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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAY 28 2008

WAC-03-058-54529

IN RE:

Petitioner:

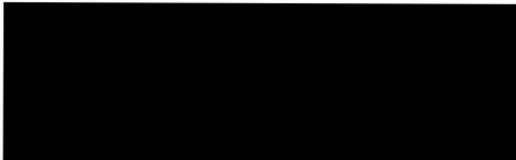


Beneficiary:

PETITION:

Immigrant petition for Alien Worker as a Skilled Worker or Professional 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.

Kevin S. Poulos for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. Based on the result of a permanent residence interview at the Los Angeles District Office, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because the response to the NOIR could not overcome the ground of revocation that the beneficiary entered into the United States by fraud and misrepresentation. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a textile wholesaler/converter. It seeks to employ the beneficiary permanently in the United States as an executive secretary and administrative assistant (administrative assistant). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The petitioner filed the instant petition on December 10, 2002 and the director approved the petition on May 19, 2003. At the permanent residence interview conducted on July 28, 2004, the interviewing officer found that the beneficiary does not qualify for the proffered position because the beneficiary entered into the United States under an assumed name and misrepresented information about it. The director determined that the petitioner's response to his NOIR did not overcome the ground of revocation and ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

Section 205 of the Immigration and Nationality Act (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."

Therefore, as set forth in the director's July 12, 2006 NOR, the single issue in this case is whether or not the fact that the beneficiary entered into the United States under an assumed name consists of a good and sufficient cause for the director to revoke the approval of the petition.

¹ 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).

On appeal, counsel asserts that the director does not have “good and sufficient cause” to revoke the approval of the instant petition because the petitioner established the beneficiary’s qualifications for the proffered position and entry by fraud is unrelated to the beneficiary’s qualifications.

The director revoked the approval of the petition based on the fact that the beneficiary entered into the United States in 1991 by fraud. Section 212(a)(6)(C)(i) of the Act provides that “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.” The current immigration procedures consist of two channels in determining whether or not an alien is admissible, i.e. an adjustment of status application at a Citizenship and Immigration Services (CIS) office in the United States or an immigrant visa application at a U.S. consulate in the alien’s home country. The instant case at this stage involves only an immigrant petition by a petitioner who seeks to classify the alien under the professional category under section 203(b)(3)(A)(ii) of the Act.² The beneficiary’s admissibility in connection with his adjustment of status application is not applicable. Therefore, section 212(a)(6)(C)(i) of the Act does not apply to the instant immigrant petition. While the beneficiary’s entry by fraud found by the interviewing office of the Los Angeles District Office may be good and sufficient cause to deny the beneficiary’s application for adjustment of status because he is inadmissible under section 212(a)(6)(C)(i), that alone cannot be good and sufficient cause to revoke the approval of the instant petition.

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

Section 204(b) of the Act provides that “[a]fter an investigation of the facts in each case, and after consultation with Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General [now Secretary, Department of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 230, approve the petition and forward one copy thereof to the Department of State.”

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien’s credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,

The visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959).

406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Therefore, material facts in an immigrant petition are the alien's qualifications. The director's NOR does not indicate whether the beneficiary's credentials meet the requirements set forth in the labor certification, or whether the beneficiary committed fraud or willful misrepresentation about his qualifications. The record does not contain any evidence that the beneficiary's entry under an assumed name constitutes fraud or willful misrepresentation regarding the beneficiary's qualifications.

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "[a]fter issuance labor certifications are subject to invalidation by the [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 involving the labor certification application." If the director had determined that the beneficiary's entry under an assumed name constitutes fraud or willful misrepresentation of a material fact involving the labor certification application, he should have invalidated the relevant labor certification in the instant case under the DOL regulation. However, the NOR does not include any decision on the validation of the labor certification.

As discussed above, the AAO concurs with counsel's assertions on appeal and finds that although the beneficiary's entry into the United States by fraud may be good and sufficient ground to deny the beneficiary's application for adjustment of status,³ it alone cannot establish fraud or willful representation of a material fact involving the instant petition. The record shows that the director did not provide good and sufficient cause to revoke the approval of the instant petition in his NOR. Therefore, the director's July 12, 2006 NOR is withdrawn.

However, beyond the director's NOR and counsel's assertions on appeal, the AAO has identified additional grounds of revocation and will discuss these issues. 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*, 299 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).

The first issue is whether or not the petitioner in the instant case provided a valid individual labor certification from DOL. The regulation 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part:

... Every petition under this classification must be accompanied by an individual labor certification from [DOL], by an application for Schedule A designation, or by

³ The AAO will not discuss the issues of the beneficiary's adjustment of status application because the application for adjustment of status is not under the AAO's jurisdiction and is not part of the instant appeal.

documentation to establish that the alien qualifies for one of the shortage occupations in the [DOL]'s Labor Market Information Pilot Program ...

The instant case is not an application for Schedule A designation, nor an application that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an individual labor certification from DOL for the proffered position.

The record shows that Update Fabrics Corp filed a Form ETA 750 on behalf of the instant beneficiary on October 9, 2001 and the Form ETA 750 was certified on October 4, 2002 to Update Fabrics Corp. The proffered wage as stated on the Form ETA 750 is \$19.17 per hour (\$39,873.60 per year). On December 10, 2002, the petitioner, Update Fabrics II Corp, filed the instant petition. With the initial filing, the petitioner submitted a letter dated November 19, 2002 from [REDACTED], the president of the petitioner, claiming that the petitioner qualifies as a successor-in-interest to Update Fabrics Corp [REDACTED]s November 19, 2002 letter).

The [REDACTED]s November 19, 2002 states in pertinent part that:

Specifically, on July 18, 2001, I incorporated Update Fabric II Corp. to take over the business and operations of Update Fabrics, Inc. I own both Update Fabrics, Inc. and Update Fabric II Corp. Although Update Fabrics, Inc. has not officially been closed, it is not longer in operation. All of Update Fabrics, Inc.'s business, operations, assets and liabilities (including immigration liabilities) have been taken over by Update Fabric II Corp. as of July 18, 2001.

... ..

As the owner of both the old and new company, I assume all rights, duties, obligations and assets of the original employer and herein state that as the successor I continue to operate the same type of business. The company's business activity remains the same.

With this letter, the petitioner also submitted the following documents to support its assertion of successor-in-interest status. These documents include Articles of Incorporation of Update Fabrics Corp., Statement of Domestic Stock Corporation for Update Fabrics Corp.; letter dated July 16, 2001 allowing [REDACTED] to open Update Fabric II Corp.; Articles of Incorporation of Update Fabric II Corp., Statement of Domestic Stock Corporation for Update Fabric II Corp.; Registration Form for Commercial Employer; a letter dated August 23, 2001 from California Employment Development Department (EDD); Seller's Permit issued by California State Board of Equalization; and a letter dated September 3, 2001 from the Internal Revenue Service (IRS).

However, the evidence in the record does not support the petitioner's assertion that the petitioner qualifies as a successor-in-interest to Update Fabrics Corp. The record shows that Update Fabrics Corp was incorporated as a California corporation on May 6, 1996 and that the petitioner was incorporated as a California corporation on July 18, 2001. Although [REDACTED] claimed that he owns both companies, and the 2001 tax returns for both corporations show that each of [REDACTED] and [REDACTED] holds 50% of stock of Update Fabrics Corp, and [REDACTED] and [REDACTED] shares the

company stock of the petitioner equally, they are separate and independent corporations. Moreover, each of them has been assigned its own federal employer identification number (FEIN), while the FEIN for Update Fabrics Corp is [REDACTED] the petitioner's is [REDACTED]. In addition, while the Statement of Domestic Stock Corporation for Update Fabrics Corp. indicates "Fabric Store" as a type of business for Update Fabrics Corp., the petitioner's Statement of Domestic Stock Corporation describes its type of business as "Wholesale Textile." The record in the record shows that they have never been a one and same corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The successor-in-interest status requires documentary evidence that the successor company has assumed all of the rights, duties, and obligations of the original employer. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. The fact that a same individual owns 50% of stock of both corporations is not sufficient to automatically establish the successor-in-interest relationship between the two corporations. With the initial filing, the petitioner claimed that all rights, duties, obligations and assets of Update Fabrics Corp. have been taken over by the petitioner as of July 18, 2001, the date when the petitioner was incorporated. However, the petitioner did not submit any documentary evidence, such as bill of sale, purchase and sale agreement or any other legal documents showing that the petitioner assumed the business and assets of Update Fabrics Corp. located at 738 E. Pico Boulevard, Los Angeles, CA 90021 with all relevant rights, duties and obligations including immigration obligations from Update Fabrics Corp. on July 18, 2001. 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)).

The petitioner also provided inconsistent information regarding the successor-in-interest. The petitioner claimed that on July 18, 2001 all of Update Fabrics Corp.'s business, operations, assets and liabilities (including immigration liabilities) have been taken over by the petitioner, that Update Fabrics Corp no longer operated and that the petitioner continued to operate the same type of business. However, the petitioner did not explain, if its successor-in-interest claim were true, how Update Fabrics Corp. filed the relevant labor certification application on October 9, 2001, almost three months after it ceased operating, and why the petitioner did not file the labor certification application. In addition, the record contains copies of 2001 tax returns for both Update Fabrics Corp. and the petitioner. However, Update Fabrics Corp.'s tax return does not show any extra income from the sale of the business or any decrease in assets from the assets transferred to the petitioner, and similarly, the petitioner's tax return does not indicate any asset increase or any other influence from the business transaction from Update Fabrics Corp. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The record does not contain any independent objective evidence to resolve these inconsistencies.

The AAO finds that the petitioner has not submitted persuasive evidence that indicates that the petitioner qualifies as the successor-in-interest to Update Fabrics Corp. Since the relevant labor certification is certified to Update Fabrics Corp. and the petitioner failed to establish its successor-in-interest status, the petitioner failed to provide a valid individual labor certification with its petition as required by the regulation at 8 C.F.R. § 204.5(l)(3)(i). Therefore, the petition was approved in error and the approval of the petition should be revoked after issuing a NOIR.

The second issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of administrative assistant. Item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|--------------------------|
| 14. | Education | |
| | Grade School | C |
| | High School | C |
| | College | C |
| | College Degree Required | Bachelor of Arts/Science |
| | Major Field of Study | Business |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any other special requirements.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Dela Salle University in Manila, Philippines in the field of "Business Management" from June 1980 through August 1984, culminating in the receipt of a "Bachelor's Degree in Business Management." In corroboration of the Form ETA-750B, the petitioner provided the beneficiary's Bachelor of Science in Commerce major in Business Management and transcripts from De La Salle University and an evaluation report from Foundation for International Services, Inc. These documents show that the beneficiary holds a foreign four-year bachelor's degree in business management, which is equivalent to a U.S. bachelor's degree in business as required by the Form ETA 750, and thus, the petitioner established the beneficiary's educational qualifications in the instant case.

In addition, as noted above the labor certification also requires two years of experience in the job offered for the proffered position. The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains two experience letters from the beneficiary's former employers to verify the beneficiary's requisite experience in the job offered prior to the priority date: an experience letter dated February 14, 2001 from [REDACTED] of Glendale Rotary Offset Printing Co. (GROP February 14, 2001 letter) and an experience letter dated March 12, 2001 from [REDACTED] of Helmsman Management Services, Inc. (HMS March 12, 2001 letter). The GROP February 14, 2001 letter states in pertinent part that:

This letter is to certify that [the beneficiary] was employed by our Company on a full-time basis as an Administrative Assistant from January 17, 1996 to December 30, 1997.

This experience letter is on the company letterhead, verifies the beneficiary's full-time employment as an administrative assistant, and includes a specific description of the duties performed by the beneficiary as required by the regulation. However, the letter was signed by Bridget Gonzalez as a system administrator. A system administrator usually is not a position or title for a legally authorized representative of a company. It is not clear whether Bridget Gonzalez as a system administrator at GROP was a legal representative for the company or was authorized to issue this letter on behalf of the company at the time of the letter. Further, the letter verifies the beneficiary's twenty-three and a half months which alone do not meet the at least two years of experience requirement. Furthermore, this office notes that there are inconsistencies between this letter and the beneficiary's statements. The beneficiary filed I-485 adjustment of status application⁴ on July 21, 1998 based on an approved I-140 petition⁵. On the Form I-485, the beneficiary indicated that his current occupation was an accounting clerk and on the accompanying Form G-325A Biographic Information signed by the beneficiary on April 4, 1998, the beneficiary states that he worked for GROP as an accounting clerk from August 1997 to the present, i.e. April 4, 1998. However, in the instant labor certification application and immigrant petition the beneficiary claimed to have worked for the petitioner as an administrative assistant since January 1998. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." In addition, the beneficiary's spouse also claimed employment with GROP as an accounting staff from December 1998 to August 2003 on her adjustment of status application. It appears

⁴ WAC-98-207-53029.

⁵ WAC-97-201-31235 filed by RN+ Professional Training, Inc. on behalf of the beneficiary and his spouse on February 21, 1997 and approved on March 17, 1997 under skilled worker or professional category.

more than coincident that husband and wife worked in the same position for the same company one after the other. It also raises a doubt as to whether the beneficiary really worked for GROF as an administrative assistant as verified by the GROF February 14, 2001 letter. "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.*

The HMS March 12, 2001 letter states in pertinent part that:

This letter is to certify that [the beneficiary] was employed by our organization on a full-time basis as a Senior Office Assistant from January 1991 to December 1994 and was promoted to a Case Manager Associate from January 1995 to December 1996.

As a Senior Office Assistant, [the beneficiary] managed Worker's Compensation claims with \$5K exposure (medical only), assisted claimants on inquiries regarding workers' compensation benefits; provided support to Claim Service Team in preparation of various Worker's Compensation notices for claimants.

As a Case Manager Associate, he managed claims with Future Medical Stipulation settlement. His responsibilities included managing claims extending up to 6-12 weeks of temporary disability.

The HMS March 12, 2001 letter is on the company letterhead, verifies the beneficiary's full-time employment as a senior office assistant for four years and as a case manager associate for two years, and includes a specific description of the duties performed by the beneficiary as required by the regulation. However, the letter was signed by [redacted] as Senior Claims Manager I, Claims Service Team. It is not clear from the letter that a claims manager is a legal representative for the company or was authorized to issue this letter on behalf of the company at the time of the letter. Further, the letter verifies the beneficiary's employment as a senior office assistant for four years and as a case manager associate for two years, however, the labor certification requires two years of experience in the job offered, that is as an administrative assistant. Furthermore, it is not clear from the letter that the duties performed by the beneficiary as a senior office assistant or as a case manager associate at HMS qualify him to perform the duties of an administrative assistant with the petitioner as described in the item 13 of the Form ETA 750A. The AAO also notes that there are inconsistencies between the experience letters and the beneficiary's statements on the Form ETA 750B. On the Form ETA 750B, the beneficiary stated that he worked 40 hours per week for HMS as a case manager associate from January 1995 to December 1996, while he also stated that he worked 40 hours per week for GROF as an administrative assistant from January 1996 to December 1997. Similarly, the HMS March 12, 2001 letter verifies that the beneficiary was employed on a full-time basis as a case manager associate from January 1995 to December 1996, while as discussed previously the GROF February 14, 2001 letter verifies that the beneficiary worked for it on a full-time basis as an administrative assistant from January 1996 to December 1997. The record does not contain any explanation from the beneficiary or either of his former employers how the beneficiary managed two full-time jobs during the period from January 1996 to December 1996. The record does not contain any independent objective evidence to resolve the inconsistencies between the beneficiary's statements and the experience letters from the beneficiary's two

former employers. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.”

Therefore, the AAO cannot accept these letters as regulatory-prescribed primary evidence to establish the beneficiary’s requisite two years of experience in the job offered. Without presenting any independent objective evidence, such as paystubs, W-2 or 1099 forms, tax returns, personnel records, or any other form of documentation to corroborate the beneficiary’s claimed employment experience at GROF and HMS and to resolve the inconsistencies discussed above, the petitioner failed to demonstrate that the beneficiary possessed the qualifying experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The third issue to be discussed in this case is whether or not the petitioner established that the beneficiary would work for the petitioner in the proffered position as stated on the labor certification and thus that the job offer the petitioner provided to the beneficiary was and continues to be a realistic and *bona fide* one.

The certified Form ETA-750 was filed on October 9, 2001 and the job offered is an “administrative assistant.” On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner in the proffered position since January 1998. CIS records show that the beneficiary filed a new adjustment of status application based on an approved family-based I-130 petition for his spouse. On the accompanied Form G-325A Biographic Information signed on October 13, 2006, the beneficiary claimed to have worked for Octagon Risk Services in Van Nuys, CA as a claims assistant since August 2003 to the present and claimed to have worked for the petitioner as an administrative assistant from January 1998 to July 2003. Since the beneficiary left the proffered position and began working in another type of position and in another city almost five years ago, and since the beneficiary is applying for his lawful permanent residence based on another petition, the AAO cannot conclude that the beneficiary would take the job offer and work for the petitioner in the proffered position if the instant petition’s approval had not been revoked. Therefore, the petitioner also failed to demonstrate that the job offer is still realistic and *bona fide*.

Further, the petitioner has not established its continuing ability to pay 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

As previously discussed, in the instant case, the petitioner failed to establish its successor-in-interest status. However, if the petitioner had demonstrated that it qualifies as the successor-in-interest to Update Fabrics Corp., the petitioner should have established its continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. The record contains the petitioner's tax return for 2001, the year of the priority date, which established the petitioner's ability to pay the proffered wage for 2001. However, the record does not contain regulatory-prescribed evidence, such as annual reports, tax returns, or audited financial statements, to establish the petitioner's continuing ability to pay the proffered wage to the present. The record before the director closed on June 9, 2006 with the receipt by the director of the petitioner's submissions in response to the NOIR. As of that date the petitioner's federal tax returns, annual reports or audited financial statements for 2002 through 2005 should have been available. However, the petitioner did not submit these documents. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner failed to establish its ability to pay the proffered wage for 2002 through the present because it failed to submit the regulatory-prescribed evidence for these years.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to provide the petitioner an opportunity to rebut the grounds of revocation discussed above by sending another NOIR. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.