U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 04244658

Date: AUG. 09, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a software development and consulting business, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the petition's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. First, the Director found that the Petitioner requested that the petition be withdrawn, resulting in the automatic revocation of the petition's approval. The Director's revocation was also based on five other grounds: 1) that the labor certification did not support the requested classification of advanced degree professional; 2) that the Petitioner misrepresented the actual minimum requirements for the offered position; 3) that the record did not establish that the Beneficiary possessed the minimum qualifications for the offered position; 4) that the Petitioner did not establish its ability to pay the proffered wage to the Beneficiary; and, 5) that the Petitioner misrepresented the Beneficiary's work experience and availability of employment for the Beneficiary. The Director also found that the Petitioner willfully misrepresented facts material to the petition.[1] Additionally, the Director found that the Petitioner's request to withdraw the petition resulted in the approval's automatic revocation.

The matter is now before us on the Beneficiary's appeal.[2]

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this

[1] The Petitioner's president and sole shareholder was convicted in [redacted] 2018 of wire and visa fraud relating to his collection of illegal filing fees and related expenses from more than 100 fraudulent visas and employer-sponsored green cards for nonimmigrant workers. *See United States v.* [redacted]

[2] Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B).

matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. THE BENEFICIARY AS AN AFFECTED PARTY

Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U.S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

In this case, the Beneficiary filed a Form I-485 Supplement J, Request for Job Portability Under INA Section 204(j), on June 12, 2018, which was later approved. The Director's NOIR is dated August 20, 2018 and was issued to the Petitioner and the Beneficiary. The Director issued the decision to both the Petitioner and the Beneficiary, which states, "The beneficiary was found to be eligible to receive notices and, therefore, was granted the opportunity to respond in revocation proceedings, … in accordance with the findings in the adopted decision in *Matter of V-S-G-, Inc.* …" Therefore, the Beneficiary is considered in affected party in these revocation proceedings.

II. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must

give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

III. ANALYSIS

The Petitioner requests classification of the Beneficiary as an advanced degree professional. The term "advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The regulations at 8 C.F.R. § 204.5(k)(3)(i) state that a petition for an advanced degree professional must be accompanied by either:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date.[3] *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Therefore, to establish eligibility for advanced degree professional classification, a petitioner must demonstrate that the beneficiary possesses an advanced degree as defined in 8 C.F.R. § 204.5(k)(2), and also that the beneficiary meets the requirements for the offered position as stated on the labor certification.

Additionally, a business may file a petition if it is "desiring and intending to employ [a foreign national] within the United States." Section 204(a)(1)(F) of the Act. A petitioner must intend to employ a beneficiary under the terms and conditions specified in an accompanying labor certification. *Matter of Izdeska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (affirming a petition's denial where,

3 The priority date of the petition is the date the underlying labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is June 6, 2011.

contrary to the terms of the accompanying labor certification, the petitioner did not intend to employ the beneficiary as a domestic worker on a full-time, live-in basis). A petitioner must establish this intent to employ a beneficiary in a *bona fide* position at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). For labor certification purposes, the job offer must be for permanent, full-time work. *See* 20 C.F.R. § 656.3; *see also* 20 C.F.R. § 656.10(c)(10).

The accompanying labor certification describes the minimum requirements for the job offered as follows:

H.4	Education: minimum level	Master's
H.4-B	Major field of study	Computer Science or Engineering or Related
H.5	Training required?	No
H.6	Experience in the job offered required?	Yes
H.6-A	Number of months	36
H.7	Alternate field of study acceptable?	No
H.8	Alternate combination of education and experience acceptable?	Yes
H.8-A	Alternate level of education required?	Bachelor's
H.8-C	Number of years of experience acceptable?	5
H.9	Foreign educational equivalent acceptable?	Yes
H.10	Experience in an alternate occupation acceptable?	Yes
H.10-A	Number of months experience required	60
H.10-B	Job title of alternate occupation	Senior Programmer, Programmer, Programmer Analyst or Related

Section H.14 states, "Employer will accept any suitable combination of Education, Experience and Training including Post-Secondary education if determined to be equivalent to US Master's or Bachelor's degree in Field consistent with H4 through H10 of this ETA 9089 Form."

Section J of the labor certification lists the Beneficiary's highest level of education as a master's degree in electronics earned in 1989 from [redacted] University in India.

Section K of the labor certification lists the following employment experience for the Beneficiary:

- The Petitioner, as a Teradata admin, from July 19, 2010 to at least the date of filing on June 6, 2011;[4]
- The Petitioner, as a programmer analyst, from June 27, 2005 to July 18, 2010;
- [redacted] as a programmer analyst, from October 1, 2003 to June 26, 2005;
- [redacted] as a programmer analyst, from July 14, 2002 to September 30, 2003;
- [redacted] as a programmer, from April 1, 2001[5] to September 1, 2001;
- [redacted] as a senior programmer, from August 12, 1998 to March 31, 2001; and
- [redacted] as a hardware engineer, from November 1, 1995 to June 30, 1998.[6]

With the petition, in support of the Beneficiary's experience, the Petitioner submitted a letter signed by its president describing the Beneficiary's previous employment with it as a programmer analyst from June 2005 to July 2010. No other evidence of the Beneficiary's qualifying experience was submitted.

The Petitioner also submitted the Beneficiary's education documents. These included a bachelor of science degree and a master of science degree in electronics awarded to the Beneficiary by [redacted] University in 1987 and 1988, respectively.[7] These were accompanied by statements of marks demonstrating three years of study toward a bachelor of science degree (1983-1985) and three semesters of study toward a master of science degree (November 1987, July 1988, and December 1988).

The Petitioner also submitted an academic equivalency evaluation from Morningside Evaluations and Consulting asserting that the Beneficiary's three-year bachelor of science degree and two-year master of science degree, were equivalent to a four-year bachelor's degree in computer science from an accredited U.S. college or university.

In the NOIR, the Director noted that the plain language in Section H.14 of the labor certification indicated that the Petitioner would accept less than a single degree equating to a U.S. bachelor's degree. Because the labor certification allows for less than single source bachelor's degree, the Director noted that it does not support the requested advanced degree professional classification.

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[4] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3).

[5] We note that a prior labor certification lists the Beneficiary's start date of employment with [redacted] as April 1, 2000. Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[6] We note that a prior labor certification does not list the Beneficiary's employment with [redacted] or [redacted] Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Id.*

[7] The Beneficiary's master of science degree states that it was issued by the Registrar in August 1998, 10 years after it was awarded to the Beneficiary.

The Director also noted that the record did not include evidence required by 8 C.F.R. § 204.5(k)(3) to document the Beneficiary's qualifying experience. The Director stated that, because the Beneficiary possessed the equivalent of a U.S. bachelor's degree, he must document his possession of five years of progressive experience in order to qualify for the position as described on the labor certification, and for advanced degree professional classification. Although the Director acknowledged the letter from the Petitioner documenting the Beneficiary's employment for more than five years as a programmer analyst, the letter did not document the progressive nature of this experience.

He further noted inconsistencies in the Beneficiary's claimed employment history on the labor certification with other evidence in the record. This evidence included a Form G-325A, Biographic Information, signed by the Beneficiary in August 2007, submitted with his I-485 Application to Register Permanent Residence or Adjust Status, and statements the Beneficiary made during an interview for his Form I-485 application.

The Director also informed the Petitioner that the record did not establish its ability to pay the proffered wage, as it submitted only its 2010 federal income tax return with the petition, which was before the 2011 priority date.

Further, the Director noted that a prior petition that the Petitioner filed on behalf of the Beneficiary cast doubt on the actual minimum requirements for the offered position described on the labor certification. The Director noted that because the Petitioner filed a prior petition offering the Beneficiary permanent employment as a programmer analyst, requiring no education or training and only 24 months of experience, and performing job duties similar to those described for a senior software engineer, he could not conclude that the offered position required an advanced degree.

In response to the NOIR, the Petitioner requested that the petition be withdrawn.

The Beneficiary provided a separate response to the NOIR as he had been granted standing. In his response, the Beneficiary asserted that he was a victim of the Petitioner's fraud. He asserted that the language in H.14 did not alter the minimum requirements and that his job duties as a software engineer were significantly more complex than those described in the prior petition for a programmer analyst. He further asserted that his job duties changed materially over the course of his employment with the Petitioner, such that his experience was progressive. He also stated that the inconsistencies in his employment history were a result of typographical errors and mistaken recollection of dates during his interview. He submitted pay records, including pay stubs and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, to demonstrate that the Petitioner paid him above the proffered wage 2012, and partial wages in other years.

On appeal, the Beneficiary asserts that the Director erred in stating that the petition's approval was automatically revoked upon the Petitioner's written request to withdraw. However, he does not address the other grounds of revocation discussed by the Director in the NOIR and NOR. These grounds include: 1) that the labor certification did not support the requested classification; 2) that the Petitioner misrepresented the actual minimum requirements for the offered position; 3) that the record did not establish the Beneficiary's qualifications for the offered position; 4) that the Petitioner did not establish its ability to pay the proffered wage; and, 5) that the Petitioner misrepresented the

Beneficiary's work experience on the labor certification and the availability of employment. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived." *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (declining to address an argument omitted on appeal). However, we will address each of the grounds briefly herein.

A. Automatic Revocation Upon Withdrawal

The regulation at 8 C.F.R. § 103.2(b)(6) states that "[a]n applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." A petitioner's right to withdraw a visa petition is further enshrined in *Matter of Cintron*, 16 I&N Dec. 9 (BIA 1976), which stated: "Just as any United States citizen or lawful permanent resident may file a visa petition in behalf of an alien, so may he withdraw the petition before a decision has been rendered. The action of the District Director in refusing to consider the petition withdrawn was erroneous."

However, that procedural right to withdraw a petition "at any time" is complicated by section 204(j) of the Act, which allows certain employment-based adjustment of status applicants experiencing delays in the employment-based adjustment of status process some flexibility to change jobs or employers while their Application to Register Permanent Residence or Adjust Status (Form I-485) is pending. In the implementing regulations, USCIS provided that "[a] petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status application has been filed, *remains approved* unless its approval is revoked on other grounds." 8 C.F.R. § 205.1(a)(iii)(C) (emphasis added).

It follows that if a petition is to "remain approved" under 8 C.F.R. § 205.1(a)(iii)(C) after a withdrawal, then that petition's approval remains subject to revocation. The Secretary's authority to revoke the approval of a petition "at any time" is enshrined in statute and a long-standing and critical function of the United States immigration system. Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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 [Procedure for Granting Immigrant Status]."

The AAO considered a similar question in *Matter of al Wazzan*, 25 I&N Dec. 359 (2010), where the petitioner had argued that a petition may become valid simply through the passage of 180 days. We disagreed and concluded:

> Considering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is "valid" when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien who was never "entitled" to the requested visa classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate.

Id. at 367.

When a petition is "filed on behalf of an alien who was never 'entitled' to the requested visa classification," and that petition was approved in error, the petition's approval is subject to revocation under section 205 of the Act.

The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) states that automatic revocation of the approval of a petition occurs as follows:

> (C) In employment-based preference cases, upon written notice of withdrawal filed by the petitioner to any officer of USCIS who is authorized to grant or deny petitions, where the withdrawal is filed less than 180 days after approval of the employment-based preference petition, unless an associated adjustment of status application has been pending for 180 days or more. *A petition that is withdrawn 180 days or more after its approval, or 180 days or more after the associated adjustment of status applications has been filed, remains approved unless its approval is revoked on other grounds.* If an employment-based petition on behalf of an alien is withdrawn, the job offer of the petitioning employer is rescinded and the alien must obtain a new employment-based preference petition in order to seek adjustment of status or issuance of an immigrant visa as an employment-based immigrant, unless eligible for adjustment of status under section 204(j) of the Act and in accordance with 8 C.F.R. 245.25.

(Emphasis added)

Although the Petitioner in this case was entitled to withdraw its approved I-140 petition, *see Matter of Cintron*, the petition "remained approved" for revocation on other grounds. Therefore, we will withdraw the portion of the Director's decision stating that the petition's approval was automatically revoked in accordance with 8 C.F.R. § 205.1(a)(3)(iii)(C).

B. The Requested Classification

If the labor certification allows for less than an advanced degree, the job offered will not qualify for advanced degree professional classification. In determining whether the proffered position qualifies for advanced degree professional classification, we look to the terms of the labor certification.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must 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). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-10422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[8]

[8] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we may nevertheless

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional because of the language in section H.14, that the employer "will accept any suitable combination of Education, Experience and Training **including Post-Secondary education if determined to be equivalent to US Master's or Bachelor's degree** in Field consistent with H4 through H10 of this ETA 9089 Form." The Director interpreted the highlighted language as broadening the requirements in a way that makes the actual minimum job requirements unclear. Accordingly, the Director concluded that the labor certification does not support the petition's request for advanced degree professional classification.

In response to the NOIR, the Beneficiary asserts that the Director's decision was incorrect because he claims the above quoted sentence in box H.14 of the labor certification does not alter the minimum requirements of the labor certification.

The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as *Kellogg* language, originating in a case before the Board of Alien Labor Certification Appeals, *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995, INA 68 (Feb. 2, 1998) (*en banc*). The language was later incorporated into the regulation at 20 C.F.R. § 656.17(h)(4)(ii), which states that if a beneficiary is already employed by a petitioner, does not meet the primary job requirements, and potentially qualifies for the job only under the employer's alternative requirements, the labor certification must state "that any suitable combination of education, training, or experience is acceptable."

We do not generally read the inclusion of *Kellogg* language in a labor certification as altering the stated minimum requirements. When a petitioner goes beyond the *Kellogg* language, however, we must evaluate the effect of that additional language. In this case the Beneficiary, through counsel, contends that the words "including Post-Secondary education" in its *Kellogg* language context and as incorporated in box H.14 of the labor certification means that any other combination of education, training, or experience must be at least equal to the stated requirements in boxes H.4 to H.10 of the labor certification. No evidence is submitted in support of this contention. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

In stating that it would accept any suitable combination of education, training, or experience "including Post-Secondary education" the otherwise defined primary and alternate requirements, the Petitioner no longer restricts acceptable combinations to those spelled out in boxes H.4 through H.10. Rather the Petitioner goes beyond the *Kellogg* language and indicates that a combination of education, training, and experience that does not necessarily accord with the minimum requirements in boxes H.4 to H.10 could also be acceptable. The language would appear to allow for a combination of education that is the equivalent to a degree, rather than requiring a degree itself as required by the category. In sum, the statement in box H.14 of the labor certification creates a different minimum requirement that allows for a combination of education, training and/or experience that could be less than a single master's degree or a single bachelor's degree plus five years of progressive experience.

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take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum educational requirement can be met with anything less than a single baccalaureate degree. In this case, since the educational component of the labor certification's primary requirements may be satisfied with less than a single U.S. bachelor's degree or foreign equivalent degree, or a single degree or any kind, the labor certification does not appear to support the requested classification of advanced degree professional under section 203(b)(2) of the Act.

Therefore, although we note the Beneficiary's waiver of this issue, if fully considered, the appeal would be dismissed on this ground.

C. Actual Minimum Requirements

As noted above, the Director found that the Petitioner's prior petition for the Beneficiary as a programmer analyst requiring no education or training and 24 months of experience, conflicted with the requirements of the position of senior software engineer with similar job duties.

The Petitioner must set forth on the labor certification its actual minimum requirements for the proffered position. *See* 20 C.F.R. § 656.17(i). Although the Director noted the lower requirements stated in the previous petition, we find that job duties for the proffered position of senior software engineer as described on the labor certification differ from the job duties of a programmer analyst, as described in Section K of this labor certification, and in the labor certification accompanying the prior petition. In this instance, the Petitioner's prior petition for a programmer analyst was insufficient evidence to conclude that the labor certification did not set forth the actual minimum requirements. Therefore, we will also withdraw this portion of the Director's decision.

D. The Beneficiary's Qualifications

As noted above, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) states that, where a Beneficiary qualifies for the position with a bachelor's degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has *at least five years of progressive post-baccalaureate experience in the specialty*" (emphasis added).

Here, the record at the time of the petition's approval did not include regulatory prescribed evidence that the Beneficiary possessed the required five years of progressive experience as of the priority date. Rather, the record included only a letter from the Petitioner asserting that it employed the Beneficiary as a programmer analyst from June 2005 to July 2010. In response to the NOIR, the Beneficiary provided a letter dated August 28, 2006, from [redacted] stating that he was "contracted through [redacted] to provide technical services." However, the letter does not state the position's job title, describe its duties, or state the dates of his employment. Further, the Beneficiary's claimed employment history in this petition does not include [redacted] or [redacted] as a prior employer.[9]

[9] We note that the Beneficiary claims to have been employed with the Petitioner in August 2006.

In his NOIR response, the Beneficiary also claimed that even if his experience with the Petitioner from 2005 to 2007 was not considered progressively responsible, the Director should consider his employment with the Petitioner from January 2007 to April 2012 to qualify him for the offered position. However, a beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159. As the priority date here is June 6, 2011, the Beneficiary's experience gained after this date cannot be considered as qualifying experience for the offered position, and as such the experience from January 2007 to June 6, 2011 would be less than five years and insufficient.

On appeal, the Beneficiary states that he began working for the Petitioner in June 2005 and that his job responsibilities expanded as his experience grew. The Beneficiary's unsupported testimonial evidence, however, does not establish this claim. We note that the Petitioner's prior labor certification, filed in 2006, describes the Beneficiary's experience as a programmer analyst from June 2005. The job duties of that position are identical to the description on the underlying labor certification here, filed in 2011, and, therefore, does not show progression. The Beneficiary does not provide additional evidence of the progressive nature of his experience with the Petitioner, or that he otherwise possesses five years of progressive post-baccalaureate experience to qualify for the offered position and as an advanced degree professional.

Further, as noted by the Director, the Forms W-2 the Petitioner issued to the Beneficiary reflect wages in varying amounts from 2006 to 2010, the years of his claimed qualifying progressive experience. The record includes the following wages shown on the Forms W-2 that the Petitioner issued to the Beneficiary:

2005	Not submitted
2006	$49,720
2007	$31,582
2008	$29,330
2009	$25,450
2010	$42,724

The wages reflected on the Forms W-2 do not corroborate the Beneficiary's claimed full-time employment in each of these years, nor does it reflect any increase in salary to correspond with the claimed expanding job responsibilities in those years.

On appeal the Beneficiary also requests that we use discretion in not revoking the approval of the petition. The Beneficiary states that he was a victim of the Petitioner's fraud scheme, losing thousands of dollars in income and causing significant delays and additional costs in his immigration process. While we are sympathetic to the Beneficiary's financial losses and personal situation, we find that the NOIR was issued for good and sufficient cause. The evidence of record at the time the notice was issued, would have warranted a denial based on the failure to demonstrate the Beneficiary's qualifications for the offered position. It is the Petitioner or Applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

Accordingly, the record does not establish that the Beneficiary met the minimum requirements for the offered position as of the priority date and although we note the Beneficiary's waiver of this issue, if fully considered, we would dismiss the appeal on this basis.

E. Ability to Pay

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date of the petition onward. The priority date in this case is June 6, 2011. The labor certification states that the wage offered for the job of senior software engineer is $100,402 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

Absent evidence that the Petitioner has paid the Beneficiary a salary equal to or above the proffered wage from the priority date onward, USCIS will generally examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year.

When a petitioner has filed other I-140 petitions, however, it must establish that its job offer is realistic not only for the instant beneficiary, but also for the beneficiaries of its other I-140 petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, a petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and every other I-140 beneficiary from the priority date of the instant petition

until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[10]

With the initial filing of the petition, the Petitioner submitted a portion of its 2010 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, and the Form W-2 it issued to the Beneficiary in 2011 reflecting partial wages in that year.

In issuing the NOIR, the Director determined that the record did not include regulatory prescribed evidence of the Petitioner's ability to pay the proffered wage for 2011, the year of the priority date.

In response to the NOIR, the Beneficiary submitted additional Forms W-2 issued by the Petitioner reflecting wages above the proffered wage in 2012, and partial wages in 2011 and 2013. However, as the Director noted, the federal employer identification number (FEIN) listed on the 2013 is different than the Petitioner's FEIN listed on the other Forms W-2 and claimed on the petition and labor certification. The Beneficiary does not submit new evidence on appeal. Nor does the Beneficiary provide any explanation for the different FEIN on the 2013 Form W-2. Inconsistencies in the record must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec.at 591-92.

Therefore, the record does not demonstrate that the Petitioner had the continuing ability to pay the proffered wage to the Beneficiary, and the beneficiaries of all of its petitions, as of the priority date. Although we note the Beneficiary's waiver of this issue, if fully considered, the appeal would also be dismissed on this basis.

F. Willful Misrepresentation of a Material Fact

To find a willful and material misrepresentation of fact an immigration officer must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing 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). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, they must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully

[10] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

As noted above, the Director found that the Petitioner misrepresented material facts on the labor certification. Specifically, that it misrepresented the Beneficiary's work experience and the availability of the job opportunity to the Beneficiary, facts material to the petition. Here, the response provided to the NOIR offered a plausible explanation of the inconsistencies in the Beneficiary's dates of employment.

The Beneficiary's assertions on appeal are persuasive. The Petitioner or Applicant must prove eligibility by a preponderance of evidence, such that the applicant's claim is "probably true" based on the factual circumstances of each individual case. *Matter of Chawathe*; *Matter of E-M-*. We find that that burden has been met with respect to the representations of the Beneficiary's employment history attested on the labor certification,. Accordingly, we will withdraw the Director's decision with respect to the alleged misrepresentations of facts in the Beneficiary's employment history.[11]

As noted above, the Director also found that the Petitioner misrepresented that it had available work for the Beneficiary. However, the Director did not raise this issue in its NOIR. Because the Petitioner did not have an opportunity to respond to this derogatory information and ground for revocation, we will also withdraw the Director's decision with respect to the alleged misrepresentation of facts in the availability of employment for the Beneficiary.

III. CONCLUSION

Portions of the Director's decision are withdrawn, including that the petition's approval was automatically revoked, that the Petitioner willfully misrepresented material facts, and that the labor certification did not reflect the actual minimum requirements of the offered position. However, the record does not establish that the labor certification supports the requested classification of advanced degree professional, that the Beneficiary meets the minimum experience requirements as set forth on the accompanying labor certification and to qualify as an advanced degree professional, or that the Petitioner had the ability to the Beneficiary the proffered wage. Therefore, the petition's approval remains revoked.

It is the Petitioner or Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the burden has not been met.

ORDER: The appeal is dismissed.

[11] We recognize that that the Director raised significant if somewhat speculative concerns. While not sufficiently developed for purposes of this visa petition, the Director is not barred from further inquiry, investigation, or the development of questions for consular processing or adjustment of status proceedings. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959) (stating that the immigrant visa petition is not the appropriate stage of the process for questions regarding admissibility). We additionally note that the allegations of misrepresentation were only found against the Petitioner.