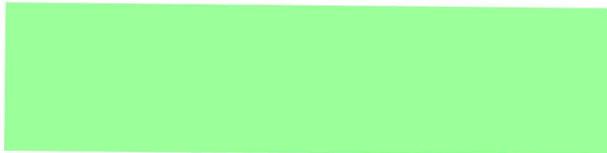


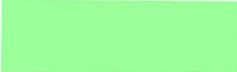
(b)(6)

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



U.S. Citizenship
and Immigration
Services

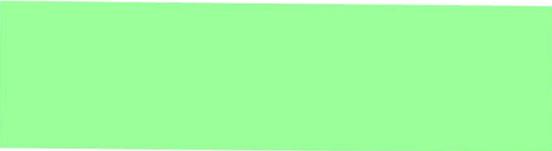


DATE: **FEB 04 2014** Office: NEBRASKA SERVICE CENTER File: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Nebraska Service Center (the director) on January 19, 2006. In connection with the beneficiary's Application to Register Permanent Residence or Adjust Status (Form I-485), the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the petition on March 10, 2010. In a Notice of Revocation (NOR) issued on July 9, 2010, the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The director found that the beneficiary, as the sole owner of the petitioner, committed fraud or misrepresentation involving the labor certification and invalidated the labor certification. The petitioner appealed the revocation to the Administrative Appeals Office (AAO) on August 30, 2010. The AAO dismissed the appeal, and affirmed the director's revocation of the previously approved petition and invalidation of the alien employment certification on February 1, 2013. The AAO also agreed that the petitioner and the beneficiary knowingly misrepresented a material fact, the former by attesting to the *bona fide* nature of the job, and the latter by submitting fraudulent documents in an effort to procure a benefit under the Immigration and Nationality Act (the Act) and the implementing regulations. The petitioner subsequently filed a Motion to Reopen and Reconsider. The AAO granted the motion and affirmed the AAO's previous decision. The matter is now before the AAO on a second Motion to Reopen and Reconsider. The motions will be granted, the previous decisions of the AAO will be affirmed in part and withdrawn in part, and the petition will remain denied.

The procedural history in this case is documented by the record of proceeding and incorporated into the decision. Further elaboration of the procedural history and facts of the case will be made only as necessary.

The petitioner describes itself as an IS/IT professional consulting service. It seeks to employ the beneficiary permanently in the United States as a human resource manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are member of the professions.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The regulation at 8 C.F.R. § 205.2 states:

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

The regulation at 8 C.F.R. § 103.2(b)(16) states:

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

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

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

Section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154 (c) provides:

Notwithstanding the provisions of subsection (b) no petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The AAO finds, based upon the evidence in the record at the time of the director's NOIR, that the derogatory information, if not responded to, would have resulted in the revocation of approval of the petition under Section 204(c) of the Act, 8 U.S.C. § 1154 (c). Thus, the director had good and sufficient cause to initiate revocation proceedings.

The director determined in the revocation decision dated July 9, 2010 that a *bona fide* job opportunity did not exist and that the petitioner willfully misrepresented material facts, thereby invalidating the labor certification.

The AAO affirmed the director's finding of material misrepresentation and the invalidation of the underlying labor certification in its February 1, 2013 decision. The AAO also determined, beyond the decision of the director, that the petitioner had failed to establish that the beneficiary possessed the minimum education and experience required to perform the duties of the position offered by the priority date, and that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO also determined that the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) did not render the instant visa petition valid.

In response to the petitioner's Motion to Reopen and Reconsider, the AAO affirmed the director's findings in the decision dated July 9, 2010 and the AAO's findings in its decision dated February 1, 2013. Specifically, the AAO found that contrary to the petitioner's claim that the beneficiary was merely an investor in and the human resource manager of the petitioner, the evidence in the record demonstrates that the beneficiary is the sole owner of the petitioner and that the beneficiary has control over its day-to-day operations. The AAO also found that based on the evidence in the record, the beneficiary appears to have a greater influence over more than the duties articulated in the position offered; and therefore, the job opportunity does not appear to be a *bona fide* job opportunity for a human resource manager. The AAO concluded that the beneficiary's 100% ownership and control of the petitioner during the labor certification process, which was not disclosed to either the Department of Labor (DOL) or United States Citizenship and Immigration Services (USCIS), appeared to be self-employment; and therefore, not a *bona fide* job offer.

The AAO found that the petitioner had failed to establish that the beneficiary possessed the required experience as set forth on the labor certification as of the priority date. Specifically, the AAO determined that the employment verification letters submitted by the petitioner on motion were insufficient to demonstrate that the beneficiary possesses the minimum 2 years of work experience for the position offered, as the information contained therein conflicts with the labor certification that was signed by the beneficiary and with previously submitted letters. On motion, the AAO affirmed its decision dated February 1, 2013 with respect to the petitioner's failure to establish that the beneficiary met the minimum education requirements of the position as stated on the labor certification as of the priority date. The AAO found that the petitioner had failed to reconcile the discrepancies in the record, and had failed to address the relevant issues or provide evidence responsive to the AAO's finding with respect to the beneficiary's education.

In response to the petitioner's Motion to Reopen and Reconsider, the AAO found that the petitioner had failed to establish its ability to pay the proffered wage through an examination of wages paid to the beneficiary, the petitioner's net income, or the petitioner's net current assets for 2003, 2004, 2005, 2007, 2009, 2010, and 2011. The AAO also found, as was noted in its February 1, 2013 decision, that the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, sufficient to conclude that the petitioner had the ability to pay the

proffered wage despite its shortfalls in wages paid to the beneficiary, net income, or net current assets.

United States Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.5(a)(3) state, in pertinent part, that "[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." In this matter, the petitioner's assertions are not supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or USCIS policy. Furthermore, the petitioner has failed to establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. The motion to reconsider is denied.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." The petitioner, through counsel, states new facts to be proved in the reopened proceeding and the motion is supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The motion to reopen is approved.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Bona Fide Job Opportunity

The director and the AAO found that a *bona fide* job opportunity did not exist in the instant matter and that the petitioner and the beneficiary willfully misrepresented material facts. Specifically, the director and the AAO determined that the record establishes that the petitioner and the beneficiary willfully withheld all information pertaining to the beneficiary's ownership and control over the petitioner's processes from the DOL in the labor certification process.²

On motion, counsel asserts that the petitioner is in compliance with *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987) and 8 U.S.C. § 1361 in that it underwent all the required recruitment

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

² The labor certification describes the job opportunity in part as "plan and carry out policies relating to all personnel activity; supervise the activity of and assist in the recruiting, interviewing and selection of employees; plan and conduct new employee orientation; create and manage records of insurance coverage...personnel transactions such as hires, promotions, transfers and termination and business development." The labor certification further indicates that the beneficiary has been working as the HR manager since 2002, during any recruitment period. The beneficiary's duties include recruiting, interviewing and recommending candidates for the position to the CEO. Nowhere in the Form ETA 750 and the Form I-140 submitted to the DOL or to USCIS is the beneficiary's name disclosed as the controlling owner of the petitioner.

processes in announcing and screening for the job offered. Counsel further asserts that the petitioner certified and was not precluded from filing an application for employment certification on behalf of the beneficiary as long as there is a *bona fide* job opportunity that is open to US workers. Counsel cites to *Matter of Modular Container Systems, Inc.* 89-INA-288 9(BALCA 1991); and *Matter of MMB Stucco, LLC.* 2011-PER-00715 (issue dated 07 May 2012). Counsel asserts that the beneficiary is a founder of the petitioner and is one of the initial investors as well as one of the petitioner's directors. Counsel further asserts that the beneficiary's role is that of an HR manager, that he has limited management involvement and has no direct control over hiring decisions at [REDACTED]. Counsel further asserts that there was no willful misrepresentation of material facts on the part of the petitioner or beneficiary during the labor certification process, and that he is unaware of any law or regulation or form that requires ownership information to be disclosed to the DOL.

It is not clear that the facts surrounding the beneficiary's relationships to the petitioner were intentionally withheld from the DOL. Based on the current record, the AAO concludes that there was not a deliberate misrepresentation or withholding of the facts by the petitioner and the beneficiary as the sole owner of the petitioner. There is insufficient evidence in the record to determine that the petitioner and/or the beneficiary engaged in fraud or willful misrepresentation in connection with the labor certification process based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. at 447. Thus, the director's and the AAO's finding of fraud and/or or misrepresentation is withdrawn. In summary, the AAO withdraws the director's finding of fraud and material misrepresentation against the petitioner and the beneficiary.

Further, as there was no fraud or misrepresentation involving the labor certification, the AAO reinstates the validity of the labor certification.³ With respect to the *bona fides* of the job offer, it is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). The regulation at 20 C.F.R. § 656.3 states that employment means: "Permanent full-time work by an employee for an employer other than oneself." Therefore, if the petitioning business is owned by the beneficiary or he has a substantial ownership interest in it, then it is the functional equivalent of self-employment and is not a job offer for someone other than oneself. That is the case in this matter where the beneficiary is a 100% owner of the petitioning business. Nevertheless, as the AAO finds that there was no fraud or misrepresentation involving the labor certification, whether the petitioner's relationship with the beneficiary invalidates the *bona fide* of the job offer will not be addressed.

As noted in the AAO's previous decisions, the certified position is for an HR manager. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner intends to employ the beneficiary as a vice president and/or COO, at [REDACTED] outside the terms of the Form ETA 750. See

³ The regulation at 20 C.F.R. § 656.30 (2010)(d) provides for invalidation of labor certifications based on fraud or willful misrepresentation.

Sunoco Energy Development Company, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment). The beneficiary is listed as the petitioner's vice president on many of its tax returns; lease agreements contained in the record are signed by the beneficiary as the petitioner's legal representative; and the petitioner's Resolution of the Board of Directors of [REDACTED] dated December 4, 2000, indicates that the beneficiary is authorized to oversee all the legal operations of the corporation in the United States. Thus, the petitioner has not established that the proposed employment will be in accordance with the terms of the approved labor certification. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

As noted by the AAO in its previous decisions, the petitioner has failed to address the discrepancy in the record regarding the petitioner's primary worksite indicated on the labor certification and the beneficiary's residence in another state. The labor certification specifies that it is approved for employment at the petitioner's office in Iowa but the record shows that the beneficiary has always resided in New Jersey. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho* at 591. It does not appear from the record of proceeding that the petitioner intended to hire the beneficiary to work in Iowa although the petitioner expressed that requirement on the labor certification, and the beneficiary signed the labor certification under penalty of perjury with an understanding of the job site requirement. A labor certification is only valid for the job opportunity in the area of intended employment described in the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). On motion, the petitioner has failed to overcome the findings of the AAO.

In view of the foregoing, the AAO concludes that the petition is not supported by a valid labor certification, and that the director properly revoked the approval of the petition.

Beneficiary's Qualifications

The AAO has also reviewed the record of proceeding and determined that the petitioner has failed to establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Beneficiary's Education

The AAO determined that the petitioner had failed to establish that the beneficiary possessed the minimum level of education as stated on the labor certification and as required by the professional visa category. Specifically, the AAO determined that the evaluation submitted by the petitioner was not persuasive in establishing that the beneficiary's education is equivalent to a U.S. bachelor's degree, in that the evaluation inaccurately concluded that the beneficiary's education was the equivalent to a single source U.S. bachelor's degree. The AAO also determined that based upon the opinion of American Association of Collegiate Registrars and Admissions Officers (AACRAO) and the Electronic Database for Global Education (EDGE), the beneficiary's education more likely than not "represents attainment of a level of education comparable to three years of university study in the United States."

On motion, the petitioner contends that it has established that the beneficiary possesses all the education, training, and experience requirements indicated on the labor certification, with a minimum of a bachelor's degree in business administration, personnel management or human resource management and two years of experience in the job offered or two years of experience in a related occupation, HR management/administration.

As noted above, the DOL certified the Form ETA 750 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The key to determining the job qualifications is found on the Form ETA 750, Part 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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 an alien labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien labor

certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien labor certification.

According to the plain terms of the labor certification in the instant matter, the applicant must have at a minimum a bachelor's degree in business administration, personnel management or human resource management and two years of experience in the job offered or two years of experience in a related occupation, HR management/administration.

The petitioner initially submitted a copy of the beneficiary's Bachelor of Arts Degree issued by the [REDACTED] in India, and dated 1976. On motion, the petitioner submitted a copy of the beneficiary's transcript from the [REDACTED] in India which indicates that English, Hindi, history, and Sanskrit were the subjects taken by the beneficiary at the university. The petitioner initially submitted a copy of a Provisional Certificate issued to the beneficiary by the [REDACTED] India, and dated August 1984 which states that the beneficiary was "a student of one year Post Graduate Diploma Programme in Personnel Management during the period [REDACTED]". The petitioner also submitted a copy of a Provisional Certificate issued to the beneficiary by the [REDACTED] India, and dated April 1995 which indicated that the beneficiary was awarded the Post Graduate Diploma Programme in Personnel Management at the [REDACTED]. On motion, the petitioner submitted a copy of a marks-sheet from the [REDACTED] which indicates course numbers and marks obtained by the beneficiary in August [REDACTED].⁴ The petitioner submitted a copy of a Provisional Certificate issued to the beneficiary by [REDACTED] in India, certifying that the beneficiary passed the [REDACTED] of [REDACTED] and was awarded the Degree of [REDACTED]. On motion, the petitioner submitted a copy of the beneficiary's transcript issued by [REDACTED] in India which indicates that the beneficiary completed a course in criminal procedure, civil procedure code and arbitration ACT, land law, pleading, conveyance & professional ethics, legal remedies, and industrial law.

As is noted in the AAO's previous decisions, according to EDGE, the beneficiary's three-year Bachelor of Arts degree is comparable to three years of university study in the United States. Additionally, the petitioner has failed to provide evidence to demonstrate that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE), or that a two or three-year bachelor's degree was required for admission into the program of study. Although the petitioner provided academic transcripts on motion, this evidence is insufficient to overcome the findings of the AAO as noted above. The transcripts lack specific descriptions of any relevant courses taken by the beneficiary and they fail to demonstrate that the institutions are accredited. Further, the record does not indicate what the enrollment requirements are at the Institute of Management Studies. In addition, although the petitioner provided on motion transcripts to demonstrate courses taken by the beneficiary leading to his claimed Bachelor of Law degree from [REDACTED] in India, the courses listed on the [REDACTED] transcript are not related to a bachelor's degree in business administration, personnel management, or HR management, as required by the labor certification.

⁴ No course description is provided in the transcript.

Additionally, as is noted in the AAO's previous decisions, the petitioner fails to address the deficiencies in the IEE evaluation which relies upon education from unaccredited institutions, or coursework not related to the required degree. Although counsel asserts on motion that the Electronic Database for Global Education (EDGE)'s analysis used by the AAO with respect to Indian education and degrees may not be relied upon, counsel fails to provide case law or evidence in support of the assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Evaluation

The petitioner resubmits the [REDACTED] evaluation dated April 12, 1999, of the beneficiary's educational credentials on motion. The evaluation concludes that the beneficiary has attained the equivalent of a US Bachelor of Science in Business Administration with a major in management and a minor in history and an equivalent of a Juris Doctor in the United States. The evaluator listed the beneficiary's Bachelor of Arts degree and final marks sheet from the [REDACTED] Post Graduate Diploma Programme in Personnel Management and marks sheets from the [REDACTED] and the Provisional Certificate for the Bachelor of Laws degree from [REDACTED] as documents reviewed in analyzing the beneficiary's education. The evaluator indicated that according to the documents submitted, the beneficiary completed the requirements for the Bachelor of Arts (History) degree. Additionally, the evaluator stated that the beneficiary completed the requirements for the post graduate diploma in personnel management in August [REDACTED] and that an analysis of the marks sheet reveals a program containing 900 marks (36 semester hours), all of which were in business administration with the concentration in human resources or personnel management; and that this program compares to an undergraduate major in management in the United States. The evaluator further stated that the record shows that the beneficiary completed the requirements for the bachelor of laws (L.L.B. Prof.) degree from [REDACTED] in [REDACTED] and that an analysis of the syllabus reveals course work which conforms or is comparable to the law major in the United States. The evaluator stated that all three schools compare to accredited colleges and universities in the United States. The evaluator concludes that the nature of the courses completed at the above noted institutions and the credit hours involved indicate that the beneficiary has completed the equivalent of a US Bachelor of Science degree as noted above.

The beneficiary's degree must be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The [REDACTED] evaluation is not persuasive in establishing that the beneficiary's education is equivalent to a U.S. bachelor's degree as required by the labor certification. The evidence in the record does not

demonstrate that the beneficiary's three year Bachelor of Arts degree is equivalent to a US bachelor's degree. The petitioner fails to establish that the [REDACTED] located in India is an accredited university.

Further, the mark sheet does not provide a description of the course work claimed to have been completed by the petitioner. Likewise, the EEI evaluation erroneously relies upon the beneficiary's courses in law as germane to a bachelor's degree in business administration, personnel management, or HR management. Therefore, the beneficiary does not meet the terms of the labor certification which requires the equivalent of a bachelor's degree in business administration, personnel management, or HR management.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

In addition, a three-year bachelor's degree will generally not be considered to be the "foreign equivalent" of a United States baccalaureate degree. See *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).⁵ See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree); see also *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich., August 20, 2010) (the beneficiary's three-year bachelor's degree was not the foreign equivalent of a U.S. bachelor's degree).

Therefore, based upon a review of the evidence and assertions made on motion, the failing of the petitioner to establish that the beneficiary's diploma from the [REDACTED] is from an accredited university, and the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree as required by the labor certification.

Beneficiary's Employment Experience

The petitioner has failed to establish that the beneficiary has the required work experience for the offered position. As noted above, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date.

⁵ In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

8 C.F.R. § 103.2(b)(1), (12). 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered, HR manager or two years of experience in a related occupation, HR management/administration. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a vice president at [REDACTED] from July 1999 to January 2002, and as a vice president at [REDACTED] from August 1997 to June 1999.

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). On motion, the petitioner resubmits the five employment letters: The employment letters are as follows:

- A letter dated February 1, 1999 from [REDACTED] of the human resources division of [REDACTED] who stated that the company employed the beneficiary from March 3, 1997 to January 29, 1999, and that at the time of leaving the company the beneficiary was vice president of operations. The declarant described the beneficiary's responsibilities as recruitment and staffing, statutory compliances, compensation and benefits, performance management, and general administration. As noted by the AAO in previous decisions in this case and in the instant matter, the declarant has failed to specify the length of time the beneficiary spent as a vice president of operations with the company and has failed to specify the beneficiary's job duties.
- A letter dated January 2002 from the president of [REDACTED] who stated that the company employed the beneficiary as a vice president of operations from July 1999 to January 2002. The declarant fails to specify the dates of the beneficiary's employment and fails to describe the beneficiary's job duties.
- A letter dated March 18, 1997 from the executive director of [REDACTED] who stated that the company employed the beneficiary as a human resources manager from January 6, 1996 to March 18, 1997. The declarant further stated that the beneficiary was instrumental in resourcing people for the four developmental centers in India. This company name is not listed on the labor certification and the declarant's job duties description is general and not specific.⁶

⁶ 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.

- A letter dated February 8, 2013 from the COO & Head-HR of [REDACTED] who stated that the company employed the beneficiary as a personnel administration manager from January 19, 1988 to January 5, 1996. As is previously noted by the AAO, the declarant fails to specify the beneficiary's job duties and the dates of employment overlap with the dates of employment at [REDACTED] which are specified by the beneficiary on the labor certification and on the Form G-325, Biographic Information.
- A letter dated December 9, 1998 from [REDACTED] who stated that he has known the beneficiary for the last ten years and that the beneficiary was employed by [REDACTED] as personnel manager while he was the president and CEO. The declarant fails to specify the beneficiary's job duties or the time period in which the beneficiary was employed.

On motion, counsel asserts that the letters from [REDACTED] and [REDACTED] were not included on the Form ETA 750B since the form asks for only the last 3 years of employment. Contrary to counsel's claim, Section 15 of the Form ETA 750B states, "List all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." Therefore, the omission of this employment experience information from the Form ETA 750 is not in compliance with the instructions to the Form ETA 750. It is further noted that the beneficiary fails to list the above noted companies on the Form G-325A, Biographic Information. Counsel further asserts on motion that the inconsistency that exists between the dates of employment listed on the Form ETA 750 and the dates of employment listed on the employment letter from [REDACTED] are due to the fact that the beneficiary worked as a trainee in [REDACTED] from March 3, 1997 to July 1997, and from February 1999 to June 1999 the beneficiary worked as a consultant to [REDACTED].

Contrary to counsel's claim, the declarant does not state in his letter that the beneficiary was a trainee or a consultant to the company nor is there any indication from the Form ETA 750B that the beneficiary was anything other than the vice president for the company from August 1997 to June 1999. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

In summary, the petitioner has not established that the beneficiary has the requisite education as required by the form ETA 750 or that he is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

Ability to Pay the Proffered Wage

Another issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In previous decisions, the AAO found that for the years 2003, 2004, 2005, 2007, 2008, 2009, 2010, 2011, and 2012, the petitioner did not establish that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage. Furthermore, the AAO found that for the years 2003, 2004, 2005, 2007, 2009, 2010, 2011, and 2012, the petitioner did not have sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary of the instant petition the proffered wage as of the priority date while continuing to meet its wage obligations to all sponsored beneficiaries through an examination of wages paid, or its net income or net current assets.

The AAO also notes that the record reflects that the petitioner is unable to pay the proffered wage as of the date of the petition's approval in 2008. Thus, the director would have had good and sufficient cause to initiate revocation proceedings based on the petitioner's inability to pay the proffered wage, at the time it issued the NOIR.

On motion, counsel asserts that the petitioner's shareholders are willing to forego officer compensation in order to pay the proffered wage. The petitioner submitted as evidence a statement from [REDACTED] who indicated that he was an officer/director of [REDACTED] and that in the event the petitioner is unable to meet the proffered wage of \$71,000.00 per year for the beneficiary, he certifies, understands, and agrees to forego his share of any salary, bonus, etc. in order to pay the beneficiary's wages. The petitioner also submitted a statement from [REDACTED] who indicated that he was the vice president/officer of [REDACTED] and that he too would be willing to forego his compensation in order to pay the proffered wage to the beneficiary in the instant that the petitioner was unable to do so.

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 the Form 1120. For this reason, the petitioner's figures for compensation of officers may be considered in certain circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The petitioner provided copies of its IRS Forms 1120, which state at page 1, Line 12 (Compensation of Officers), the petitioner elected to pay compensation to its officers in the amount of \$42,000.00 in 2004, \$32,316.00 in 2005, \$42,000.00 in 2006, \$35,000.00 in 2007, \$42,000.00 in 2008, 2009, and 2010, \$44,500.00 in 2011, and \$45,000.00 in 2012. The petitioner's Forms 1120 list [REDACTED] as the sole officer who received officer's

compensation in the above noted years. However, the petitioner failed to submit Forms W-2 and Forms 1040 to show that [REDACTED] was compensated by the petitioner for the amounts listed above. Although the petitioner submitted copies of [REDACTED] Forms W-2 for 2006, 2007, 2008, 2009, 2010, 2011, and 2012, its tax returns do not list him as an officer and do not show that he received any officer's compensation in the relevant years. Furthermore, the statements submitted by the petitioner are not in affidavit form and the petitioner did not submit a copy of the officer's IRS Forms 1040 or a list of his recurring monthly household expenses for the relevant years. Thus, the petitioner has not demonstrated that the officer would have been willing and able to forego officer compensation during the relevant years while still covering his own household expenses. Based upon the amount of compensation issued by the petitioner to the officer, it is more likely than not that the beneficiary's proffered wage would consume a large percentage of the total officer compensation paid each year, and the petitioner has not established that the officer could forego a large portion of his compensation on a continuing basis. Going on record without adequate supporting documentary evidence 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)).

In addition, although the officer compensation amounts may exceed the difference between the wages paid to the beneficiary and the proffered wage amount in the relevant years, USCIS electronic records indicate that the petitioner has filed multiple immigrant petitions since it was established in 2003. USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, 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'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 750B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States

and at colleges and universities in California. The Regional Commissioner's determination in *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.

In assessing the totality of the circumstances in this case, as is noted in the AAO's prior decisions, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. Furthermore, there are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. The petitioner does not establish that it could have paid the proffered wage to the beneficiary and the sponsored beneficiaries, assessing the totality of the circumstances.

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

In view of the foregoing, the previous decisions of the director and the AAO will be partially withdrawn with respect to the finding of willful misrepresentation and the validity of the labor certification will be reinstated. The previous decisions revoking the approval of the petition will be affirmed. The petition's approval remains revoked for the reasons stated above, with each considered as a separate and alternative ground for revocation.

ORDER: The portions of the director's and the AAO's decisions finding fraud against the petitioner and the beneficiary are withdrawn.

ORDER: The director's invalidation of the labor certification number [REDACTED] is withdrawn and the approval of the labor certification is reinstated.

ORDER: The director's decision to revoke the approval of the petition is affirmed. The petition's approval remains revoked.