



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **FEB 19 2015** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(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 (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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (Director), initially approved the immigrant visa petition on April 11, 2003. However, after issuing two Notices of Intent to Revoke (NOIRs), the Director revoked the petition's approval on May 5, 2010. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. We granted the petitioner's two later motions to reopen and reconsider, but affirmed the appeal's dismissal on both occasions. The petitioner's third motion is now before us. The motion will be granted, our previous decision will be affirmed in part, and withdrawn in part, and the appeal will remain dismissed.

The petitioner described itself on the Form I-140, Petition for Alien Worker, as an import and export company. The record indicates that it sells cellular telephones, other wireless communications devices and accessories, and personal travel items. The petitioner seeks to permanently employ the beneficiary in the United States as a bilingual secretary.¹ The petition requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date an office within DOL's employment service system accepted the labor certification for processing, is October 10, 2000. *See* 8 C.F.R. § 204.5(d).

In dismissing the petitioner's appeal in our prior decisions, we agreed with the Director's conclusion that the petitioner and the beneficiary fraudulently represented the beneficiary's qualifying experience for the offered position. We therefore affirmed the Director's invalidation of the accompanying labor certification and his revocation of the petition's approval. *See* former 20 C.F.R. § 656.30(d) (2004) (authorizing U.S. Citizenship and Immigration Services (USCIS) to invalidate a labor certification after its issuance upon a finding that it involved fraud or willful misrepresentation of a material fact);³ 8 C.F.R. § 204.5(l)(3)(i) (requiring a petition for a skilled worker or professional to be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation establishing that the alien qualifies for a shortage occupation in the Labor Market Information Pilot Program).

¹ As indicated in our most recent decision, dated October 24, 2014, the beneficiary acquired control of the petitioning corporation in 2012. *See Matter of Allan Gee, Inc.*, 17 I&N Dec. 296, 298 (Acting Reg'l Comm'r 1979) (holding that an employer may petition for preference classification of its sole shareholder because a corporation is a separate legal entity existing independently of its shareholders). The petitioner submits copies of its federal income tax returns on motion, indicating that the beneficiary first obtained an ownership interest in the corporation in 2008.

² Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing permanent, skilled labor (requiring at least two years training or experience), for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ Because the accompanying labor certification was filed before March 28, 2005, it is governed by the former DOL regulations at 20 C.F.R. § 656, *et seq.* *See* Final PERM Regulations, 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). Therefore, we cite to Title 20 of the Code of Federal Regulations as it existed in 2004, before the effective date of the current regulations.

In our October 24, 2014 decision, we also found that the record did not establish the beneficiary's qualifying experience or the petitioner's ability to pay the proffered wage at the time of revocation. Because the petitioner received notice of these additional grounds and responded to them, we also found the petition's approval revocable on these grounds.

On motion, the petitioner submits additional evidence and argues that the record on motion does not support the revocation grounds.

The petitioner's motion states new facts supported by documentary evidence. We will therefore grant the filing as a motion to reopen under 8 C.F.R. § 103.5(a)(2). We exercise *de novo* review. See 5 U.S.C. § 557b (stating that, in reviewing an initial decision, a federal agency has all the powers it would have in making that decision, except as it may limit the issues on notice or by rule); see also *Soltane v. U.S. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004) (stating that we conduct appellate review on a *de novo* basis).

Fraud or Willful Misrepresentation of a Material Fact

We may invalidate a labor certification after its issuance “upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification.” 20 C.F.R. § 656.30(d) (2004).

Fraud “consist[s] of false representation of a material fact made with knowledge of its falsity and with intent to deceive the other party.” *Ortiz-Bouchet v. Att’y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (citing *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956)). Also, to constitute fraud, “[t]he representation must be believed and acted upon by the party deceived to his [or her] disadvantage.” *Id.*

Fraud involves the same elements as a willful misrepresentation of a material fact. *Id.* at 1356-57. However, a willful misrepresentation does not require proof “that the person to whom the misrepresentation was made was motivated to action because of the misrepresentation.” *Id.* A willful misrepresentation also does not require “intent to deceive.” *Id.* at 1357 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

In our October 24, 2014 decision, we concluded that the beneficiary fraudulently stated her qualifying experience for the offered position on the accompanying labor certification, which she signed, attesting to the truth of her statements. We also found that the petitioner submitted fraudulent documentation in support of the beneficiary's claimed qualifying experience.

The labor certification states that the offered position of bilingual secretary requires at least four years of high school, two years of experience in the job offered, and oral and written fluency in the Portuguese language. The beneficiary attested on the labor certification that she worked full-time in the offered position for [REDACTED] in Brazil from February

17, 1994 to June 7, 1996. The beneficiary confirmed the veracity and accuracy of this information in an affidavit dated July 28, 2003.

A September 6, 2002 letter on university stationery from an administrative clerk accompanied the petition and supported the beneficiary's claimed qualifying experience. The petitioner also submitted copies of purported salary receipts from the university, indicating the beneficiary's employment there as an executive bilingual secretary during the months of February 1994 and June 1996.

In 2008, a university official told an officer at the United States Consulate in [REDACTED] Brazil that the university had no record of employing the beneficiary. The petitioner and the beneficiary later admitted that she did not gain qualifying experience at the university. However, they deny intentionally misrepresenting her experience. They blame the false statements and evidence on their former attorney, who prepared and filed the labor certification and the petition, and who was convicted of 11 counts of making false statements in other I-140 petitions. *See* 18 U.S.C. § 1101.

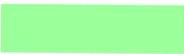
The False Salary Receipts

The petitioner asserts that the record on motion does not support our finding that it fraudulently submitted the salary receipts. The petitioner submitted the receipts in response to the Director's first NOIR, dated June 30, 2003, about a month after the conviction of the petitioner's first attorney.

The petitioner submits a November 25, 2014 affidavit from a second attorney who represented it in responding to the first NOIR. The affidavit states that the second attorney submitted "the documents from [the first attorney's] file that were responsive to the issues raised in the NOIR" and that "[a]t no time did [the second attorney] suspect that the pay receipts were fraudulent, or that the information on the Labor Certification was not true and correct."

At that time, the second attorney stated that he handled several cases originally filed by the petitioner's first attorney. He stated that many of the cases involved fictitious employers, or real employers who were unaware that the first attorney had filed labor certification applications in their names. The second attorney attested that the beneficiary assured him that the petitioner existed, operated, and continued to offer her the job opportunity stated on the labor certification. She also reportedly told him that she was fully qualified for the position and had provided the first attorney with information required to complete the labor certification application.

The second attorney stated that he does not believe the petitioner or the beneficiary reviewed the NOIR response before its submission because the response deadline did not permit review. He also stated that there was insufficient time in which to receive copies of USCIS case documents pursuant to the Freedom of Information Act. *See* 5 U.S.C. § 552. He stated that "[e]very effort was made to be truthful and responsive under very difficult conditions" and that his office "provided the best response we could under the circumstances."



The second attorney's affidavit suggests that he found the university salary receipts in the first attorney's case file and, unaware of their falsity, submitted them to USCIS. The petitioner and the beneficiary have stated that the first attorney never provided them with copies of the documentation in their file and that they were unaware of the misrepresentation on the labor certification until receiving the Director's second NOIR, dated February 17, 2010.

However, evidence does not support the second attorney's assertion of inadequate time in which to review the petitioner's NOIR response. The petitioner's NOIR response contains documents dated on various days in July 2003, suggesting that the materials were not all prepared at the same time. In addition, the beneficiary indicated in an affidavit, dated June 21, 2013, that she had NOIR response documents "notarize[d]" before sending them to the second attorney, suggesting that she reviewed and verified the accuracy of the documents.

The record also does not support the assertions of the petitioner and the beneficiary that they were unaware of the misrepresentation on the labor certification. The copy of the salary receipts, purportedly issued by the university and submitted to USCIS, states facsimile transmission information on its top. The transmission information indicates that the copy was faxed from the petitioner's office in July 2003, after the issuance of the first NOIR on June 30, 2003. The fax number in the transmission information matches the fax number on the letterhead of July 21, 2003 statements by the petitioner, which were also submitted in response to the first NOIR.

The fax transmission information suggests that the false salary receipts were not in the first attorney's file and therefore were not likely created by him or his office. Rather, the information indicates that the petitioner or the beneficiary sent copies of the receipts from the petitioner's office to the second attorney. An English translation of the false receipts does not identify the translator or indicate when the translation occurred. However, the translation contains no fax transmission information, suggesting that the second attorney's office obtained the translation after receiving the faxed receipts and before sending the materials in response to the NOIR.

The timing of the transmission of the false salary receipts - after the issuance of the first NOIR - suggests that the petitioner or the beneficiary knew of the misrepresentation on the labor certification and intentionally sent the salary receipts to corroborate the beneficiary's false experience. The salary receipts sent from the petitioner's fax machine contain the same employer, position, and employment start and end dates as misrepresented on the labor certification. The petitioner or the beneficiary therefore appear to have known about the misrepresentation and to have intentionally provided the false salary receipts to deceive government officials regarding the beneficiary's qualifying experience.

Although the petitioner and the beneficiary claim that they were unaware of the misrepresentation on the labor certification until receiving the Director's second NOIR in 2010, the fax transmission information from July 2003 casts doubt on the truthfulness of their assertions. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (holding that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of remaining evidence in support of a

petition). The evidence also suggests that the second attorney had access to the prior attorney's file to prepare the NOIR response and that he had the petitioner and the beneficiary execute statements over several days in July 2003. Therefore, the record does not support his statement that there was insufficient time to review the NOIR response before submitting it.

Therefore, substantial evidence of record indicates that the petitioner or the beneficiary fraudulently provided the salary receipts.

The False Experience Letter

The petitioner also submits additional evidence regarding the false 2002 experience letter. The petitioner argues that the record on motion does not support our finding that it fraudulently submitted this letter.

As indicated in our October 24, 2014 decision, the record contains affidavits from the university clerk who purportedly signed the false experience letter. The clerk claims that he received the letter's contents from the petitioner's first attorney via email, printed the contents onto university stationery, and signed the letter. However, the clerk claims that he could not then read the English language and that he neglectfully signed the letter, which was in English, without having its contents read to him. He states that he mistakenly assumed that the letter confirmed the beneficiary's studies and internships at the university as he had previously discussed with her on the telephone, not her employment there.

We did not previously credit the clerk's affidavits because the signatures on the 2002 letter and his 2010 affidavits differed, and we found a forensic document report submitted by the petitioner to be unreliable. On motion, the petitioner submits additional evidence to overcome our doubts. Thus, the record establishes the reliability of the forensic document report and the authenticity, though not necessarily the truthfulness, of the clerk's 2010 affidavits.

The record contains a copy of a July 23, 2002 email message from the first attorney's office to the beneficiary, which contains the template of a letter for submission to USCIS to confirm her completion of university coursework relevant to the offered position. The wording of the template's introduction and conclusion match the wording of those sections of the September 6, 2002 experience letter from the university. As the petitioner argues, the identical wording in both letters suggests that they both were prepared by the first attorney's office and supports the university clerk's testimony that the attorney's office emailed the experience letter to him.

However, the July 2003 fax transmission of the salary receipts from the petitioner's office suggests that the petitioner or the beneficiary participated in a deliberate scheme to misrepresent the beneficiary's qualifying experience. The evidence of the fax transmission from the petitioner's office casts doubt on the assertions by the petitioner and the beneficiary that they were then unaware of the misrepresentation on the labor certification. It also casts doubt on their assertions that they did not fraudulently submit the 2002 experience letter as part of a scheme. *See Matter of Ho*, 19 I&N

Dec. at 591 (doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of a petition). Therefore, substantial evidence of record supports a finding that the September 6, 2002 letter was fraudulently submitted to USCIS.

The petitioner argues that there was no reason to misrepresent the beneficiary's qualifications because she otherwise possessed the qualifying experience for the offered position. However, as discussed below, the record does not establish the beneficiary's qualifying experience. Therefore, this argument is unconvincing.

The petitioner has not submitted independent, objective evidence to overcome evidence of record that the beneficiary fraudulently stated her qualifying experience on the labor certification, and that she or the petitioner fraudulently submitted evidence in support of her claimed experience. We will therefore affirm the invalidation of the labor certification pursuant to former 20 C.F.R. § 656.30(d) and the revocation of the petition's approval for lack of a valid labor certification.

The Beneficiary's Qualifying Experience

A petitioner must demonstrate a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications for an offered position, we may not ignore a term of the labor certification, nor may we impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, as previously discussed, the accompanying labor certification states that the offered position of bilingual secretary requires at least four years of high school, two years of experience in the job offered, and oral and written fluency in the Portuguese language. The beneficiary's educational qualifications and fluency in Portuguese are not at issue.

The beneficiary attested on the labor certification that she worked full-time in the offered position for [REDACTED] in Brazil from February 17, 1994 to June 7, 1996. However, as previously discussed, the petitioner and the beneficiary concede that the university did not employ the beneficiary. Nevertheless, the petitioner argues that the beneficiary qualifies for the offered position.

A petitioner must support a beneficiary's claimed experience with letters from employers giving the name, address, and title of the employer and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

As indicated in our October 24, 2014 decision, the instant record contains a declaration from a woman who purportedly completed an internship between 1992 and 1994 at a Brazilian preparatory school where the beneficiary worked during the same period. The declaration states that the beneficiary “worked at the Administrative Department” of the school, “fulfilling secretarial activities as well.”

We found the declaration insufficient to establish the beneficiary’s claimed qualifying experience at the school, in part because the petitioner did not demonstrate the unavailability of the regulatory required letter from the employer or secondary evidence of the beneficiary’s experience. *See* 8 C.F.R. § 103.2(b)(2)(i) (requiring a petitioner to document the unavailability of required and secondary evidence before affidavits from individuals with direct knowledge of the events will be considered).

On motion, the petitioner states that a private investigator located the school’s former owner in Brazil. The petitioner submits a November 8, 2014 declaration from the purported former owner, stating that the beneficiary worked at the Brazilian school from September 22, 1992 to October 3, 1994.

The declaration does not establish its signatory as the beneficiary’s former employer, as it identifies him as a “legal representative” of the franchisee that then operated the school. However, the purported former school intern identified him as the school’s previous owner in her prior declaration and continues to do so in a November 19, 2014 statement submitted by the petitioner on motion. The record therefore establishes the signatory’s prior affiliation with the school.

In our most recent decision, we noted that the record did not explain how the beneficiary could have worked on a full-time basis from 1992 to 1994 while she was attending university full-time from 1991 to 1995. However, on motion, the petitioner submits a November 6, 2014 declaration from a university official, stating that the beneficiary attended classes at night from 7 to 11:30 during that period. The record therefore establishes that the beneficiary could have worked full-time during the day, while attending classes at night from 1992 to 1994.

However, the November 8, 2014 declaration from the school’s former owner does not establish the beneficiary’s qualifying experience in the job offered. The declaration states that the beneficiary’s “duties at the school were, among others, the job of secretary of the school, attending to students, parents and teachers, marketing and advertising.” The declaration does not state that the beneficiary performed the job duties of the offered position stated on the labor certification, including preparing and maintaining files, composing and typing routine correspondence, answering telephone calls, providing guidance to services in the English and Portuguese languages, operating office machinery, and translating documents in English and Portuguese on a full-time basis.

Also, the declaration indicates that the beneficiary performed duties other than those of a secretary while employed at the school. The declaration states that the secretarial duties were “among others” she performed, including “marketing and advertising.”

The declarations of the former intern also indicate that the beneficiary performed duties at the school beyond those of a secretary. The former intern's first declaration states that the beneficiary "worked at the Administrative Department" of the school, "fulfilling secretary activities as well." Her November 19, 2014 declaration states that the beneficiary "worked as [an] administrative assistant and secretary" for the school's prior owner. Further, the beneficiary herself in her November 25, 2014 affidavit states that her job at the school "provided experience in the operational management department, as well as secretarial and administrative activities." Thus, the record indicates that the beneficiary performed a variety of duties at the school and spent only part of her time as a secretary. The record therefore does not establish that she obtained at least two years of full-time experience in the offered position of bilingual secretary.

In addition, the declarations from the school's former owner and intern do not indicate that the beneficiary worked for the school on a full-time basis. If the beneficiary worked for the school part-time, she may not possess the required two years of experience in the job offered specified on the labor certification. See *Matter of Cable Television Labs.*, 2012-PER-00449, 2014 WL 548115, *2 (BALCA Oct. 23, 2014) (finding that the amount of an alien's part-time experience equals one-half full-time experience). Our October 24, 2014 decision stated that the first declaration of the former school intern failed to indicate whether the beneficiary worked there full-time. Yet, the petitioner submits declarations on motion with the same defects. See *Z-Noorani, Inc. v. Richardson*, 950 F. Supp. 2d 1330, 1340-41 (N.D. Ga. 2013) (finding that a petitioner failed to demonstrate a beneficiary's qualifying experience where the record did not establish the claimed full-time nature of his job).

The petitioner also submits copies of pages in the beneficiary's "work and social security card," issued by the Brazilian Ministry of Labor and Employment.⁴ However, the pages do not identify the school as one of the beneficiary's former employers. The work card also indicates that the beneficiary completed an internship through the university at a branch of the [REDACTED] from March 18, 1994 to July 31, 1995.⁵ The dates of this internship overlap the dates of the beneficiary's claimed qualifying experience at the school from September 22, 1992 to October 3, 1994. The record does not explain how the beneficiary simultaneously participated in an internship, worked at the preparatory school, and attended university from March 18, 1994 to October 3, 1994. See *Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

Similarly, the petitioner previously indicated that the beneficiary worked and participated in an internship at other Brazilian businesses in 1992. The record does not indicate whether the 1992

⁴ The record indicates that the petitioner previously submitted copies of pages from the beneficiary's Brazilian "work card." However, we did not previously consider the evidence because the record did not then contain English translations of the pages. See 8 C.F.R. § 103.2(b)(3) (requiring a full English translation to accompany any document containing foreign language that is submitted to USCIS).

⁵ The petitioner previously submitted copies of the beneficiary's university transcript and a letter from a university official, indicating that the beneficiary completed two internships through the university in 1995. The record does not explain the discrepancy in the dates of the internships between the beneficiary's work card and the previously submitted documentation.

employment or internship overlapped with the beneficiary's claimed employment at the school, which began on September 22, 1992. If so, the record also does not explain how she simultaneously worked at the preparatory school, worked and interned at the other businesses, and attended university. *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

The Brazilian work card also indicates that the beneficiary was hired as a trainee for 30 days by a company on October 23, 1995 and worked at another bank from November 16, 1995 to May 31, 1996. However, these employment experiences, either separately or in the aggregate, do not represent at least two years of full-time experience as required for the offered position. Also, the record does not contain letters from these employers as the regulations require, indicate whether the beneficiary's employment was full- or part-time, or establish that the beneficiary's experience was in the offered position.⁶

For the foregoing reasons, the record does not establish the beneficiary's qualifying experience for the offered position by the petition's priority date. We will therefore affirm the appeal's dismissal on this ground.

Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay the proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

The labor certification states the proffered wage for the offered position of bilingual secretary as \$9.37 per hour for a 40-hour week, or \$19,489.60 per year.⁷ The record before the Director closed on March 17, 2010, with his receipt of the petitioner's submissions in response to the second NOIR. As of that date, the petitioner's 2008 federal income tax return was the most recent return available.

In our October 24, 2014 decision, we found that the record did not establish the petitioner's ability to pay the proffered wage. The record did not contain copies of any annual reports, federal tax returns, or audited financial statements for 2003, 2004, and 2005. Also, the petitioner's federal tax returns for 2006, 2007, and 2008 were partial returns, containing only the first pages and the Schedules L of the annual Forms 1120 U.S. Corporation Income Tax Return.

⁶ The work card does not indicate the position in which the beneficiary was trained. The document states that the bank employed the beneficiary as an "escriturario." The petitioner submits an English translation indicating that an *escriturario* records accounting data, registers financial transactions, files documents, opens accounts, and often performs secretarial duties. However, the record does not contain a corresponding document in the Portuguese language to establish the source or credibility of this information.

⁷ In its brief, the petitioner states the proffered wage as \$8.00 per hour, or \$16,640 per year. However, the labor certification of record indicates that the proffered wage was amended to \$9.37 per hour pursuant to DOL instructions after the filing of the certification application.

In addition, the petitioner's financial documentation for 2002 contained an unexplained discrepancy. The petitioner's federal tax return indicates that it paid a total of \$14,813 in salaries and wages in 2002. However, a copy of a Form W-2 indicates that the petitioner paid the beneficiary \$23,956 during the same year. This unexplained discrepancy cast doubt on the accuracy of the petitioner's financial records. *See Matter of Ho*, 19 I&N Dec. at 591-92 (holding that a petitioner must resolve inconsistencies in the record by independent, objective evidence).

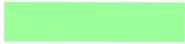
On motion, the petitioner submits copies of: its federal tax returns for the missing years; the beneficiary's Internal Revenue Service (IRS) Forms W-2 Tax and Wage Statements; payroll records; and a November 19, 2014 letter from its accountant.

In her letter, the accountant states that a clerical error resulted in the discrepancy between the wages stated on the beneficiary's 2002 Form W-2 and the total wage amount reflected on the petitioner's tax return for that year. The accountant stated that the total wage figure on the 2002 tax return mistakenly resulted from the subtraction of an officer's salary from a total *net* salary figure, rather than from a total *gross* salary figure. She stated that the petitioner's correct total wage amount for 2002 is \$29,566, which exceeds the annual proffered wage of \$19,489.60. The accountant's corrected figure is consistent with previously submitted copies of Forms W-2 for the petitioner's three employees in 2002. The record therefore supports the accountant's explanation and establishes the reliability of the petitioner's financial documentation.

The petitioner's financial documentation does not establish its ability to pay the proffered wage in 2008. The beneficiary's Form W-2 states that the petitioner paid her \$16,663.62 that year, \$2,825.98 below the annual proffered wage of \$19,489.60. The petitioner's 2008 income tax return reflects negative amounts of net income and net current assets.

However, we may also consider the overall magnitude of a petitioner's business activities in determining its ability to pay a proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As in *Sonogawa*, we may consider evidence of a petitioner's financial ability beyond its net income and net current assets. We may consider such factors as: the number of years the petitioner has conducted business; the established historical growth of its business; the number of its employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the beneficiary will replace a former employee or an outsourced service; and other evidence relevant to its ability to pay the proffered wage.

In the instant case, the record indicates that the petitioner has conducted business for more than 20 years. Payroll records show that its number of employees has increased from three in 2002 to 10 in 2013. The petitioner's tax returns also reflect substantial increases since the petition's filing date in the amounts of its revenues and wages paid. In consideration of these factors and the small difference between the annual proffered wage and the amount the petition paid the beneficiary in 2008, we find that the totality of the circumstances establishes the petitioner's ability to pay. Therefore, we will withdraw this finding from our prior decision.



Conclusion

We will grant the petitioner's filing as a motion to reopen. We will affirm in part, and withdraw in part, the grounds for revoking the petition's approval cited in our prior decision. We will affirm our conclusion that the petitioner and the beneficiary fraudulently represented the beneficiary's qualifying experience. Accordingly, we will affirm the invalidation of the accompanying labor certification and the revocation of the petition's approval for lack of a valid labor certification. We will also affirm the revocation on grounds that the record at the time of the NOR's issuance did not establish the beneficiary's qualifying experience for the offered position. However, we will withdraw our finding that the petitioner failed to demonstrate its ability to pay the proffered wage.

The appeal will remain dismissed for the above stated reasons, with each considered an independent and alternative basis for revocation of the petition's approval. The accompanying labor certification remains invalidated. As in visa petition proceedings, the petitioner in visa petition revocation proceedings bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *see also Matter of Ho*, 19 I&N Dec. at 588. Here, that burden was not met on all grounds.

ORDER: The petitioner's motion to reopen is granted, and our decision of October 24, 2014 is affirmed in part, and withdrawn in part. The petition's approval remains revoked, and the labor certification remains invalidated.