,826.50 in 2004; \$201,640.74 in 2005; \$317,777.50 in 2006; \$461,120.50 in 2007; \$412,510.69 in 2008; and \$390,403.30 in 2009. Because both the petitioner’s corresponding annual net income and net current asset amounts are less than the above-listed amounts, the AAO finds that the petitioner has not established its ability to pay the proffered wages in 2004, 2006, 2007, and 2008.

Moreover, the AAO finds that the petitioner underestimated the total annual proffered wage amounts by failing to include portions of the proffered wages of the petitions it withdrew and of the petitions whose beneficiaries chose to work for other employers. Until those petitions were withdrawn or the beneficiaries obtained lawful permanent resident status, the petitioner was required to demonstrate its ability to pay the proffered wages of those petitions while it still intended to permanently employ those beneficiaries. *See* 8 C.F.R. § 204.5(g)(2). The petitioner, however, has excluded all of the annual proffered wages of those petitions without recognizing the accumulation of some annual proffered wage amounts before the petitions were withdrawn, or before the beneficiaries obtained lawful permanent resident status.

The petitioner also underestimated the total proffered wage amounts by failing to include the proffered wages of at least 10 other I-140 petitions that USCIS records show it has filed since 2004. The petitioner has identified only petitions with priority dates after the instant petition’s priority date of April 7, 2004. USCIS records show that the priority dates of at least three of the petitioner’s other 10 petitions pre-date the instant petition’s priority date. In addition to the proffered wage of the instant petition, the petitioner is obligated to demonstrate its simultaneous ability to pay the proffered wages of any other petitions whose beneficiaries do not obtain lawful permanent resident status (or which are not withdrawn, denied or revoked) before April 7, 2004. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not included the proffered wages of petitions with earlier priority dates whose beneficiaries did not obtain lawful permanent resident status until after April 7, 2004. Nor has the petitioner explained why it did not include the proffered wages of these other I-140 petitions that it filed.

Therefore, from the priority date of this Form ETA 750, the petitioner has not established its continuing ability to pay the beneficiary the proffered wage based on examinations of the wages it paid to the beneficiary, its net income, or its net current assets.

In determining a petitioner's continuing ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N at 612-13. The petitioner in *Sonegawa* 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 conduct regular business. The Regional Commissioner, however, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, its 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.

Like the petitioner in *Sonegawa*, the petitioner here has been doing business for more than 11 years, as the record shows that it was established in 2001. The petitioner's tax returns show increasing amounts of revenues and wages paid from 2004 through 2007. But the returns show decreasing revenues from 2008 through 2011. Unlike the petitioner in *Sonegawa*, the petitioner here has not demonstrated an outstanding reputation in its industry or the occurrence of any uncharacteristic business expenses or losses that affected its ability to pay the proffered wage. Also unlike the petitioner in *Sonegawa*, the petitioner here has filed multiple immigrant and nonimmigrant visa petitions and therefore must demonstrate its continuing ability to pay all of the proffered and prevailing wages during the relevant years. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage.

The director also concluded that the petitioner submitted false evidence in support of the instant petition. As the director advised the petitioner in his March 8, 2012 RFE, USCIS obtained copies of the petitioner's California quarterly wage reports pursuant to a subpoena. *See* 8 C.F.R. § 287.4 (prescribing procedures for USCIS issuance of subpoenas). The director stated that information in

the wage reports that USCIS received from the California Employment Development Department (EDD) differed from the corresponding information contained in wage reports for the same time periods that the petitioner submitted to USCIS.

In response to the RFE, the record shows that the petitioner submitted copies of all of its purported California Quarterly Wage and Withholding Reports for 2007, 2008, 2009, 2010 and 2011. It also submitted copies of its purported California Annual Reconciliation Statements for 2007 and 2009, as well as copies of its similar purported wage reports to other states. The director ultimately concluded that “[t]he significant differences between the evidence that the petitioner submitted to support the instant petition, and the records provided in response to subpoena by the State of California, clearly show a willful misrepresentation of a material fact, and must be regarded as a willful effort to procure a benefit for the alien ultimately leading to permanent residence, and may render the alien beneficiary inadmissible to the United States.”

On appeal, counsel asserts that the regulation at 8 C.F.R. § 103.2(b)(16)(i) requires USCIS to provide the petitioner “with a complete copy of the records received in response to the subpoena.” Counsel argues that, once it receives a complete copy of the records, “[t]he petitioner can then adequately address what the [director] has claimed to be discrepancies.”

The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides, in relevant part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service 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 ...

Contrary to counsel’s assertion, the regulation at 8 C.F.R. § 103.2(b)(16)(i) does not require USCIS to provide the petitioner “with a complete copy” of the documents containing the derogatory information. Rather, the regulation requires USCIS to advise the petitioner of the derogatory information and to offer the petitioner an opportunity to rebut the information and present information on its own behalf. *See Ghaly v. INS*, 48 F.3d 1426, 1434 (7<sup>th</sup> Cir.1995) (a summary of the grounds of the Service’s revocation provided sufficient notice to the petitioner because “the regulations do not mandate an opportunity to view each and every statement”); *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7<sup>th</sup> Cir.2009) (in accord); *see also Matter of Liedtke*, 2009 WL 5548116, at \*1 (BIA 2009); *Matter of Firmery*, 2006 WL 901430, at \*1 (BIA 2006) (the regulation at 8 C.F.R. § 103.2(b)(16)(i) does not require that USCIS provide the actual documents containing the derogatory information to the petitioner, only that the petitioner be advised of the information).

Here, the record shows that the director, in his RFE, advised the petitioner that USCIS had received quarterly wage reports from the State of California containing information that differed from corresponding information in the wage reports that the petitioner provided to USCIS. Before rendering his decision, the director provided the petitioner with an opportunity to rebut the information and to present information on its own behalf. The AAO also notes that the petitioner

prepared and filed the wage reports that the director referenced in the RFE and therefore had access to the records.

The record shows that the director complied with the regulation at 8 C.F.R. § 103.2(b)(16)(i) by advising the petitioner of the derogatory information and by offering the petitioner an opportunity to rebut the information and present information on its own behalf. The AAO therefore finds that, contrary to counsel's assertion, USCIS is not required to provide the petitioner with complete copies of the documents containing the derogatory information.

Although USCIS properly advised the petitioner of the derogatory information, the AAO finds that the record does not support a finding that the petitioner made a material misrepresentation by submitting false documents in this case.

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. A finding of fraud or material misrepresentation in the adjudication of a visa petition will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *See Matter of Ho*, at 591.

Section 204(b) of the Act, in pertinent part, states:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [s]he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made 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 the instant petition are true.

A material misrepresentation involves a willful, material misstatement to a government official for the purpose of obtaining an immigration benefit to which the party is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). A misrepresentation can be made to a government official in an oral interview, on the face of a written application or petition, or by submitting evidence containing false information. INS Genco Op. No. 91-39, 1991 WL 1185150 (April 30, 1991).

The term "willfully" means 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). To be considered material, a false statement must be shown to have been predictably capable of affecting the decision. *Kungys v. U.S.*, 485 U.S. 759 (1988). Accordingly, in visa petition proceedings, a finding of a willful, material misrepresentation requires an immigration officer to determine that: 1) the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) the misrepresentation was willfully made; and 3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

A fraud determination is similar to a finding of material representation, except that a fraud determination also requires a finding that the petitioner or beneficiary intended to deceive an immigration officer and that the officer believed and acted upon the false representation. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

Because wage reports submitted to government agencies tend to independently and objectively demonstrate a petitioner's payment of wages to the beneficiary, they are relevant in determining whether a petitioner has the required continuing ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

In the instant case, the record shows that information in one of the California quarterly wage reports that the petitioner submitted to USCIS differs from the information in the corresponding, certified wage report received from the EDD. The corresponding reports from the EDD and the petitioner for the fourth quarter of 2008 contain many discrepancies, including: their number of pages; the number of employees indicated on them for each month of the quarter; their signers and dates of signatures; the order of the employees listed on them; and the total amount of California personal income taxes ("PIT") they reflect as withheld from the wages of employees. Both reports, however, indicate that, during the quarter, the petitioner paid the beneficiary wages of \$24,000, and paid all of its California employees wages totaling \$358,533.02.

Because only one quarterly report out of the five years' worth of quarterly reports that the petitioner submitted appears to contain erroneous information, and because the quarterly wages of the beneficiary and the petitioner's other California employees on the inconsistent report remain identical to the figures on the certified report received from EDD, the AAO finds insufficient evidence that the petitioner willfully misrepresented its financial documentation.

Even assuming that the petitioner knowingly submitted the false quarterly wage report, the record does not support a finding that the petitioner's misrepresentation in the instant case was material. As indicated above, the false quarterly wage report reflects the same wage amounts paid to the beneficiary and to all of the petitioner's California employees as the valid, certified report received from the EDD. The false report contains inflated monthly employee figures that USCIS could have considered in determining the petitioner's ability to pay pursuant to *Sonegawa*. But the number of the petitioner's employees is but one of many factors considered in a *Sonegawa* analysis. The number of a petitioner's employees also closely relates to another *Sonegawa* factor, the total wages the petitioner paid, which in this case remained unchanged in the false wage report. The AAO therefore finds that the false wage report was not predictably capable of affecting USCIS' decision regarding the petitioner's ability to pay the proffered wage. The petitioner's submission of the false wage report for the fourth quarter of 2008, however, may cast doubt on the reliability and sufficiency of the petitioner's remaining evidence in this case. *See Matter of Ho*, 19 I&N Dec. at 591.

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner, [REDACTED] doing business as (dba) [REDACTED] is a different entity than the one that filed the labor

certification, [REDACTED] As indicated in the director's original denial of December 13, 2011, records of the California Secretary of State's office show that the labor certification employer was incorporated on April 13, 1999 and dissolved on July 31, 2006. These records show, and the copy of the Articles of Incorporation that the petitioner submitted confirm, that the petitioner was incorporated on September 26, 2001 and remains an active corporation. In addition, the copy of the labor certification employer's 2004 federal income tax return that the petitioner submitted shows that [REDACTED] had a different federal employer identification number (FEIN) than the petitioner. See 20 C.F.R. §§ 656.3, 656.17(i)(5)(i) (entities with different FEINs are not the same "employer" for labor certification purposes).

A labor certification remains valid only for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, it must establish that it is a "successor-in-interest" to the labor certification employer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part, of the predecessor. Second, the successor must demonstrate that the job opportunity remains the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for approval of the petition in all respects. See *Matter of Dial Auto Repair*, 19 I&N Dec. at 482-83. Evidence that the same shareholder owned both entities is insufficient.

The evidence in the record does not satisfy the conditions described above. There is no evidence of any transaction by which the petitioner acquired the essential rights and obligations to carry on the business of the labor certification employer. The petitioner also failed to demonstrate its eligibility for petition approval, as it failed to establish its continuing ability to pay the proffered wage since the petition's priority date. Accordingly, the AAO must also dismiss the appeal because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

The AAO may dismiss an appeal or a motion that fails to comply with the technical requirements of the law even if the director did not identify all of the grounds for denial in the 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 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Also beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. at 159; see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must examine the job offer portion of 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 *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 (1<sup>st</sup> Cir. 1981).

In the instant case, in addition to a Bachelor's degree in engineering, computer science "or the equivalent," the labor certification states that the offered position requires at least two years of full-time employment experience in the offered position of software engineer or in "[a]ny position in Software Development or Software Testing." On the labor certification, the beneficiary claims to qualify for the offered position based on one-and-one-half years of experience as a senior software/hardware support engineer at [REDACTED] Massachusetts, two-and-one-half years of experience as a senior software test engineer at [REDACTED] Illinois, and more than five-and-one-half years of experience as a system test engineer/software engineer at [REDACTED] Illinois.

The petitioner must support the beneficiary's claimed qualifying experience by submitting letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a faxed copy of a March 7, 1999 letter from [REDACTED] letterhead. The letter states that the beneficiary worked full-time as a software development and test engineer from October 1992 to July 1998 and provides a brief description of the beneficiary's purported experience there.

The letter on [REDACTED] stationery does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because it does not contain an address. The letter is therefore unacceptable to demonstrate the beneficiary's qualifying experience for the offered position.

The record also contains a September 29, 2010 letter from [REDACTED] who states that he was a software engineer at [REDACTED] from July 27, 1998 to July 30, 2003. In the letter, Mr. [REDACTED] states that [REDACTED] employed the beneficiary as a software engineer and provides a description of the beneficiary's purported experience there. Mr. [REDACTED] also states that he worked for [REDACTED] before the beneficiary began work there and remained working at [REDACTED] after the beneficiary's employment there ended. Mr. [REDACTED] however, does not indicate the exact dates of the beneficiary's employment at [REDACTED]

On the labor certification, the beneficiary states that [REDACTED] employed him from July 1998 to January 2001. The record also contains copies of: IRS W-2 forms indicating that [REDACTED] paid the beneficiary in 1998, 1999 and 2000; an online employment verification printout stating that [REDACTED] employed the beneficiary from July 27, 1998 to January 16, 2001; and four [REDACTED] training certificates in the beneficiary's name purportedly awarded between 1999 and 2000.

Mr. [REDACTED]'s letter is not from an employer, as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires, nor does it indicate the beneficiary's length of employment at [REDACTED]. Also, Mr. [REDACTED] states that he began working for [REDACTED] before the beneficiary, but the online employment verification printout states that the beneficiary began work for [REDACTED] on the same day (July 27, 1998) as Mr. [REDACTED]. See *Matter of*

*Ho*, 19 I&N Dec. at 591-592 (the petitioner must submit independent, objective evidence to resolve inconsistencies in the record). The AAO therefore finds that Mr. [REDACTED]'s letter is also insufficient to establish the beneficiary's qualifications for the offered position.

The record also contains numerous other discrepancies regarding the beneficiary's employment history. On a Form G-325A, Biographic Information, which the beneficiary submitted with his application for adjustment of status in July 2007, the beneficiary states that he worked for the petitioner since December 1999. On a later Form G-325A, which the beneficiary submitted in November 2009 in response to the director's RFE regarding his adjustment application, the beneficiary states that he worked for the petitioner since October 2004. The record also contains copies of H-1B visa approval notices that suggest that the beneficiary was not authorized to work for the petitioner in H-1B status until 2005. Also, copies of IRS Forms W-2 show that the petitioner employed the beneficiary from 2003 through 2011. These inconsistencies cast doubt on the beneficiary's claimed employment experience. *See Matter of Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Thus, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

In summary, the AAO finds that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. The AAO also finds that the petitioner has failed to establish that it is the successor-in-interest of the labor certification employer, and that the beneficiary possessed the minimum experience required for the offered position by the petition's priority date.

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.