

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

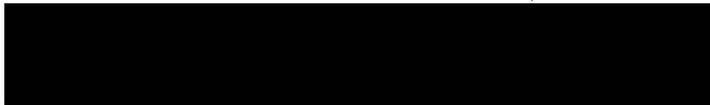


FILE: [REDACTED]
EAC 00 129 50931

Office: VERMONT SERVICE CENTER

Date: DEC 12 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition approval was revoked by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as dining room attendant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor for the [REDACTED]. The director on January 28, 2004, determined that the petitioner had not established that the petitioner had the intent to employ the beneficiary in a specific job offer that corresponds to the position and duties stated in the labor certification.

The certified Alien Employment Certification was accepted on May 5, 1989, and, it was certified for [REDACTED] under the sixth preference on March 13, 1990. A Form I-140 preference petition was then filed for a substitute beneficiary [REDACTED] using that labor certification. The I-140 petition was approved for [REDACTED], and forwarded to the National Visa Center on October 1, 1991, for visa processing abroad. Mr. [REDACTED] did not process, and, the petition was cancelled. The certified Alien Employment Certification was then filed with the above-mentioned petition for the beneficiary [REDACTED] formerly [REDACTED].

Originally, the employer that filed the labor certification was Ulysses, Inc. / Ulysses Hotel Corporation. Its stated business was a restaurant that required a dining room attendant. The proffered position would be performed in various locations in Maryland according to the labor certification. According to a letter dated July 23, 1999, from counsel, the present petitioner, the Holiday Inn Washington/Spring Spring is the successor-in-interest to Ulysses, Inc. / Ulysses Hotel Corporation through various intervening corporations, [REDACTED] then [REDACTED].

Counsel has made assertions based on anecdotal evidence, a press release, and a U.S. Security and Exchange Commission Form 10-Q filing for 1999, that Lodgian, Inc. is the successor in interest to Ulysses, Inc. / Ulysses Hotel Corporation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's submissions are insufficient and they do not demonstrate a passing of ownerships through the many corporations and appears incomplete based on the evidence submitted. For example, the Form 10-Q mentions another corporation not included by counsel in his statement.

The assertion that [REDACTED] assumed all of the rights, duties, obligations, and assets of the original employer, [REDACTED] by passing through the ownerships of three other intervening corporations over a span of 17 years is not supported by the evidence submitted. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay the proffered wage. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). Beyond the decision of the director, we find that the petitioner had not established that the petitioner is the successor in interest to [REDACTED] through the various intervening corporations, International Hotel Inc., Wynegardner & Hammons, and, Servico, Inc.

On appeal, counsel submits a brief.

College Degree Required	Blank
Major Field of Study	Blank
Training	
Years	Blank
Experience	
Years	Blank
Related Occupation	
Years	Blank

With the I-140 petition filed on March 23, 2000, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; petitioner's 2001 U.S. federal tax return; an accountant's letter; copies of documentation concerning the petitioner and beneficiary's qualifications as well as other documents.

The director approved the petition on August 7, 2000. Citizenship and Immigration Services (CIS) regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed. 8 C.F.R. § 245.1(a). If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

In order to reflect the record of proceeding (and, for what evidence the following may provide to the issues of this case relating only to the I-140 petition, its approval and subsequent revocation), the director's request for evidence relating to the beneficiary's adjustment application, and the beneficiary's response, is included below. Since this communication took place in the context of the adjudication of the alien's application for adjustment of status, the proper venue for consideration of the evidence presented is with the CIS official with jurisdiction over the application for adjustment. The AAO has no jurisdictional authority to determine or review adjustment of status matters. Further, the beneficiary has no standing in the subject proceeding relating to the issues first set forth above relating to the petitioner and its I-140 petition.

In connection with the adjustment of status proceedings, on February 21, 2002, the director issued a request for evidence, *inter alia*, to the beneficiary requesting her earning statements for the last two months, her personal tax returns, W-2 wage and tax statements or 1099-MISC statements for the preceding two years. Further, the director requested an original letter from "your prospective" employer concerning her future employment.

In response to the above, the beneficiary submitted copies of the following documents: a letter from a past employer, Unibar Maintenance Services Inc. of Ann Arbor, Michigan, dated May 15, 2002, that the beneficiary was employed as a cleaner from October 1, 2001 to April 30, 2002 at \$5.15 per hour. In verification of this employment experience, the beneficiary submitted a W-2 Wage and Tax Statement for 2001 stating wages paid in that year of \$1,318.40 by Unibar of College Park, Maryland; two checks with pay statement attached from Unibar to the beneficiary in 2002 stating year to date wages of \$1,730.40; and the personal joint tax return of the beneficiary and spouse for 2001. A letter from [REDACTED] d/b/a [REDACTED] [REDACTED] dated May 15, 2002, offered a full-time permanent position as a dining room attendant at that Maryland facility at \$6.15 per hour. The letter also stated that the

beneficiary was already employed by Lodgian, Inc. at another facility. The beneficiary's Application for Adjustment of Status was denied by the director on February 27, 2003.

Subsequently, the director issued an intent to revoke the petition's approval on May 23, 2003. According to the notice, the director stated that the beneficiary was not employed "... under the conditions set forth on the labor certification supporting the instant petition." Also, a copy of a Memorandum dated February 25, 2003 (the "Memorandum") was transmitted to the petitioner and its statements referenced by the director.² In pertinent part, the Memorandum dated February 25, reported that the beneficiary appeared before an immigration officer on September 3, 2002 concerning her adjustment application. The immigration officer reported in the Memorandum that the beneficiary stated that at the time of the interview she was employed by the petitioner in the housekeeping department of the petitioner and not as a dining attendant, which is the job stated in the labor certification.

On June 19, 2003, counsel submitted a response to the intent to revoke the petition's approval. In pertinent part, counsel asserts that relative to the I-140 petition, the issues in the case concern the beneficiary's employment in petitioner's housekeeping department,³ and, the application by the director of the case precedent, *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966).⁴

Counsel also stated the director had evidenced an intent to invalidate the labor certification in the notice of intent to revoke the petition. This is correct. Counsel then contends, "The authority and jurisdiction of the certification or denial of a labor certification falls within the [U.S.] Department of Labor." In the context of CIS's authority regarding eligibility for occupational (job) preference classification, counsel's preceding statement must be qualified.

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(5)(A) of the Act, 8 U.S.C. 1182(a) (5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after

² The immigration officer stated in the Memorandum that the Alien Employment Certification was filed on May 5, 1989, and it was certified on March 13, 1990 under the sixth visa preference but, since the beneficiary did not file for adjustment within two-years of the visa becoming available, the beneficiary does not qualify for the automatic conversion to the third preference category (i.e. "Other Worker"). Again, the AAO has no jurisdictional authority in adjustment of status determinations.

³ The job offered and stated in ETA 750 A was "dining room attendant."

⁴ In pertinent part, in the case *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966), the court stated that in resolving the question of intent to accept employment in the stated job of the labor certification consideration may be given to factors such as whether the alien is presently employed, (and in that case, his/her profession) and, if not, the length of time he/she has not been so employed and the reasons therefore. As will be discussed, there is no evidence in the record of proceeding that the beneficiary was ever employed as a dining room attendant for any employer before or after her arrival in the United States.

consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification.⁵ Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

⁵ Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth Circuit Court of Appeals in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) stated in pertinent part:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

Id. at 1008. The court in that case relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

As evidence to support counsel's response to the director's notice of intent to deny the petition, counsel submitted copies of the following documents: an internal CIS Memorandum dated February 25, 2003 (a copy of which was provided the petitioner); a computer printed copy of one page of U.S. Department of Labor regulations, specifically the regulation at 20 CFR 656.30 (2)(d); an excerpt from page 163 of an unidentified publication concerned with "Misrepresentations in Labor Certification Cases;" an excerpt from Interpreter Releases dated May 4, 1998, page number 624 concerned with U.S. State Department guidance on adjudication of labor certification cases; a letter dated April 20, 2000, relating to another employment based petition and its labor certification; and, approximately 8 pages relating to U.S. State Department guidance on adjudication of labor certification cases.

On January 23, 2004, the director revoked the approval of the I-140 petition filed for the beneficiary on March 23, 2000. The director found that the beneficiary is not employed in the position, dining room attendant,⁶ and at the terms as required by the supporting labor certification, and, therefore the petition is not supported by evidence of a valid labor certification as required by the regulation at 8 CFR § 204.5(l)(3), and, the regulation at 20 CFR § 656.30(C)(2). The former regulation states in pertinent part that a petition under the "Other Worker" classification (that is under Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii)), must be accompanied by a labor certification from the U.S. Department of Labor (i.e. Form ETA 750 A/B). The latter regulation states in pertinent part that a labor certification for a specific job offer, in this instance a dining room attendant in a hotel, is valid only for the particular job opportunity and for the area of intended employment, in this instance at various locations in the State of Maryland.

Counsel appealed the revocation of the petition approval⁷ on February 10, 2004 and asserted that the director cannot revoke a previously approved I-140 petition without a showing of error in approving the petition, or, without demonstrating good and sufficient cause, and, explaining the factual and legal basis that the petition should not have been approved, or, by demonstrating that the petition approval was obtained through fraud or misrepresentation.

As for counsel's last assertion above noted, after a review of the record of proceeding, there is no evidence that the labor certification was secured by fraud or willful misrepresentation.⁸ There is no finding by the director in

⁶ The petitioner had filed an application for employment (CIS Form I-765) for the beneficiary to allow her to work. According to the petitioner by letter dated September 3, 2002 found in the record of proceeding, the beneficiary was employed in petitioner's housekeeping department but not at the Silver Spring, Maryland location.

⁷ As noted previously in petitioner's response to the director's intent to revoke the petition, counsel asserted that the director has moved to invalidate the labor certification in the notice of intent to revoke the petition citing the case precedent of *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966). However, in the decision dated January 23, 2004, the director did not invalidate the labor certification. Counsel had successfully contended that the director could only invalidate a labor certification upon a finding of misrepresentation or fraud. The director concurred with counsel's assertion in the decision. Therefore, that is not an issue in this case as is argued by counsel on appeal.

⁸ The regulation at 20 C.F.R. § 656.30 (d) entitled "Validity and invalidation of labor certifications." states in pertinent part:

After issuance labor certifications are subject to invalidation by the INS [now CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact

the decision in regard to fraud or willful misrepresentation. That is not an issue in this case. As counsel raises this issue throughout his contentions in this case, we find that it is not an issue based upon the director's findings or the record of proceeding, and, it will not be further discussed.

Counsel contends that the petitioner never formally withdrew the I-140 petition, the I-140 was not automatically revoked, and, the petitioner's business did not terminate. Counsel has not elaborated on these assertions, and, we do not find evidence in the record of proceeding presented in support of these assertions. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. They will not be further discussed.

Counsel asserts in the CIS form I-290 appeal statement that the job offer was *bona fide*. Further counsel contends that "... there is no requirement in statute or regulation that a beneficiary" of an employment based preference visa petition be in the "underlying employment" until permanent residence is authorized. Counsel provided no explanation for the term "underlying employment" that presumably is the job offered, dining room attendant. The beneficiary's employment during the pendency of the petition proceedings is relevant as will be discussed below according to case precedent. *See Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966). The petitioner's employment of the beneficiary in its housekeeping department is similarly relevant.

Counsel has submitted a brief in the matter. Counsel contends that the labor certification is valid and "valid indefinitely," and, that a labor certification may only be invalidated through fraud or willful misrepresentation.⁹ Counsel contends that the petitioner intends to employ the beneficiary and the beneficiary intends to accept the position of dining room attendant according to the terms of the labor certification.

Counsel asserts that the labor certification is "valid indefinitely" as long as the "Employer/Petitioner [sic] offer of employment is available" citing the regulation at 20 CFR § 656.30.¹⁰ We agree. Beyond the decision

involving the labor certification application

By implication, counsel is contending that five corporations over 17 years could not hire a dining room attendant to fill the job position of dining room attendant in their hotel facilities in the State of Maryland, or that the Holiday Inn chain in Maryland could not place the beneficiary in that position due to the impact of the events of September 11, 2001, on its business.

⁹ This is not an issue in this case.

¹⁰ Section 656.30 Validity of and invalidation of labor certifications.

(a) Except as provided in paragraph (d) of this section, a labor certification is valid indefinitely. Labor certifications for Household Domestic Service Workers and teachers which were granted under the previous regulations at 29 CFR Part 60 and which lapsed after one year, shall be deemed automatically revalidated on the effective date of this part.

(b) (1) Labor certifications involving job offers shall be deemed validated as of the date of the local Employment Service office date-stamped the application; and

(2) Labor certifications for Schedule A occupations shall be deemed validated as of the date the applications were dated by the Immigration or Consular Officer.

(c) (1) A labor certification for a Schedule A occupation is valid only for the occupation set forth on the Application for Alien Employment Certification form, the alien for whom certification was granted, and throughout the United States unless the certification contains a geographic limitation.

(2) A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form

of the director,¹¹ under the particular facts of this case, counsel is asserting that five corporations, [REDACTED], [REDACTED], [REDACTED], and now L [REDACTED] [REDACTED] for a 17 year period, continuously without interruption, offered the job of dining room attendant under the subject labor certification.

There is no evidence in the record of proceeding that each of those named corporations kept the offer of employment available over a 17 year period. Further, no evidence was submitted to demonstrate that those corporations had the ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*,¹² . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The evidence as found in the record of proceeding (when the director's notice of intention to revoke the visa petition was issued on May 23, 2003, and, when on January 23, 2004, the director revoked the approval of the I-140 petition filed for the beneficiary on March 23, 2000) relate to the following issues as enunciated by counsel on appeal: "the director cannot revoke a previously approved I-140 petition without a showing of error in approving the petition, or, without demonstrating good and sufficient cause, and, explaining the factual and legal basis that the petition should not have been approved." Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

¹¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

¹² *Matter of Estime*, 19 I&N 450 (BIA 1987).

In relation to the particular facts of the case, counsel asserted in response to the director's intent to revoke that the issues in the case concern the beneficiary's employment in the petitioner's housekeeping department which the beneficiary disclosed to the immigration officer, and, the application by the director of the case precedent, *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966) to the facts of the case. Counsel contends that the petitioner intends to employ the beneficiary and the beneficiary intends to accept the position of dining room attendant according to the terms of the labor certification.

According to a letter from U [REDACTED], the beneficiary was employed by [REDACTED], from its College Park, Maryland location as a "Cleaner" from October 1, 2001 to April 30, 2002. At the time of the beneficiary's adjustment interview on September 3, 2002, the petitioner stated by its letter dated May 15, 2002, that the beneficiary was already employed by [REDACTED] at another facility other than at Silver Spring, Maryland since May, 2002. The petitioner stated that it was employing the beneficiary in its housekeeping department due to the events of September 11, 2001, and, its effects on its business. In the record of proceeding are seven payroll checks from the petitioner to the beneficiary in 2002 for its location at BWI International Airport, near Baltimore, Maryland.

According to the U.S. Department of Labor Form ETA 750 Part B signed by the beneficiary on March 16, 2000, the beneficiary stated under Section 15 concerning her prior work experience that she was a housewife with "No jobs held in the past three years." According to the undated CIS form G-325A submitted by the beneficiary with her adjustment application filed April 17, 2001, as found in the record of proceeding, under the job information section requesting employment held by the beneficiary in the last five years, she stated "N/A." There is no evidence in the record of proceeding that the beneficiary was ever employed as a dining room attendant for any employer before or after her arrival in the United States. No explanation was submitted why the beneficiary did not work as a dining room attendant.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twentifirst Century Act of 2000 (Public Law 106-313) (hereinafter "AC21"). Counsel submits a letter from the [REDACTED] of [REDACTED] Maryland, that offers the beneficiary employment as an assistant waitress at the pay rate of \$6.00 per hour. Counsel states that the beneficiary desires to work for this new employer.

The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*¹³ to be approved despite the fact that the initial job offer is no longer

¹³ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper

valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid," suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

Beyond the decision of the director, we find that the evidence submitted did not demonstrate that petitioner was the successor in interest to the prior business owner who was the applicant on the Alien Employment [REDACTED] through the various intervening corporations, [REDACTED], and, [REDACTED] and, that each of those corporation had the ability to pay the proffered wage. In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer through the three intervening corporations.

Counsel asserts that the labor certification is "valid indefinitely" as long as the "Employer/Petitioner [sic] offer of employment is available" citing the regulation at 20 CFR § 656.30. Counsel is asserting that five corporations, [REDACTED] and now [REDACTED] over a 17 year period, continuously without interruption, offered the job of dining room attendant under the subject labor certification. There is no evidence in the record of proceeding that each of those named corporations kept the offer of employment available over a 17 year period. There are no assignment and assumption agreements in the record of proceeding between the various corporations encompassing the offer of employment made to the beneficiary under the labor certification from each of the corporations mentioned.

We find that, according to the facts as presented by the petitioner, the petitioner had no intent to employ the beneficiary as a dining room attendant according to the regulation at 8 C.F.R. § 204.5(c).¹⁴ The petitioner

venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

¹⁴ 8 C.F.R. § 204.5(c). Filing petition. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under

contends, without substantiation, that the events of "September 11, 2001" impacted the petitioner's business, and, prevented its employment of the beneficiary in any of its Holiday Inn facilities in Maryland as a dining room attendant,¹⁵ but, the petitioner was able to employ her in its housekeeping department. We do not find this to be a credible statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

We find that, according to the facts as presented, the beneficiary had no intent to work as a dining room attendant for the petitioner according to the job stated and the terms of the labor certification, according to the regulation at 8 C.F.R. § 204.5(c), and, the case precedent of *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966). There is no evidence in the record of proceeding that the beneficiary ever was employed as a dining room attendant for any employer before or after her arrival in the United States on June 26, 1999. The record does show that the beneficiary was a housewife, worked as a cleaner, and in the housekeeping department of the petitioner during that time.

We find that the director demonstrated good and sufficient cause in revoking the approval of the petition. The director found that the beneficiary is not employed in the position, dining room attendant at the terms as required by the supporting labor certification. There is no evidence in the record of proceeding that the beneficiary was ever employed as a dining room attendant for any employer before or after her arrival in the United States. The federal court in *Spyropoulos v. Immigration and Naturalization Service*, 590 F.2d 1 (1978), in a similar factual situation, found that when evidence was submitted to demonstrate that an alien did not take the job for which a valid labor certification was issued that the then Immigration and Naturalization Service was not required to prove that fraud or willful misrepresentation was used to procure the certification because the validity of the certification was not at issue.

We find that the director did explain the factual and legal basis why the petition's approval was revoked by providing factual information including the aforementioned Memorandum found in the record of proceeding, that the director communicated to the petitioner his findings together with the prior case precedent citation as found in the director's decision dated January 23, 2004.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

¹⁵ The petitioner did state and demonstrate that the beneficiary was employed by the petitioner at its housekeeping department in a hotel facility near the BWI International Airport in Maryland but not as a dining room attendant.