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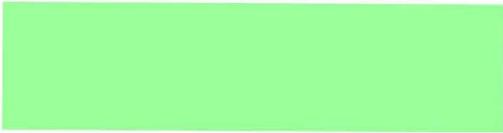
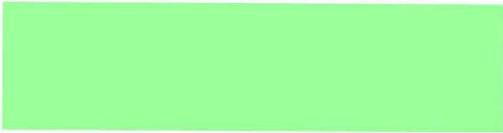
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

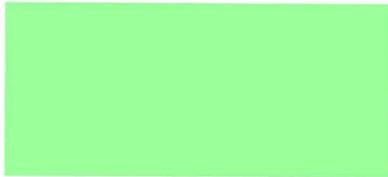
DATE: **MAY 24 2013** OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consultation company and seeks to employ the beneficiary permanently in the United States as a programmer analyst.<sup>1</sup> On August 6, 2007, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the above-named beneficiary.<sup>2</sup> As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>3</sup> The director concluded that the petitioner failed to demonstrate its ability to pay the proffered wage as of the priority date onward and denied the petition accordingly.

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>4</sup>

The director denied the petition on July 14, 2009, concluding that the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage in 2005, 2006, and 2007. On appeal, the petitioner submitted additional evidence to demonstrate its ability to pay the proffered wage. Upon review of the appeal and the evidence in the record, the AAO noticed several discrepancies and deficiencies in the record. Accordingly, on February 28, 2013, we issued a notice of intent to dismiss (NOID), notice of derogatory information (NODI) and request for evidence (RFE). In its NOID/NODI/RFE, the AAO informed the petitioner that the record contained inconsistent information regarding the beneficiary's work experience and noted that it considered

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<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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The record contains another Form I-140 which was filed by a different petitioner on behalf of the beneficiary. This petition was approved on January 29, 2009.

<sup>3</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>4</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).

such information willful misrepresentation. The AAO also sought explanation as to how the beneficiary could have obtained a U.S. bachelor's degree while living in India; that the job offer was *bona fide* despite the familial relationship between the beneficiary and one the petitioner's officers; and that the petitioner has the ability to pay the proffered wage to its each beneficiary for whom it petitioned. The AAO also requested a copy of the beneficiary's diploma from the

### **The Petitioner's Ability to Pay**

The AAO will first address the petitioner's ability to pay the proffered wage as of the priority date onwards. 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). Here, the Form ETA 750 was accepted on September 23, 2004. The proffered wage as stated on the Form ETA 750 is \$60,000 per year.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

In evaluating whether a job offer is realistic, U.S. 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). However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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. The record indicates that the beneficiary has not worked for the petitioner.

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 (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 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).

On appeal, the petitioner states that it made significant investments in years 2002 through 2004 and amortized these investments in 2005, 2006, and 2007. It also states that it utilized a number of subcontractors to provide the services the beneficiary would have otherwise provided, had he been employed by it. The petitioner also states that its tax returns are filed on a cash accounting basis and does not reflect its account receivables.

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997 and to employ more than 20 workers. 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. At the time the AAO sent its RFE, the petitioner’s 2012 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2011 is the most recent return available. The petitioner’s tax returns indicate the following information:

Year	Net Income
2004	\$107,203
2005	\$-30,385
2006	\$-67,580
2007	\$-69,545
2008	\$31,536

2009	\$104,232
2010	\$86,777
2011	\$55,728

Thus, for the year 2005 to 2008, and 2011, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> 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.

Year	Year-end Current Assets	Year-end Current Liabilities	Net Current Assets
2005	\$11,190	\$499,692	\$-488,502
2006	\$1,853	\$667,022	\$-665,169
2007	\$713	\$856,270	\$-855,557
2008	\$334	\$545,352	\$-545,018
2011	\$45,790	\$471,540	\$-425,750

The petitioner's tax return demonstrates that its year-end net current assets for 2005 to 2008, and 2011 were in the negative and therefore, the petitioner did not have sufficient net current assets to pay the proffered wage.

However, USCIS may also 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. at 612. 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

<sup>5</sup>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.

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, 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.

Furthermore, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The petitioner asserts several basis for its ability to pay the beneficiary from 2005 to 2007 despite its net losses. The petitioner states that it invested about \$400,000 from 2002 through 2004 and amortized these investments in 2005 through 2007. The petitioner further states that it utilized a number of subcontractors and independent contractors (collectively "contractors") to provide the man power necessary to conduct its business. In addition, the petitioner emphasizes that it files its tax returns on a "cash" basis and therefore they do not reflect its "accounts receivables." The petitioner asserts that its business is profitable on an accrual basis. In support of its assertions the petitioner submits its tax returns from 2005 to 2007; a summary list of its depreciation<sup>6</sup> and amortization figures from 2005 to 2007; a summary list of its contractors and the payments the petitioner made to them; and copies of invoices. In response to the AAO's

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<sup>6</sup> With respect to depreciation a court have noted 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. 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. 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, even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) ("[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.") (Emphasis added).

NOID/NODI/RFE, the petitioner further asserts that it reiterates the arguments it made in its 2009 appeal statement; however, the petitioner submits no evidence in support of these assertions for 2008 through 2011. The assertions of the petitioner are relevant evidence and have been considered. However, absent supporting documentation, these assertions are insufficient proof of its ability to pay. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) (“Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it.”). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

We first note that the invoices from the petitioner’s contractors do not detail the type of work the contractors performed for the petitioner and therefore, the invoices are insufficient to demonstrate that these contractors in fact performed the duties the beneficiary otherwise would have provided, had he been employed by the petitioner. If a contractor performed other kinds of work, then the beneficiary could not have replaced him or her.<sup>7</sup> With respect to accounts receivables, we note that the petitioner chose to report its earnings in cash method and considering its accounts receivable would duplicate figures used to calculate its net income for the following years. Therefore considering its accounts receivables while it reports its earnings on a cash basis would not result in an accurate figure in determining its ability to pay. In addition, there is no evidence in the record demonstrating the petitioner’s historical growth or its reputation in the industry. Furthermore, the sole share owner of the petitioner makes no explicit statements indicating that he would forego his officer compensation in order to pay the proffered wage. Considering the totality of the circumstances, the petitioner fails to demonstrate that it had the ability to pay the beneficiary from the priority date onward.

In addition, the record reflects that the petitioner filed Form I-140 immigrant petitions for multiple beneficiaries. In the NOID/NODI/RFE, the AAO requested very specific information regarding these beneficiaries from the petitioner, including Internal Revenue Service (IRS) Forms W-2 or 1099 that the petitioner issued to each beneficiary since the priority date. In response, the petitioner submits a list of 20 current or future employees for whom it petitioned and indicates that only four of these petitions are active or pending. The petitioner submits 2011 and 2012 IRS Forms W-2 for some of these beneficiaries. We first note that the petitioner did not submit all the requested IRS Forms W-2 for each beneficiary for all the relevant years. In addition, some of the individuals named on the IRS Forms W-2 are not included on the petitioner’s list implying that the list is incomplete. The list also does not indicate the proffered wage for all the relevant beneficiaries.

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<sup>7</sup> The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

Furthermore, USCIS records do not reflect that any of these petitions were withdrawn as claimed by the petitioner, nor does the petitioner submit any evidence in support of its assertions. We also note that there are discrepancies between the wages indicated on the list and the wages reflected on IRS Forms W-2. The petitioner has failed to provide independent, objective evidence pointing to where the truth lies, which casts a shadow of doubt over all of the evidence provided in support of the petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Nevertheless, we note that the petitioner had multiple beneficiaries on its payroll for the relevant years or had future employees for whom it is required to show ability to pay. Considering that, for the years 2005 to 2008, and 2011, the petitioner did not have the net income to pay the proffered wage to the instant beneficiary alone and its net current assets were in the negative, the petitioner did not have the ability to pay the proffered wages for all of its beneficiaries. Therefore, the petitioner has failed to demonstrate that it has the ability to pay all of its beneficiaries the proffered wages from the priority date onward.

### Familial Relationship

The petitioner must establish that the petition is supported by a *bona fide* job offer. The evidence in the record indicated that the beneficiary is the brother of [REDACTED] one of the petitioner's executives.<sup>8</sup> This family relationship between the beneficiary and [REDACTED] raised doubts that a *bona fide* job opportunity exists.<sup>9</sup> In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-

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<sup>8</sup> The AAO contacted the petitioner and spoke to [REDACTED] who indicated that the beneficiary was related to one of the petitioner's officers.

<sup>9</sup> The Board of Alien Labor Certification Appeals (BALCA) in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991),<sup>9</sup> determined that a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a per se bar to labor certification. Whether the job is clearly open to U.S. workers if measured by such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.

related reasons. That case relied upon a DOL advisory opinion in invalidating the labor certification. The AAO noted that given the beneficiary's relationship to one of the petitioner's executives, this may be the functional equivalent of self-employment. Therefore, this office requested verifiable evidence of the relationship between the beneficiary and the petitioner's officers, directors, shareholders and executives and evidence that the petitioner may have provided to USCIS when it requested that the original beneficiary on the labor certification be substituted with the instant beneficiary.

In response to the AAO's RFE, the petitioner states that [REDACTED] the beneficiary's brother, worked for the petitioner from April 2004 until December 2005. However, the petitioner explains that the beneficiary was not the beneficiary on the original labor certification, rather he was substituted in on August 2, 2007. The petitioner also submits an affidavit from [REDACTED] which states that he was not associated with the petitioner at the time of the substitution request in 2007. The petitioner submits [REDACTED] 2006 and 2007 IRS Forms W-2 indicating that he worked for [REDACTED] when the petitioner requested that the original beneficiary on the labor certification be substituted with the instant beneficiary. The AAO concludes that the petitioner has demonstrated that there was no familial relationship between the petitioner and the beneficiary when it requested to substitute the original beneficiary on the labor certification.

#### **The Beneficiary's Qualifications**

Beyond the director's decision, the AAO concludes that the petitioner has failed to demonstrate that the beneficiary has the required experience as indicated on the labor certification. To warrant an approval, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In evaluating the beneficiary's qualifications, USCIS must look to 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 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). 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." (Emphasis added). *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

The job qualifications for the certified position of programmer analyst are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed as follows:

Design, Development, Testing and Maintenance of Web Development Applications using ASP, SQL, PL/SQL, XML, HTML, DHTML, JavaScript, XSL, Visual Basic and Oracle.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	[Blank]
High school	[Blank]
College	4 years
College Degree Required	Bachelors
Major Field of Study	Any

Experience:

Job Offered	2 years
Related Occupation	2 years

Block 15:

Other Special Requirements: Experience in Web Development Applications

As set forth above, the proffered position requires four years of college culminating in a Bachelor's degree in any major field plus two years of experience in the job offered or two years of experience in a related field. Part B, Item 11 of the labor certification states that the beneficiary's education related to the offered position is a "B.S. IT" (Bachelor of Science in Information Technology) degree from [redacted] Ohio, completed in 2003; and B. Com. (Bachelor of Commerce) degree from [redacted] India, completed in 1997.

In support of the beneficiary's educational qualifications, the petitioner submits a copy of the beneficiary's diploma and transcript from [redacted]. The petitioner also submits a "Provisional Certificate" and memoranda from [redacted] indicating that the beneficiary has qualified for the bachelor's degree in commerce. Upon reviewing the evidence, the AAO questioned the beneficiary's degree from [redacted] that was awarded in 2003, because the university is based in Ohio, and the beneficiary did not enter the United States until 2005. In response to the AAO's NOID/NODI/RFE, the beneficiary submitted evidence demonstrating that [redacted] established a partnership with [redacted] in India, which allowed the students in India to obtain a U.S. degree in Bachelor of Science in Information

Technology through its [REDACTED] adult education program, while completing the first module of the program in India. The second module required the students to complete an internship in the United States after obtaining their F-1 student visa. However, the beneficiary states that he was not granted the student visa to enter the United States; and therefore, he completed all program requirements in India. The beneficiary's transcript from [REDACTED] indicates that he completed 126 credits - 27 credits with the university, plus 99 transfer credits. The AAO concludes that the beneficiary has satisfactorily explained the discrepancy between the date of his U.S. degree and the date of his initial entry into the United States. We therefore, find that the petitioner has established that the beneficiary possessed the education requirements of the labor certification as of the priority date.

With respect to the beneficiary's experience, the petitioner submitted a Form ETA 750B that was signed by the beneficiary on July 1, 2009 under a declaration that the contents are true and correct under penalty of perjury. The beneficiary indicated that he qualifies for the proffered position based on his work experience as a programmer at [REDACTED] in India from February 1998 until October 2004. The beneficiary also indicated that he was employed at [REDACTED] as a programmer analyst from June 2005 until August 2006; and as a systems analyst at [REDACTED] since September 2006.

The beneficiary must meet the experience requirement as of the priority date. The priority date is September 23, 2004; therefore, the only relevant experience is the beneficiary's experience with [REDACTED]. The beneficiary's claimed qualifying experience must be supported by 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). As indicated in the AAO's RFE, the record contains a copy of a letter dated April 11, 2005 from [REDACTED] on [REDACTED] letterhead stating the beneficiary worked as a programmer from February 1998 to October 2004 (first experience letter). This first experience letter lists the beneficiary's duties as "application programming and testing related job duties which include configuration, development, debugging, testing using Microsoft.NET, JAVA and Oracle technologies," but it does not indicate whether or not the beneficiary was working full- or part-time.

The record also contains a second Form I-140 filed on behalf of the beneficiary by a different petitioner which includes a Form ETA 9089, Application for Permanent Employment Certification. The beneficiary signed this labor certification on September 15, 2008, under penalty of perjury (2008 labor certification). The beneficiary states on this 2008 labor certification that he worked for [REDACTED] from July 1, 2003 until June 1, 2005. This second Form I-140 is accompanied by an experience letter dated April 26, 2005 from [REDACTED] on [REDACTED] letterhead stating the beneficiary worked as a programmer from July 2003 until the date of the letter April 26, 2005 (second experience letter). This second experience letter lists the beneficiary's duties as "developed and tested business applications using Microsoft.NET platform."

The two experience letters from [REDACTED] are signed by the same individual and contain a round seal bearing the name [REDACTED] around the outer rim with an initial and date inscribed in the middle.

The date inscribed on the seals on both letters is April 26, 2005, even though the first experience letter is dated April 11, 2005. From a close examination of both letters, it appears that the signature and seal are exactly the same, as though the signature and seal from one letter has been photocopied to create the other letter.

The record also contains a Form G-325A Biographic Information which the beneficiary signed on August 15, 2007 and submitted in connection with his application for status as a permanent resident. On this form, the beneficiary stated that he worked for [REDACTED] as a programmer from July 2003 until May 2006.

In response to the AAO's RFE, the petitioner submits a letter from [REDACTED] its general manager, dated March 28, 2013, which states that the beneficiary provided the information regarding his prior employment, as well as the experience letter. Therefore, [REDACTED] has no knowledge of the origins of the experience letter as it relied on the beneficiary to obtain and forward experience letters for the application process. The petitioner states that it should not be penalized for relying on "another's statement and documentation."

The beneficiary submits an affidavit, signed on March 26, 2013, stating that he was employed at [REDACTED] part-time from February 1998 until June 2003 as a programmer; and full-time from July 2003 until June 1, 2005. However, the beneficiary states that he has no record of the first experience letter and submits the original of the second experience letter. The beneficiary further states he has "no knowledge of the use of Experience Letter 1 and [he does] not know why or how Experience Letter 1 was used." Regarding the Form G-325A discrepancy in the dates of his [REDACTED] employment, the beneficiary states that it was a typographical error, which he "did not catch at the time of filing."

The beneficiary also submits an affidavit from [REDACTED] dated March 23, 2013, who claims to have worked at [REDACTED] from January 2003 until "December August 2005." He states that the petitioner worked at [REDACTED] full-time from July 2003 until May 2005. He also states that he is "aware" that the beneficiary worked part-time from 1998 until June 2003. He further indicates that [REDACTED] went out of business about three years ago.

First, we note that as a former co-worker of the beneficiary, [REDACTED] affidavit is insufficient to establish the beneficiary's employment with [REDACTED] as he was not the employer of the beneficiary. See 8 C.F.R. § 204.5(l)(3)(ii)(A). Second, other than his own statement, there is no evidence demonstrating that [REDACTED] himself was ever employed by [REDACTED]. Therefore, we find [REDACTED] affidavit insufficient to demonstrate the beneficiary employment with [REDACTED] and resolve the inconsistencies in the beneficiary's employment dates. The AAO also finds the petitioner's and the beneficiary's purported lack of knowledge of the first experience letter insufficient to explain why two letters from the same person with inconsistent information regarding the beneficiary's employment with [REDACTED] were submitted to USCIS. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b);

*see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It is incumbent upon 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. *Matter of Ho* at 591-592. Here, the petitioner and the beneficiary have failed to resolve the inconsistency regarding the beneficiary's employment dates that the beneficiary reported on the labor certification and have failed to explain the existence of two letters with inconsistent information from the same individual. The petitioner has failed to provide independent, objective evidence pointing to where the truth lies, which casts a shadow of doubt over all of the evidence provided in support of the petition. *Id.* Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary had the experience required by the labor certification on the priority date.

With regards 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 DHS 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).

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. 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* at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of DHS 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 a 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.

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 and USCIS have the

authority to enter a fraud or a material misrepresentation finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

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. Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or
- (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. at 447. 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.

Furthermore, a finding of willful misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

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.

In examining the evidence of record, we find that the petitioner and the beneficiary willfully misrepresented the beneficiary's experience on the Form ETA 750B. We also find that the first experience letter submitted in support of the labor certification, more likely than not, was fraudulently manufactured. By misrepresenting the beneficiary's experience to qualify for the offered position, both the petitioner and the beneficiary would seek to procure a benefit provided under the Act through fraud or willful misrepresentation of a material fact. Any finding of fraud or willful misrepresentation as a result shall be considered in any future proceeding where admissibility is an issue. Based on the finding of fraud or willful misrepresentation of the beneficiary's experience, the labor certification is invalidated.

In summary, the AAO concludes that the petitioner has failed to demonstrate that the beneficiary qualifies for classification as a professional under section 203(b)(3)(A)(ii) of the Act. The petitioner also has failed to demonstrate that it has the ability to pay the beneficiary the proffered wage from the priority date onward. The AAO also finds that the petitioner and the beneficiary have made willful misrepresentation on the labor certification and have submitted, more likely than not, a fraudulent document in support of the beneficiary's experience; therefore, the labor certification is invalidated.

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. The petition remains denied.

**FURTHER ORDER:** The labor certification [REDACTED] is invalidated.