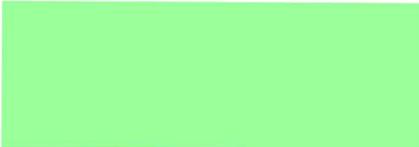




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **AUG 21 2014**

OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: PETITIONER:  
BENEFICIARY: 

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

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner<sup>1</sup> describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>2</sup> The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 30, 2005. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to establish its ability to pay the proffered wage.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

### Successor-In-Interest

On appeal, counsel claimed that the appellant, [REDACTED] could meet the petitioner's ability to pay the proffered wage.<sup>4</sup> On October 31, 2013, we issued a request for

<sup>1</sup> The petitioner is [REDACTED] Federal Employer Identification Number [REDACTED] also filed the ETA Form 9089, Application for Permanent Employment Certification.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>4</sup> The record demonstrates that [REDACTED] is an assumed business name of [REDACTED] as of July 23, 2008. [REDACTED] is a separate company from the business which filed the labor certification and Form I-140 immigrant petition as reflected by its [REDACTED]

evidence (RFE) for, *inter alia*, evidence that [REDACTED] is a successor-in-interest to [REDACTED]. Counsel claims that [REDACTED] is the successor-in-interest to the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

*Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader:

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was established on March 10, 2000, and is the entity listed on the 2009 through 2011 tax returns that were submitted to establish the ability to pay the proffered wage in the instant case. [REDACTED] was established on October 2, 2000, dissolved on December 2, 2009, and filed its last tax return in 2008.

“One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009) (defining “successor in interest”).

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>5</sup> *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.<sup>6</sup>

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>7</sup> *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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<sup>5</sup> Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

<sup>6</sup> For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a *bona fide* successor-in-interest.

<sup>7</sup> The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same "business unit" as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*, HQ70/6.2 ADO9-37 (August 6, 2009); and *Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

On appeal, the petitioner submitted the following evidence to establish a successor-in-interest:

- Assumed Name Certificate for [REDACTED] {GCT}, Inc., July 23, 2008, reflecting the assumed name of [REDACTED]
- Assumed Name Certificate for [REDACTED] {GCT}, Inc., July 22, 2008, reflecting the assumed name of [REDACTED]
- Print-outs of [REDACTED] {GCT}, Inc.'s website w [REDACTED]

We informed the petitioner in the RFE that the evidence in the record was not sufficient to establish that [REDACTED] is the successor-in-interest to [REDACTED]. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

In response to the RFE, counsel states that the shares of [REDACTED] are held by the same individuals and submits a December 4, 2013 letter from [REDACTED], CPA, indicating that "after dissolving the corporation and filing the final return for the year 2008 of [REDACTED] . . . all the assets and liabilities are assumed by the shareholders on the record of [REDACTED]" However, there is

no contemporaneous evidence of a definitive transfer between [REDACTED]. Instead, counsel relies on a non-contemporaneous letter from a CPA to demonstrate the relationship between the two companies. There is no evidence in the record, therefore, that establishes the actual transfer of assets/liabilities from [REDACTED].

On appeal, counsel states that the petitioner moved to a new location, from [REDACTED]. These two locations are more than 60 miles apart and over 1.5 hours driving distance. The two locations are in different counties and different metropolitan statistical areas. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). In response to the RFE, counsel states that, while the petitioner's main office relocated to New Windsor, the proffered position will be at [REDACTED] location, a location which is listed on [REDACTED] website. While this location is within commuting distance of the [REDACTED] address, the two locations are still in different counties and different metropolitan statistical areas. Neither the labor certification nor the petition lists a work location other than the petitioner's [REDACTED] address.

Further, in a successor-in-interest case, the petitioner must also establish that the original employer possessed the ability to pay the proffered wage from the priority date until the date the petitioner assumed the original employer's rights and responsibilities. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). The record does not demonstrate that the petitioner possessed the ability to pay the proffered wage from the priority date to the date it was acquired by the successor.<sup>8</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

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<sup>8</sup> The director noted in the NOR that the petitioner's ability to pay the proffered wage was established for 2007, as the 2007 Form W-2 issued by the petitioner to the beneficiary reflects that the beneficiary was paid more than the proffered wage. The AAO concurs with the director's conclusion that the ability to pay the proffered wage has been established for 2007.

Here, the ETA Form 9089 was accepted on October 30, 2005. The proffered wage as stated on the ETA Form 9089 is \$13.76 per hour (\$28,620.80 per year based on a 40-hour work week). The evidence in the record of proceeding shows that the petitioner and [REDACTED] are structured as S corporations. On the petition, the petitioner claimed to have been established in 2000 and to currently employ 7 workers. On the ETA Form 9089, signed by the beneficiary on January 10, 2006, the beneficiary did not claim to have worked for the petitioner, but did claim to have worked for [REDACTED] from July 9, 2002 to September 30, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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, 614-15 (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. As reflected in the table below, in the instant case, the record contains Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements reflecting [REDACTED]'s payment of wages to the beneficiary in 2005 and 2006. The petitioner has not provided IRS Forms W-2 reflecting payment of wages by the petitioner from the priority date onward, or payment of wages by [REDACTED] since 2006.<sup>9</sup> According to USCIS records, the petitioner has filed one (1) other Form I-140 immigrant petition on behalf of another beneficiary and [REDACTED] filed four (4) Form I-140 immigrant petitions on behalf of other beneficiaries.<sup>10</sup> Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

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<sup>9</sup> As [REDACTED] are separate entities, payment of wages by [REDACTED] cannot be used for the years prior to any asserted successorship during which the petitioner must show its ability to pay the proffered wage.

<sup>10</sup> It is noted that counsel provided information on two petitions filed by the petitioner and information on only one of the four petitions filed by [REDACTED]. Without the proffered wages, priority dates and status of [REDACTED] other petitions, the total wages owed by [REDACTED] to all of its beneficiaries cannot be determined.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

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

*River Street Donuts*, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

For an S corporation, USCIS considers net income to be the figure shown on Line 21 of the Form 1120S, U.S. Income Tax Return for an S Corporation.<sup>11</sup> If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>12</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. The tables below reflect the information provided by the petitioner regarding its ability to pay the proffered wage and [REDACTED]’s ability to pay the proffered wage:

Tax Year	Petitioner		Calculation of Net		Balance Due Beneficiary	Balance Due to Other beneficiaries	Total Remaining Balance
	Net Income	Current Assets	W-2 Wage	W-2 Wage			
2005	\$98,051.00	\$332,410.00	\$0.00	\$0.00	\$28,620.80	\$58,240.00	\$86,860.80
2006	\$42,654.00	\$190,197.00	\$0.00	\$0.00	\$28,620.80	\$58,240.00	\$86,860.80
2007	\$48,667.00	\$196,876.00	\$0.00	\$0.00	\$28,620.80	\$58,240.00	\$86,860.80
2008	-\$20,279.00	-\$4,882.00	\$0.00	\$0.00	\$28,620.80	\$58,240.00	\$86,860.80

<sup>11</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) line 18 (2006-2012) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 29, 2014) (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, credits, deductions, or other adjustments shown on its Schedule K, the petitioner’s net income is found on Schedule K of its tax returns.

<sup>12</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.

Tax Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due Beneficiary	Balance Due to Other beneficiaries	Total Remaining Balance
2009	-\$271,621.00	-\$102,659.00	\$0.00	\$28,620.80	\$85,280.00	UNKNOWN
2010	\$83,138.00	-\$416,743.00	\$0.00	\$28,620.80	\$85,280.00	UNKNOWN
2011	-\$14,678.00	-\$317,174.00	\$0.00	\$28,620.80	\$85,280.00	UNKNOWN
2012	UNKNOWN	UNKNOWN	\$0.00	\$28,620.80	\$85,280.00	UNKNOWN

Therefore, for the year 2008, the petitioner did not pay the full proffered wage and did not have sufficient net income or net current assets to pay the proffered wages to the beneficiary and the beneficiaries of other petitions filed on their behalf by the petitioner. For the year 2009 onward, [redacted] did not pay the full proffered wage and did not have sufficient net income or net current assets to pay the proffered wages to the beneficiary and the beneficiaries of other petitions filed on their behalf by [redacted] and the petitioner.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it and [redacted] had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in [redacted] magazines. Her clients included [redacted], movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner’s ability to pay the proffered wage.

In the instant case, the petitioner has failed to provide full information regarding beneficiaries of other petitions filed by [REDACTED] preventing us from making a determination as to whether the petitioner had the ability to pay the proffered wages since 2009. In addition, there is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the business' reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it and [REDACTED] had the continuing ability to pay the proffered wage.

Therefore, [REDACTED] has failed to establish that it is a valid successor-in-interest to the petitioner.

### **Beneficiary's Qualifications**

Beyond the decision of the director,<sup>13</sup> the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. As is discussed above, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the October 30, 2005 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification states that the offered position requires High School graduation and 24 months of experience in the proffered position.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on High School graduation from the [REDACTED] State Board of Secondary and Higher Education in 1989 and experience as a cook with [REDACTED] India from January 11, 1991 to June 30, 1994; and as a manager with [REDACTED] New York, from July 9, 2002 to September 30, 2007. No other experience is listed.

The record contains a document from [REDACTED] State Board of Secondary and Higher Secondary Education, indicating that the beneficiary passed the Secondary School Certificate Examination in March 1989 and a statement of full marks. We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE

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<sup>13</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php>. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.<sup>14</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>15</sup>

According to EDGE, a Secondary School Certificate from India is comparable to “less than completion of senior high school in the United States.” Additionally, the first document from the State Board was issued to [REDACTED] and not the beneficiary. The document misspells “[REDACTED] State Board of Secondary and Higher Secondary Education” as “[REDACTED] State Board of Secondary and Higher Secondary Education.” The statement of full marks was issued to [REDACTED] and not to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary’s passport was issued under the name [REDACTED]. The BIA has held that government documents are entitled to a presumption of regularity. *Matter of P-N-*, 8 I&N Dec. 456 (BIA 1959). It is the petitioner’s burden to overcome this presumption. In response to our RFE counsel claims that [REDACTED] are the same person. In support of this claim, counsel submitted affidavits from the beneficiary and two other individuals stating that the beneficiary’s passport was accidentally issued under the name [REDACTED] and that [REDACTED] are the same person. The petitioner has failed to provide any independent, objective evidence of where the truth lies to overcome the presumption of regularity in the beneficiary’s passport. *Matter of Ho* at 591-92. The beneficiary’s

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<sup>14</sup> See *An Author’s Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>15</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

affidavit is self-serving and the record does not include the beneficiary's passport issued prior to 2002, when the typographical error in the beneficiary's name was alleged to have occurred.

Moreover, our June 12, 2014 notice of derogatory information and notice of intent to dismiss (NDI/NOID) informed the petitioner that, on March 6, 2014, the [REDACTED] State Board of Secondary and Higher Secondary Education confirmed that the beneficiary's mark sheet number 041561 is fraudulent. The petitioner failed to make any statement regarding this information in response to the NDI/NOID.

In response to the RFE, counsel alternatively submits additional education documents for the beneficiary. Counsel submits a diploma in hotel management and catering technology from the Board of Technical Examinations, [REDACTED] State, India, issued to the beneficiary on July 15, 1990. A credentials evaluation prepared by [REDACTED] for [REDACTED] on December 10, 2013 accompanies the diploma and states that the beneficiary's qualification is equivalent to an individual who has completed a U.S. High School diploma from an accredited school in the United States.

This education does not appear on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted. Again, the document is issued to [REDACTED] and not the beneficiary. *Matter of Ho* at 591-92. The diploma indicates that the Institute issuing the credential is the [REDACTED]. However, according to its website, [REDACTED] does not offer a diploma in hotel management and catering technology and, while [REDACTED] is affiliated with the [REDACTED] it is not affiliated with the Board of Technical Examinations [REDACTED] State.<sup>16</sup> *Matter of Ho* at 591-92. The diploma does not appear to be granted by any known university or college and is not recognized in the Electronic Database for Global Education (EDGE) as having any U.S. degree equivalency.

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

(ii) *Other documentation*—

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

The record contains an experience letter dated July 7, 1994, from an unknown individual, manager, on [REDACTED] letterhead stating that the company employed the beneficiary from November 14, 1991 to June 30, 1994. However, the letter does not provide the name of the signatory, the title of the beneficiary's position or a description of his duties. The letter is

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<sup>16</sup> See [www.\[REDACTED\]](http://www.[REDACTED]) (accessed August 8, 2014).

inconsistent with the labor certification regarding the beneficiary's dates of employment. The labor certification states that the beneficiary was employed from January 11, 1991 to June 30, 1994. Further, the experience letter was issued for [REDACTED] and not the beneficiary. *Matter of Ho*, 19 I&N Dec. at 591-92.

The record contains an experience letter dated November 27, 1991, from an unknown individual, manager/partner, on [REDACTED] letterhead stating that the company employed the beneficiary as a trainee/assistant cook from November 16, 1989 to October 31, 1991. However, the letter does not provide the name of the signatory or a description of the beneficiary's duties.

The record contains an experience letter dated March 31, 1995, from an unknown individual, manager, or [REDACTED] letterhead stating that the company employed the beneficiary as a cook from July 10, 1994 to the date of signature. However, the letter does not provide the name of the signatory or a description of the beneficiary's duties.

The experience with [REDACTED] were not listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. The letter for [REDACTED] is internally inconsistent as the company letterhead and the company stamp at the bottom of the letter indicate that the company is [REDACTED]. Further, the experience letters from [REDACTED] were issued for [REDACTED] and not the beneficiary. *Matter of Ho*, 19 I&N Dec. at 591-92.

In response to our RFE, counsel admits that there were inconsistencies and deficiencies in the letters. In support of the beneficiary's experience, counsel submits an affidavit from the beneficiary. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Moreover, our June 12, 2014 notice of derogatory information and notice of intent to dismiss (NDI/NOID) informed the petitioner that, in March, 2014, a USCIS officer confirmed that a [REDACTED] have never been located at the addresses listed on the experience letter. The USCIS officer determined that the experience letters are fraudulent. Counsel failed to make any statement regarding this information in her response to the NDI/NOID.

Counsel claims that the beneficiary has experience working as a cook in the UAE, Indonesia, Hong Kong, Singapore and Europe. In support of these claims counsel submits copies of the beneficiary's passport pages reflecting travel to these countries and a business card for [REDACTED] President Europe. [REDACTED] These documents do not meet the requirements of 8 C.F.R. § 204.5(l)(3).

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed the minimum requirements by the priority date as required by the terms of the labor certification.

### **Invalidation**

The material issue in this case is whether the beneficiary has willfully misrepresented his qualifications to obtain an immigration benefit.

As immigration officers USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.<sup>17</sup>

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<sup>17</sup> It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible 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,

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that the beneficiary submitted fraudulent documentation to establish that he graduated High School and has 24 months of experience in the proffered position. Thus, the beneficiary made a willful misrepresentation of a material fact by stating that he graduated High School and was employed as a cook with [REDACTED], India from January 11, 1991 to June 30, 1994.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, “(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible.”

A material issue in this case is whether the beneficiary has the required education and two (2) years of experience for the position offered. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

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

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the

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8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, we have the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with opportunity to respond to the same.

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

In this case, the beneficiary certified, upon completing and signing the ETA Form 9089 labor certification application that he qualified for the position (that he had, at least 24 months of work experience in the job offered and that he had graduated High School) before the priority date. The documentation submitted in support of these statements has been found to be fraudulent.

Based on the noted inconsistencies, the petitioner's failure to provide independent, objective evidence to overcome the inconsistencies and the fraudulent findings of the USCIS officer, we find that the beneficiary has deliberately concealed and misrepresented facts about his education and prior work experience.

On the true facts, the beneficiary is inadmissible. As a third preference employment-based immigrant, the beneficiary's proposed employer was required to obtain a permanent labor certification from the Department of Labor in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the Department of Labor issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. *Compare* 8 C.F.R. § 204.5(g) with § 204.5(1)(1)(3)(ii)(B). The beneficiary does not have the necessary qualifications in this case, as he has not graduated from High School and did not possess 24 months of work experience as an Indian cook as of the filing date of the labor certification. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such, the misrepresentation of his education and work experience was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The beneficiary's false statements about his education and prior employment shut off a line of relevant inquiry in these proceedings. Before the Department of Labor, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another

way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. See *Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C*.

By misrepresenting his education and work experience and making misrepresentations to the DOL, as well as submitting false documents, the beneficiary sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. See also *Matter of Ho*, 19 I&N Dec. at 591-592.

As noted above, it is proper for us to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182. We specifically issued notice to the petitioner to allow an opportunity to respond or submit evidence to overcome the alleged misrepresentation. As noted, the petitioner failed to address the misrepresentation in response to the NDI/NOID.

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

Further, we make a finding of fraud and misrepresentation by the beneficiary involving the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides:

(d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

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

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The alien employment certification, ETA Form 9089, ETA case number [REDACTED] is invalidated pursuant to 20 C.F.R. § 656.30(d).