

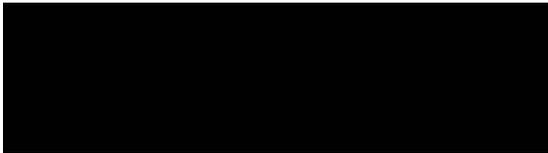


U.S. Citizenship
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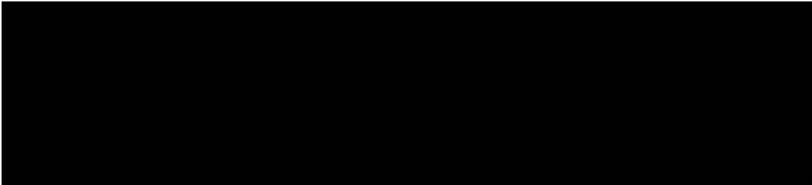
Office: CALIFORNIA SERVICE CENTER

Date: **MAY 02 2006**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Form I-485 Application to Register Permanent Resident or Adjust Status, the director served the petitioner with notice of intent to revoke the approval of the petition (ITR). In a Notice of Revocation, the director ultimately revoked the approval of the Form I-140 Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a private individual. He seeks to employ the beneficiary permanently in the United States as a child monitor/housekeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the evidence did not establish that the petitioner had the intention to engage the beneficiary in accordance with the terms of the job offer. The director accordingly revoked the petition.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is June 17, 1993. The proffered wage as stated on the Form ETA 750 is \$7.35 per hour, which amounts to \$15,288.00 annually. On the Form ETA 750B, signed by the beneficiary on May 19, 1993, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on September 28, 1994.

The I-140 petition was submitted on February 17, 1995. With the petition, the petitioner submitted supporting evidence.

The petition was approved on March 8, 1995.

The beneficiary submitted a Form I-485 Application to Register Permanent Residence or to Adjust Status on August 29, 2000, based on the approved I-140 petition.

In a request for evidence (RFE) dated May 11, 2001 to the I-485 applicant, the director requested additional evidence. In response to the RFE, the applicant submitted additional evidence. The applicant's submissions in response to the RFE were received by the director on August 13, 2001.

The director issued a second RFE to the I-485 applicant, dated December 3, 2001. In response to the second RFE, the applicant submitted a letter from counsel. The applicant's submission in response to the second RFE was received by the director on February 22, 2002.

In a notice of intent to revoke (ITR) dated July 7, 2004 the director notified the I-140 petitioner of his intention to revoke the approved I-140 petition. The director accorded the petitioner a period of thirty days to offer evidence in support of the petition and in opposition to the proposed revocation.

In response to the ITR, the petitioner submitted additional evidence. The petitioner's response to the ITR was received by the director on August 9, 2004.

In a decision dated September 27, 2004, the director determined that the evidence did not establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also determined that the evidence did not establish that the petitioner had the intention to engage the beneficiary in accordance with the terms of the job offer. The director accordingly revoked the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that a new employer has substituted for the petitioner as allowed by the American Competitiveness in the 21st Century Act (AC21). Counsel states that the beneficiary's I-485 application has remained unadjudicated for 180 days or more and that the beneficiary's new position is in the same or similar occupational classification as the job for which the certification was initially made.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The instant appeal raises the issue of the relationships among the portability provisions of AC21, the regulation at 8 C.F.R. § 204.5(g)(2) concerning the petitioner's ability to pay the proffered wage to the beneficiary and the provisions of INA § 205 and 8 C.F.R. § 205.2 governing revocations of previously approved petitions.

The American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, became law on October 17, 2000. AC21 § 106(c) added a new subsection (j) to section 204 of the INA, which states:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence - A petition under subsection (a)(1)(D) for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

INA § 204(j) (*added by The American Competitiveness in the 21st Century Act (AC21)*, Pub.L.No. 106-313, § 106(c), 114 Stat. 1251 (2000)).

AC21 also provides that where an I-140 petition and a new job offer satisfy the requirements of INA § 204(j), the underlying labor certification also remains valid. *American Competitiveness in the 21st Century Act*, Pub.L.No. 106-313, § 106(c)(2).

A memorandum to CIS Service Center Directors and Regional Directors dated August 4, 2003 by William R. Yates, Acting Associate Director for Operations, discusses effect of AC21 on I-140 petitions. The memorandum is not binding on the AAO, but it presents a reasonable interpretation of the statute. The memorandum states in pertinent part as follows:

B. Provisions in Cases of Revocation of the Approved Form I-140.

As discussed above, if an alien is the beneficiary of an approved Form I-140 and is also the beneficiary of a Form I-485 that has been pending 180 days or longer, then the approved Form I-140 remains valid with respect to a new offer of employment under the flexibility provisions of § 106(c) of AC 21.

Accordingly, if the employer withdraws the approved Form I-140 on or after the date that the Form I-485 has been pending 180 days, the approved Form I-140 shall remain valid under the provisions of § 106(c) of AC21.

Memo. from William R. Yates, Acting Associate Director for Operations, to Service Center Directors, BCIS and Regional Directors, BCIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (AD03-16) at 2-3 (August 4, 2003) (available at <http://uscis.gov/graphics/index.htm>; *path* Immigration Laws, Regulations and Guides; Immigration Handbooks, Manuals and Policy Guidance; Immigration Policy and Procedure Memoranda; *topic category* American Competitiveness in the Twenty-First Century Act of 2000 (AC21)).

Although the title of Section B of the Yates memorandum refers to revocation of an approved I-140, the text of that section mainly discusses withdrawals of petitions, and it does not explicitly state the effect of a revocation which occurs on or after the date that a Form I-485 has been pending 180 days. Nonetheless, it appears that the Yates memorandum considers AC21 to have the same effect on revocations as on withdrawals of petitions.

The Yates memorandum does make several explicit references to revocations. The memorandum states, "If approval of the Form I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied." *Id.* at 3. According to the memorandum, if a revocation of an I-140 petition

is based on fraud, the portability provisions of AC21 do not apply, even if the revocation occurs after a beneficiary's I-485 application has been pending for more than 180 days. *Id.* at 3.

Concerning the offer of employment from the original employer, the memorandum states the following:

In all cases an offer of employment must have been bona fide, and the employer must have had the intent, at the time the Form I-140 was approved, to employ the beneficiary upon adjustment. It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is authorized. Therefore, it is possible for an alien to qualify for the provisions of § 106(c) of AC21 even if he or she has never been employed by the prior petitioning employer or the subsequent employer under section 204(j) of the Act.

Id. at 3.

In the instant case, the I-140 petition was approved on March 8, 1995. The I-485 application was filed on August 29, 2000. The date 180 days after the filing date was February 25, 2001. As of February 25, 2001, the I-485 application was still pending. Therefore by operation of INA § 204(j), the I-140 petition became valid with respect to any new job for the beneficiary in the same or a similar job occupational classification.

The director's actions to revoke the approved I-140 petition were based on evidence received from the beneficiary in response to the RFE's to the beneficiary concerning her I-485 application.

In the RFE dated May 11, 2001 the director requested additional evidence. The director requested a copy of the Form W-2's for the last four years of the applicant (the beneficiary of the I-140 petition). The director also requested any other evidence indicating that the applicant was employed by the petitioner and requested copies of pay stubs or cancelled checks for the last four pay periods.

In response to the RFE the applicant submitted copies of her Form W-2 Wage and Tax Statements for the years 1997, 1998, 1999 and 2000. None of those Form W-2's showed any compensation from the I-140 petitioner. The applicant's submissions in response to the RFE were received by the director on August 13, 2001. On a Form G-325A Biographical Information dated August 15, 2000 which had been submitted with the I-485 application, the applicant had similarly stated no employment by the I-140 petitioner.

The director issued a second RFE to the I-485 applicant, dated December 3, 2001. The director made requests in the second RFE which are identical to those made in the first RFE. In response to the second RFE, counsel submitted a letter dated February 7, 2002 stating that the applicant is not yet working for the I-140 petitioner, but that she will do so once obtaining her permanent residency. Counsel noted that the Form W-2's were consistent with the applicant's Form G-325A, since the Form W-2's do not show any employment by the I-140 petitioner and since the applicant's Form G-325A similarly shows no employment by the petitioner. The applicant's submission in response to the second RFE was received by the director on February 22, 2002.

The director's next action related not to the I-485 application, but to the I-140 petition. The director issued the ITR to the petitioner on July 7, 2004. In the ITR, the director summarizes the general legal principles requiring a petitioner to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains legal permanent residence. The director then states as follows:

The record does not contain evidence of the compensation has ever been provided for. There is no explanation why the beneficiary does not receive the benefit. Absent evidentiary documentation, the record does not support that the petitioner has offered a valid job offer to the beneficiary for classification as a skilled worker.

(Notice of Intent to Revoke (ITR), July 7, 2004, at 2 (grammatical errors in the original)).

In the ITR, the director requests various financial documents of the petitioner, including the petitioner's complete tax documents from 1993 to the present. The director summarizes the W-2 forms of the beneficiary for the years 1999 through 2001, which show that the beneficiary worked for a total of four employers during that period, one of which she worked for in all three years and which provided her with the more than two-thirds of her income in each of those years. None of the beneficiary's employers during those years was the I-140 petitioner.

In the ITR, the director then states as follows: "The beneficiary is dependent on supplemental employment or solicitation of funds for support. The records failed to establish that the beneficiary fully intended to work as permanent and full time position for the petitioner." (ITR, July 7, 2004, at 3).

The ITR appears to have been based on the director's assumption that the beneficiary was under an obligation to begin working for the petitioner prior to the approval of the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status. But neither the Act nor the regulations require a beneficiary to begin working for an I-140 petitioner prior to the grant of permanent resident status to the beneficiary pursuant to an approved I-140 petition. *See* Memo. from William R. Yates, at 3.

In response to the ITR, the petitioner submitted a letter dated July 28, 2004 from [REDACTED] a new potential employer of the beneficiary. The letter confirms a job offer to the beneficiary at \$7.50 per hour in the position of Child Monitor/Housekeeper. The letter describes job duties which are very similar to those of the offered position as described in block 13 of the ETA 750 submitted by the petitioner. Under [REDACTED] signature on the letter is the title "Nurse Practitioner." (Letter from [REDACTED], July 28, 2004). With the letter, the petitioner submitted copies of Form 1040 U.S. Individual Income Tax Returns of [REDACTED] for 2002 and 2003. Those returns show [REDACTED] filing status as head of household, and show two dependents, for a household size of three persons. The adjusted gross income on the Form 1040 for 2002 is \$131,396.00, and the adjusted gross income on the Form 1040 for 2003 is \$110,661.00

The petitioner's submissions in response to the ITR were received by the director on August 9, 2004.

In a decision dated September 27, 2004 the director repeated verbatim most of the language in the ITR. The director then stated that the evidence submitted in response to the ITR did not overcome the grounds for denial. The director therefore revoked the petition as of the date of its approval.

With regard to AC21, since the beneficiary's I-485 application was pending for more than 180 days, by operation of INA § 204(j), the I-140 petition became valid with respect to any new job for the beneficiary in the same or a similar job occupational classification. The later revocation of the I-140 petition by the director was based on the failure of the evidence to establish the petitioner's ability to pay the proffered wage and on the failure of the evidence to establish the petitioner's intent to engage the beneficiary in accordance with the terms of the job offer. The revocation was not based on fraud. Moreover, nothing in the director's decision nor in the evidence in the record indicates any lack of good faith on the part of the petitioner in making the original job offer. Therefore the

revocation of the I-140 petition had no effect on the validity of that I-140 petition with regard to an offer of employment by another employer. *See* Memo. from William R. Yates, at 3; INA § 204(j).

For the foregoing reasons, even if the director's decision to revoke the instant I-140 petition was correct, the I-140 petition appears to satisfy the requirements of section 106(c) to remain valid with regard to the job offer to the beneficiary from [REDACTED]

The decision of the director to deny the beneficiary's I-485 application is not now before the AAO on appeal, and in any event, barring certification, the AAO would lack jurisdiction for any administrative appeal of the director's decision of the beneficiary's I-485 application. The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Notwithstanding the continuing validity of the I-140 petition with regard to a job offer to the beneficiary from [REDACTED], it is still necessary to evaluate the director's revocation decision, since the statutory provision in INA § 204(j) applies only to a job offer from a new employer, not to the job offer by the petitioner in the instant petition.¹ The record does not indicate whether the beneficiary has accepted the job offer from [REDACTED]. But even if the beneficiary has accepted that job offer, she may prefer to accept the original job offer from the petitioner. The beneficiary could seek permanent residence based on the petitioner's job offer only if the instant petition is reinstated on appeal.

As noted above, the director's revocation decision was based in part on a finding that the evidence failed to establish the petitioner's ability to pay the beneficiary the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on May 19, 1993, the beneficiary did not claim to have worked for the petitioner and no other evidence indicates that the beneficiary has worked for the petitioner.

¹ The determination regarding any job offer from a new employer is made by the director, in the course of the I-485 adjudication.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a private individual. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner and his wife for 1993 and 1999.

The record before the director closed on August 9, 2004 with the receipt by the director of the petitioner's submissions in response to the ITR. As of that date, the federal tax return of the petitioner for 2003 should have been available, as well his returns for prior years. However, the only returns of the petitioner submitted in evidence were those for 1993 and 1999. The petitioner's submissions in response to the ITR included a letter from counsel dated August 6, 2004 in which counsel refers to [REDACTED] as the "substitute sponsor" for the petitioner on the I-140 petition. Counsel also submitted copies of the Form 1040 federal income tax returns of

However, neither the statute nor the regulations permit the substitution of one petitioner for another on an I-140 petition. Counsel evidently misunderstood the effect of AC21, apparently believing that AC21 authorizes a substitution of petitioners. But AC21 does not make any changes concerning the adjudication of I-140 petitions. Rather, AC21 affects I-485 applications which are based on I-140 petitions. AC21 allows a beneficiary to seek employment from a new employer without jeopardizing his or her right to receive an approval of his or her I-485 application to adjust status to that of permanent residence, provided that the I-485 application has remained unadjudicated for 180 days or more.

In any event, whether counsel misunderstood AC21 or not, tax returns for the petitioner were submitted only for the years 1993 and 1999, even though each of the years from 1993 through 2003 is at issue in the instant petition.

A private individual's income and personal obligations are considered as part of the petitioner's ability to pay. Private individuals report income on the Form 1040 U.S. Individual Income Tax Return. A private individual must show sufficient resources for his or her own support and for that of any dependents as well as to pay the proffered wage. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner are joint returns of the owner and his wife. Those returns show three dependents. Therefore the household size of the petitioner is five persons. No statements of monthly or annual household expenses of the petitioner were submitted in evidence.

For a private individual, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the petitioner's Form 1040 U.S. Individual Income Tax Return. The petitioner's tax returns state amounts for adjusted gross income as shown in the following table.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
1993	\$47,871.00	not submitted	\$15,288.00*	\$32,583.00
1994	not submitted	not submitted	\$15,288.00*	no information
1995	not submitted	not submitted	\$15,288.00*	no information
1996	not submitted	not submitted	\$15,288.00*	no information
1997	not submitted	not submitted	\$15,288.00*	no information
1998	not submitted	not submitted	\$15,288.00*	no information
1999	\$37,545.00	not submitted	\$15,288.00*	\$22,257.00
2000	not submitted	not submitted	\$15,288.00*	no information
2001	not submitted	not submitted	\$15,288.00*	no information
2002	not submitted	not submitted	\$15,288.00*	no information
2003	not submitted	not submitted	\$15,288.00*	no information

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 1993. For the year 1999, absent any statement of annual household expenses, the information fails to establish the petitioner's ability to pay the petitioner's reasonable household expenses for a five-person household and also to pay the beneficiary the proffered wage. For the years 1994 through 1998 and 2000 through 2001 no copies of tax returns of the petitioner were submitted. Therefore the above information also fails to establish the petitioner's ability to pay the proffered wage in those years.

The record contains no other evidence relevant to the financial situation of the petitioner during the years at issue. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director apparently assumed that the fact that the beneficiary was not yet working for the petitioner prior to obtaining legal permanent resident status indicated that the petitioner lacked the ability to pay the proffered wage. The director also found that fact to be evidence that the petitioner failed to establish the intent to engage the beneficiary in accordance with the job offer.

With regard to the petitioner's ability to pay the proffered wage, although the director's analysis was incorrect, the director's decision was correct in finding that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

With regard to the intention of the petitioner to hire the beneficiary, the regulation at 8 C.F.R. § 204.5(c) is relevant. The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "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." The instant petition has been filed under section 203(b)(3) of the Act.

The only evidence relevant to the petitioner's intention to hire the beneficiary in the record concerns the intention of another potential employer, [REDACTED] to hire the beneficiary. However, that evidence is not sufficient to establish that the petitioner lacks the required intention to hire the beneficiary. Therefore the record lacks a basis for the director's finding that good and sufficient cause exists to revoke the petition on that ground. *See Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

For the foregoing reasons, the portion of the director's decision pertaining to the intention of the petitioner to hire the beneficiary will be withdrawn. Nonetheless, as discussed above, the director's finding that the evidence fails to establish the petitioner's ability to pay the proffered wage was correct. Therefore, the decision of the director to revoke the petition was correct. The assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

The file will be returned to the director to consider whether the petition satisfies section 106(c) of AC 21 with respect to the beneficiary's I-485 application.

ORDER: The portion of the director's decision pertaining to the intention of the petitioner to hire the beneficiary is withdrawn. The appeal is dismissed. The file is returned to the director for further actions in accordance with this decision.