



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 10 2015

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director) denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal, a decision reaffirmed in our responses to four combined Motions to Reopen and Reconsider. The matter is again before us as a fifth Motion to Reopen. The motion will be granted. Our prior decision will be affirmed. The visa petition will remain denied.

The petitioner is a newspaper distributor. It seeks to employ the beneficiary permanently in the United States as a circulation-sales representative pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The petition's priority date is June 19, 2003, the date the labor certification was accepted for processing by DOL. 8 C.F.R. § 204.5(d).

We conduct appellate review on a *de novo* basis.² We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.³ An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision.⁴

I. PROCEDURAL HISTORY

The petitioner filed the visa petition on November 3, 2006. On September 13, 2007, the director issued a Request for Evidence (RFE) seeking additional evidence of the petitioner's ability to pay the proffered wage. The petitioner responded to the RFE on October 25, 2007, submitting copies of the beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the years 2003 through 2006, and his Form 1099-MISC, Miscellaneous Income, for 2006; the first pages of its federal tax returns for 2003 through 2005; and the Forms 1099-MISC issued to the petitioner's owner by [REDACTED] in the years 2002 through 2004, and in 2006. Finding that the submitted evidence failed to establish that the petitioner had a continuing ability to pay the proffered wage as of the June 19, 2003 priority date, the director denied the visa petition on January 24, 2008.

The petitioner appealed the director's decision to this office on February 22, 2008. We issued a Notice of Derogatory Information (NDI) to the petitioner, based on online records of the Commonwealth of Virginia State Corporation Commission that reflected the petitioner's business terminated on February 2, 2009. The petitioner submitted evidence establishing its reinstatement.

¹ Section 203(b)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning, 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.

² See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991).

³ The Form I-290B, Notice of Appeal or Motion, instructions permit the submission of additional evidence on appeal. 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

⁴ *Supra* n. 2; see also *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003).

On October 1, 2009, we dismissed the appeal, finding that the record did not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date forward. On November 2, 2009, the petitioner filed a Motion to Reopen and Reconsider (MTR, motion); we granted the motion and affirmed our prior decision. The petitioner filed a second MTR on July 9, 2010; we dismissed the motion because the filing failed to meet the regulatory requirements for a motion. 8 C.F.R. §§ 103.5(a)(2), (3). The petitioner filed a third MTR on March 1, 2013; we granted the motion, but found the record did not demonstrate the petitioner's ability to pay the proffered wage. On August 29, 2013, the petitioner filed a fourth MTR, which was dismissed for not meeting the motion requirements. *Id.*

In the petitioner's fifth MTR, received on April 7, 2014, counsel for the petitioner contends that the petitioner has established its ability to pay the beneficiary the proffered wage based on its sound financial history. The motion includes: a statement from counsel; the 2013 Form 1099-MISC issued to the petitioner's owner by [REDACTED]; copies of a [REDACTED] Renewal Agreement for a Home Delivery Agency Agreement or Single Copy, dated April 1, 2014; a Renewal Agreement for a Distribution Agency Agreement, dated September 24, 2013; and an unsigned copy of a memorandum to the Circulation Accounting and Administration Manager at [REDACTED] reflecting the fee schedule for the petitioner's owner as of June 3, 2013.

On July 3, 2014, we issued a Notice of Derogatory Information and Request for Evidence (RFE) to the petitioner informing it that our consideration of the present case had uncovered information that cast doubt on the beneficiary's qualifying experience for the offered position.⁵ 8 C.F.R. §§ 103.2(b)(8), (16)(i). Our RFE provided the petitioner 60 days to submit additional evidence from it or the beneficiary of the beneficiary's claimed employment, including a letter from the beneficiary's prior employer and supporting documentation. We requested that the petitioner submit copies of its federal income tax return, annual report or audited financial statement for 2013, and documentation of any wages paid to the beneficiary in 2013. In response to counsel's request for additional time in which to respond to the RFE, we extended the response period to the maximum permitted by regulation.⁶

On October 20, 2014, the petitioner responded with evidence in support of the visa petition, and through counsel again requested additional time in which to respond to the July 3, 2014 RFE.

A. Extension of Response Time

Counsel has requested that the petitioner be allowed an additional 90 days in which to provide evidence of the employment experience claimed by the beneficiary. In her October 16, 2014 letter, counsel asserts that the additional period of 30 days beyond September 18, 2014 does not provide enough time for the beneficiary to obtain clarification regarding his employment. She contends that

⁵ Our RFE also notified the petitioner that the derogatory information, if not overcome, may lead to a finding of willful misrepresentation or fraud by it and/or the beneficiary.

⁶ 8 C.F.R. § 103.2(b)(8)(iv) (maximum response time for an RFE shall not exceed 12 weeks; additional time to response to an RFE may not be granted).

there is no statutory time period within which a petitioner is required to respond to derogatory information and that the petitioner's request for a 90-day extension is reasonable.

An extension may not be granted; counsel fails to consider that the derogatory information was provided to the petitioner in an RFE and that the maximum amount of time allowed for response to an RFE is 12 weeks. 8 C.F.R. § 103.2(b)(8)(iv). The July 3, 2014 RFE initially granted the petitioner 60 days in which to provide the requested evidence⁷ and our September 18, 2014 extension provided it with an additional 30 days. As the petitioner received 12 weeks in which to provide the evidence requested by the RFE, additional response time may not be granted. *Id.*

B. Motion to Reopen

The requirements for motions to reopen are found at 8 C.F.R. § 103.5(a)(2):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

The record reflects that the motion is properly filed and timely. Counsel for the petitioner stated new facts and submitted new evidence relating to the petitioner's ability to pay and the beneficiary's qualifications for the offered position. Accordingly, the petitioner's motion is granted; we will reopen our decision. Our discussion will, however, be limited to the issues raised by the petitioner on this motion and those referenced in the RFE issued on July 3, 2014.

II. LAW AND ANALYSIS

A. Ability to Pay

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.

⁷ The record reflects that the July 3, 2014 RFE addressed to the petitioner at its address of record was returned as undeliverable; we reissued the RFE on July 24, 2014 to the petitioner's registered agent's address as listed the Virginia State Corporation Commission. We note that the RFE was also sent to the petitioner's counsel on July 3, 2014. Counsel does not claim that she did not receive the RFE; therefore, we find the 60-day response period granted by the RFE to have begun on July 3, 2014. It is the petitioner's responsibility to notify USCIS of any change of address. On September 13, 2014, we again notified the petitioner of this on-going obligation, and the record of proceeding reflects that the petitioner updated its address following that notice.

In the present case, the priority date for the visa petition is June 19, 2003 and the proffered wage is \$30.95 an hour or \$64,376.00 a year, based on a 40-hour week. Therefore, the petitioner must establish its ability to pay the beneficiary the proffered wage of \$64,376.00 a year from the June 19, 2003 priority date through 2013, the most recent year for which the petitioner's tax returns are available.

In determining a petitioner's ability to pay, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner was employing the beneficiary. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during this period, that evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS next examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses.⁸ If the petitioner's net income during the required period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither the employer's net income nor its net current assets establish a consistent ability to pay the proffered wage, USCIS may also consider the overall magnitude of a petitioner's business activities.⁹ In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Our prior decisions in this case found the petitioner unable to establish its ability to pay the proffered wage in either 2003 or 2004 under the regulatory requirements at 8 C.F.R. § 204.5(g)(2).¹⁰ These same decisions also concluded that the petitioner's failure to demonstrate its ability to pay on the basis of wages paid to the beneficiary, net income, or net current assets is not overcome by the totality of its circumstances, as those circumstances have been documented in the record.

In the instant motion, counsel asserts that we should take note of the fact that the petitioner in this case, like the fashion design business in *Sonegawa*, has a prominent client, [REDACTED] one that "belongs within the circle of prominence of a Ms. Universe."¹¹ She also contends that the petitioner is a

⁸ *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).

⁹ *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

¹⁰ In response to the July 3, 2014 RFE, the petitioner submitted its 2013 tax return, which indicates it had \$28,975.00 in net income and \$12,224.00 in net current assets, neither of which is sufficient to cover the proffered wage. The petitioner failed to submit a Form W-2 or 1099-MISC issued to the beneficiary in 2013, as requested. The record fails to establish the petitioner's ability to pay the proffered wage in 2013, as well as 2003 and 2004. 8 C.F.R. § 204.5(g)(2).

¹¹ Ms. Universe was identified by the Regional Commissioner in *Sonegawa* as one of the high-profile clients of the petitioning fashion designer, a client list that he found indicative of the petitioner's sound business reputation.

well-established business with a sound financial history, that it has been profitable for the past decade and that its future looks even better.¹² Counsel further maintains that, while the petitioner “does not employ a number of employees,” its ability to pay should not be based on the size of its workforce.

In support of the motion, the petitioner submitted a 2013 Form 1099-MISC for its owner, reflecting \$825,741.03 in income from [REDACTED],¹³ a 20-week renewal agreement of the petitioner’s distribution agreement with [REDACTED] dated September 24, 2013; a 52-week renewal of this agreement, dated April 6, 2014; and an unsigned June 3, 2013 [REDACTED] memorandum reflecting the service fees to be paid to the petitioner’s owner as of that date.

We also note that the tax returns submitted for the record reflect steady growth in the petitioner’s gross receipts since 2003:

• 2003	\$372,161.00
• 2004	\$402,607.00
• 2005	\$400,552.00
• 2006	\$405,531.00
• 2007	\$536,150.00
• 2008	\$594,825.00
• 2009	\$561,757.00
• 2010	\$550,639.00
• 2011	\$664,232.00
• 2012	\$807,104.00
• 2013	\$825,741.03

We acknowledge the claims of business expansion made in an undated statement by the petitioner’s owner, submitted in support of the petitioner’s March 1, 2013 motion. The petitioner’s owner claims that his company has doubled its business since 2003/2004, going from 5,000 subscribers and the delivery of two publications to 11,000 subscribers and the delivery of 11 publications. We also consider the additional Forms 1099-MISC issued to the petitioner’s owner by [REDACTED] in 2002 through 2004, and 2006.

However, the above evidence, even when considered in the aggregate, does not establish the petitioner’s ability to pay the proffered wage. Although the submitted Renewal Agreements, like the various Forms

¹² We note, however, that the evidence submitted by the petitioner does not support counsel’s claim. The petitioner has submitted a printout of an August 5, 2013 article from [REDACTED] to be sold to [REDACTED] the founder of [REDACTED]” by [REDACTED] which reports that the newspaper’s print circulation “has dwindled, falling an additional 7 percent daily on Sundays during the first half of this year.” Such evidence appears to contradict counsel’s assertion regarding the petitioner’s bright future as a distributor of the print edition of [REDACTED]

¹³ The petitioner is not paid directly by [REDACTED]. It appears that [REDACTED] pays the petitioner’s owner as a sole proprietor, using Form 1099-MISC. The petitioner’s owner then transfers this income to the petitioner (Part V, Schedule C of the owner’s Forms 1040, U.S. Individual Income Tax Returns) and it is reported using the petitioner’s Federal Employer Identification Number (FEIN) on the petitioner’s tax returns as gross receipts.

1099-MISC that have been submitted for the record, reflect that the petitioner's owner is a distributor of [REDACTED] newspaper, a business relationship with [REDACTED] does not, in and of itself, establish the petitioner's ability to pay the proffered wage. Moreover, based on these Renewal Agreements, the petitioner's business relationship with the [REDACTED], its primary client,¹⁴ appears to consist solely of short-term distribution contracts of one year or less.

We also note that the increase in the petitioner's gross receipts between 2003 and 2013 is not reflected in the petitioner's net income totals over this same period. Instead, the petitioner's net income appears to have declined from a high of \$136,361.00 in 2008 to \$26,019.00 in 2012 and \$28,975.00 in 2013; the record does not indicate that these declines resulted from uncharacteristic business expenses.¹⁵

The record also contains no documentary evidence in support of the claim made by the petitioner's owner regarding the doubling of the petitioner's customer base between 2003 and 2013 or the significant increase in the number of publications it distributes. The record does not identify or document the specific publications distributed by the petitioner. Neither does it contain business records that establish the claimed increase in circulation. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding.¹⁶

Moreover, we note that the petitioner has reported no "Salaries and wages" on its tax returns since 2006, and that no labor costs are reflected on the relating Schedules A under "Cost of Labor" or Forms 1125-A as "Cost of Goods Sold." Accordingly, the petitioner's tax returns do not reflect the increase in gross wages that would support its owner's claim of an expanding business. We also find no evidence in the record that would establish the petitioner as a business leader in the distribution of newspapers or publications in its region, e.g., letters from [REDACTED] or other publishers of materials distributed by the petitioner indicating their appreciation of and reliance on its services. We further note that in *Sonegawa*, the Regional Commissioner found the petitioner's prestigious client list to offer proof that it could rebound from its uncharacteristic expenses. However, there is nothing in the record that indicates the petitioner in the present matter experienced uncharacteristic losses in 2003, 2004 or 2013. The petitioner has also failed to establish that its success in 2013, five years after the director's denial of the visa petition, would demonstrate its ability to pay the proffered wage in 2003 and 2004, the first two relevant years.

Therefore, based on the record before us, we do not find the petitioner to have submitted sufficient evidence to demonstrate that the totality of its circumstances establish its ability to pay the proffered wage. Critical factors that supported the Regional Commissioner's favorable decision in *Sonegawa*

¹⁴ In an undated statement submitted in support of the petitioner's August 29, 2013 motion the petitioner's president indicates that the [REDACTED] is the petitioner's primary source of income.

¹⁵ The petitioner's owner previously attempted to explain the petitioner's negative net income in 2004 as the result of uncharacteristic business expenses, specifically the purchase of equipment, vehicle repairs and an increase in his salary. However, our August 1, 2013 decision found that no specific evidence had been submitted to document these expenses. Moreover, we concluded that the expenses, such as salary increases, did not appear to be the type of uncharacteristic expenses experienced by the petitioner in *Sonegawa*, but were, instead normal business costs.

¹⁶ 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)).

– a sound business standing accompanied by an outstanding reputation, as well as the documentation of uncharacteristic business expenses to explain financial losses or downturns – have not been demonstrated by the petitioner in the present matter. Accordingly, the petitioner has not established a continuing ability to pay the proffered wage from the June 19, 2003 priority date forward.

However, we notified the petitioner in our July 3, 2014 RFE that our consideration of the petitioner’s motion has resulted in a determination that the record not only fails to demonstrate the petitioner’s ability to pay the proffered wage, but also the beneficiary’s qualifications for the offered position.¹⁷

B. Beneficiary Qualifications

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition.¹⁸ In evaluating 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.¹⁹

Part A.14. of the labor certification filed in support of the visa petition requires the beneficiary to have a high school education and two years of experience, either as a Circulation-Sales Representative or a Sales/Distribution Coordinator. In Part B.15. of the labor certification, the beneficiary claims full-time employment as a Circulation-Sales Representative with the petitioner from December 2000 until the “present.” The beneficiary also claims full-time employment as a Circulation-Sales Representative with [REDACTED] a newspaper company located in [REDACTED] Indonesia, from January 1996 until October 1998.

The record contains a September 25, 2006 statement in which the petitioner indicates that it wishes to qualify the beneficiary for the offered position based on his prior employment with [REDACTED]. An October 30, 1998 statement on [REDACTED] letterhead signed by [REDACTED] Director, [REDACTED] indicates that the beneficiary was employed by the company as a Circulation Sales Representative from January 1996 to October 1998.

We note at the outset that the October 30, 1998 experience statement fails to describe the duties performed by the beneficiary for [REDACTED] and, therefore does not satisfy the regulatory requirements. 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring letters from employers giving the name, address, and title of the employer, and a description of the experience). Moreover, the statement indicates that the beneficiary’s employment lasted only from January 1996 to October 1998 and does not specify that he was employed on a full-time basis during this time period; this prevents us from analyzing whether the beneficiary possessed two years of full-time experience in the position offered, as required by the terms of the labor certification. Therefore, the letter does not establish

¹⁷ *Supra*, n. 4.

¹⁸ 8 C.F.R. §§ 103.2(b)(1), (12); 8 C.F.R. § 204.5(l)(3)(ii)(A); see *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

¹⁹ 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).

that the beneficiary has the two years of experience required by the labor certification. *See Z-Noorani, Inc. v. Richardson*, 950 F.Supp.2d 1330, 1340 (N.D. Ga. 2013) (whether employment is full- or part-time is a necessary part of the “specific description” requirement of 8 C.F.R. § 204.5(g)(1)). Further, in Part B.11. of the labor certification, the beneficiary claims to have attended [REDACTED] from June 1994 to June 1998, a time period that overlaps almost the entire period in which he claims to have been employed on a full-time basis by [REDACTED]. This casts doubts on his claim of full-time employment. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (doubt cast on any aspect of a petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Based on the above, the petitioner has not established that the beneficiary was qualified for the offered position.

Our July 3, 2014 RFE informed the petitioner that [REDACTED], in response to an overseas inquiry into the beneficiary’s claimed employment, indicated that it has no record of the beneficiary in its employee database and that no individual by the name of [REDACTED] has served as its director. This casts additional doubt on the beneficiary’s claimed employment, and suggested that the letter was a forged document. *Id.* To overcome the doubt created by this information with regard to the beneficiary’s qualifying experience, the RFE requested the submission of a new letter from [REDACTED] in compliance with 8 C.F.R. § 204.5(l)(3)(ii)(A), including a description of the specific duties performed by the beneficiary, the timeframe during which these duties were performed, and the number of hours worked by the beneficiary. The RFE informed the petitioner that any experience letter provided by [REDACTED] should explain its initial denial of having employed the beneficiary and Ms. [REDACTED]. Further, it instructed the petitioner to submit independent, objective evidence of the beneficiary’s employment with [REDACTED] such as business or tax records. Inconsistencies must be resolved by the submission of “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.” *Id.* at 591-92. We notified the petitioner that, absent this evidence, we intended to enter a finding against the beneficiary for having willfully misrepresented his employment experience to USCIS, and that we may invalidate the approval of the labor certification for this same reason. Section 212(a)(6)(C)(i) of the Act; 20 C.F.R. § 656.30(d).

Finally, the RFE noted that the beneficiary’s claimed baccalaureate degree in accounting from [REDACTED] did not establish that he had the underlying high school education required by the labor certification. Moreover, the RFE indicated to the petitioner that the beneficiary’s assertion that he had received a baccalaureate degree in 1998 from [REDACTED] after four years of study appeared inconsistent with his claim of having been employed by [REDACTED] full-time from January 1996 until October 1998. We requested additional evidence of the beneficiary’s education.

In response to the RFE, the petitioner submitted a certified authorized English-language translation of a Ministry of Education and Culture of the Republic of Indonesia certificate signed by the principal of the [REDACTED] on May 29, 1993. The translated certificate states that the beneficiary has passed the final examination of [REDACTED] as of February 9, 1993. The certificate is accompanied by a translated academic transcript for the 1992/1993 school year, which was also signed by the principal on May 29, 1993. The petitioner also submitted the beneficiary’s graduate transcript from [REDACTED], dated December 3, 2003.

The petitioner submitted translations of the beneficiary's high school certificate and transcript; it has not submitted the Indonesian () language documents from which these translations were purportedly made, and has not claimed or established that they cannot be provided. We cannot accept the submitted translations as proof that the beneficiary completed the four years of high school required by the labor certification without the original language documents. *See* 8 C.F.R. § 103.2(b)(3). The beneficiary's graduate transcript from () fails to establish that the beneficiary has the underlying high school education required by the labor certification. A petitioner may submit secondary evidence in place of requested evidence only when it has demonstrated that this evidence does not exist or cannot be obtained.²⁰ The petitioner has not indicated that the beneficiary's Indonesian-language high school certificate and transcript are not available. Accordingly, the record does not establish that the beneficiary has the high school education required by the labor certification.

In response to the information provided by the RFE regarding the beneficiary's apparent misrepresentation of his qualifying employment experience, the petitioner has submitted three statements, the first from its owner, the second from the beneficiary, and the third from () a friend that worked with the beneficiary distributing the () newspaper from 1996 to 1998.

In his August 26, 2014 statement, the petitioner's owner asserts that there was no intent on his part to misrepresent the beneficiary's experience and that he would not jeopardize his business for the sake of a single individual. He indicates that the beneficiary now believes he may have worked for an independent contractor, but he previously believed he was employed by () directly because he delivered its newspapers.

In his statement, also dated August 26, 2014, the beneficiary asserts that his brother checked on his employment with () but was told that the beneficiary had been employed so long ago that he could not be found in the company's computer system. He also reports that his own attempts to obtain information from () have been unsuccessful. The beneficiary indicates that his claim of having worked for () was based on his belief that because he distributed () newspaper, he was employed by (). He states that he was paid in cash by his boss, "Sam," who worked for () and that he submitted the letter signed by Ms. () believing it was genuine. Now, based on () response to USCIS inquiries regarding his employment, the beneficiary concludes that he must have been an independent contractor.

The beneficiary's assertion regarding his belief to have been employed by () is supported by an October 10, 2014 statement from () Mr. () asserts that he and the beneficiary both believed they worked for () during this time. He states that he knew that the beneficiary worked for () who, he thought, worked for the () newspaper.

²⁰ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner must demonstrate the non-existence or unavailability of both the required document, and relevant secondary evidence, before submitting at least two affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of that which must be proved. *Id.*

While we note the submitted statements from Mr. [REDACTED] and the beneficiary regarding their confusion as to the identity of their employer, they do not establish the beneficiary's qualifying experience as they are not the letters of experience required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Neither do they constitute the independent, objective evidence of the beneficiary's employment required to overcome the doubt that has been created by the submission of the [REDACTED] experience letter signed by [REDACTED]. Inconsistencies must be resolved by the submission of independent, objective evidence. *Matter of Ho*, 19 I&N at 591-92. Further, we observe that Mr. [REDACTED] statement refers to [REDACTED] as "[REDACTED]" raising questions regarding the reliability of his claims to be familiar with the beneficiary's employment history with [REDACTED]. Moreover, Mr. [REDACTED] statement is written in English, not translated from the Indonesian [REDACTED] language, and the record fails to offer any evidence that he reads or speaks English.

We also observe that Mr. [REDACTED] statement, in which he asserts that he and the beneficiary "[had] newspaper stalls, and distributed the [REDACTED] newspaper during 1996-1998," appears to indicate that the beneficiary's "distribution" experience with [REDACTED] even if established, would not provide him with the distribution experience required by the labor certification, which indicates that the offered position requires the beneficiary to "promote and coordinate sale and distribution of newspapers," and to "[s]chedule the delivery and distribution of newspapers and regulate size of orders to maintain maximum sale and distribution." The labor certification also indicates that the beneficiary will be responsible for inspecting delivery routes, instructing drivers and carriers in sales and delivery techniques, laying out home delivery routes and organizing carrier crews; the record contains no evidence to document his experience with these duties. Therefore, we do not find the record to establish that the beneficiary had the two years of experience in the position offered required by the labor certification at the time of filing.

Moreover, Mr. [REDACTED] statement also contradicts the beneficiary's description of his [REDACTED] employment in Part B.15. of the labor certification, where he states that he "[p]romoted and supervised sale and distribution of daily newspaper. Assigned routes of delivery and regulated size of orders and circulation, etc." Accordingly, as discussed below, it supports a finding that the beneficiary willfully misrepresented his experience on the labor certification in order to establish his qualifications for the offered position.

C. Willful Misrepresentation under 212(a)(6)(C)(i) of the Act

The record contains evidence contradicting the employment experience claimed by the beneficiary on the labor certification. The petitioner failed to submit independent, objective evidence establishing the beneficiary's qualifying employment with [REDACTED] as claimed on the labor certification. We find the beneficiary's submission of the experience letter signed by [REDACTED] purportedly on behalf of [REDACTED], to constitute fraud and/or the willful misrepresentation of a material fact pursuant to section 212(a)(6)(C)(i) of the Act because [REDACTED] indicated Ms. [REDACTED] was never one of its directors, the beneficiary was never one of its employees, and the

petitioner has not submitted independent, objective evidence to overcome those issue.²¹ This finding is further supported by the inconsistent descriptions of the beneficiary's [REDACTED] experience found in [REDACTED]; October 10, 2014 statement from that provided in Part B.15. of the labor certification.

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. Section 212(a)(6)(C) of the Act states that any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, has sought to procure, or has procured, a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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

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

Matter of S & B-C-, 9 I&N Dec. 446, 447 (BIA 1960). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

We also note that a finding of misrepresentation or fraud under section 212(a)(6)(C)(i) of the Act, may lead to the invalidation of an approved labor certification. 20 C.F.R. §§ 656.30(d), 656.32.

In response to our RFE, counsel asserts that the record does not establish that the beneficiary is excludable on the true facts as the beneficiary "did circulate/distribute and sell [REDACTED] for the time period 1996-1998" and that he believed that, in distributing [REDACTED]' newspaper, he was its employee. She also contends that the submission of the experience letter did not shut off a relevant line of inquiry because the beneficiary had the experience it reflected and, therefore, does not establish that the beneficiary is excludable.

Counsel's claims regarding the genuineness of the beneficiary's experience with [REDACTED], like those provided by the beneficiary and Mr. [REDACTED] do not demonstrate the claimed employment experience. Without supporting documentation, the assertions of counsel are not sufficient to meet

²¹ The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

the burden of proof in these proceedings. *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). Moreover, as previously indicated, inconsistencies must be resolved by the submission of independent, objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The beneficiary claims on the labor certification to have been employed on a full-time basis with [REDACTED]. However, he also indicates on the labor certification at Part B.11. that he was attending school at the time of his [REDACTED] employment, raising questions as to whether his [REDACTED] employment, even if established, could have been full-time and, therefore, of sufficient length to provide him with the two years of experience required by the labor certification.

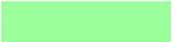
Further, the duties claimed by the beneficiary on the labor certification are inconsistent with the description of the work performed by the beneficiary as described by [REDACTED]. In addition, the record contains a letter on [REDACTED] letterhead that is signed by an individual who was not employed by that entity. Accordingly, we find that the beneficiary does not have the experience required by the labor certification and, therefore, that he is excludable on the true facts of this matter. Moreover, even if the beneficiary were not excludable on the true facts, his misrepresentation of his employment experience in Part B.15. of the labor certification cut off a line of inquiry that was relevant to his eligibility for the offered position, which, had it been explored by DOL, might well have resulted in a proper determination that he was not qualified for the position, and therefore approval of that application would be in error.

The petitioner failed to submit the independent, objective evidence of the beneficiary's [REDACTED] employment, as requested by our RFE. We find that in asserting the experience with [REDACTED] on the labor certification and by providing the [REDACTED] experience letter signed by [REDACTED], the beneficiary knowingly made false statements on the labor certification and submitted a false document to USCIS to establish his experience for the offered position.²² Accordingly, he is found to have willfully misrepresented a material fact in order to obtain an immigration benefit. This finding of material misrepresentation may be considered in any future proceeding where inadmissibility is an issue. Based on our finding of material misrepresentation, we will invalidate the approval of the labor certification pursuant to our authority. 20 C.F.R. § 656.30(d).

III. CASE SUMMARY

For the reasons discussed above, the record does not establish the petitioner's ability to pay the proffered wage from the June 19, 2003 priority date forward. Moreover, the experience letter submitted by the petitioner to establish the employment experience claimed by the beneficiary on the labor certification is fraudulent and the record contains no independent, objective evidence demonstrating that the beneficiary's employment claims are, nevertheless, genuine. Further, the

²² We again note that the record contains an August 26, 2014, affidavit from the beneficiary, prepared and submitted in response to our notice of derogatory information and addressing the issue of the fake experience letter. We also note that the beneficiary states that he had "no [intent] to commit any fraud to the government." However, the asserted experience on the labor certification, coupled with the submission of and reliance on the fraudulent letter, is a willful misrepresentation of a material fact. As such, we need not make a finding regarding the beneficiary's intent to deceive.

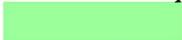


record establishes that the beneficiary made false claims regarding his prior employment experience on the labor certification. The petitioner failed to submit sufficient evidence to establish that the beneficiary has the education required by the labor certification. Therefore, the record does not establish the beneficiary's qualifications for the offered position. Finally, as we have entered a finding of willful misrepresentation against the beneficiary for making false statements and for submitting a fraudulent letter of experience to USCIS, we have also invalidated the approval of the underlying labor certification pursuant to 20 C.F.R. § 656.30(d).

The petition will remain 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 motion is granted. Our prior decision is affirmed in part, with an additional ground of denial added. The visa petition remains denied.

FURTHER ORDER: Pursuant to section 212(a)(6)(C)(i) of the Act, we find that the beneficiary willfully misrepresented a material fact by making false statements and submitting a fraudulent document in an effort to procure a benefit under the Act and implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number   is invalidated pursuant to 20 C.F.R. § 656.30(d).