U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 22 2010

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IN RE: Petitioner: [redacted]
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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner[1] is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL) with a Form ETA 750, Part B for the substituted beneficiary.[2] The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The director denied the petition accordingly.

As set forth in the director's denial dated November 13, 2007, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the director's decision, threshold issues in this case are whether the petitioner has presented sufficient evidence to establish successorship between itself and [redacted], and, whether [redacted] is an affected party in this matter.

An additional issue, also beyond the director's decision, is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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.

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

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[1] According to a letter dated August 31, 2007, from prior counsel, [redacted] was formed as [redacted] trading and doing business as [redacted] on October 4, 2004. According to the record, [redacted]'s federal employer identification number is [redacted] According to the Form I-140, the petitioner, [redacted], has employer identification number [redacted] Accordingly, it appears that the employer in the labor certification is a different business organization from the filer of the Form I-290B. *See infra.*

[2] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

> *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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour ($24,689.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 appeal.[3]

On July 26, 2007, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2). The director instructed the petitioner to submit its federal tax returns for 2001, 2002, 2003, 2004, 2005, and 2006, as well as annual reports or audited financial statements since April 30, 2001. Additionally, the director requested additional evidence such as audited profit/loss statements, bank account records and personnel records.

In response to the RFE, the petitioner submitted, *inter alia,* partial copies of the petitioner's tax returns for 2001 and 2002 and [redacted] tax returns for 2003, 2004, and 2005.

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[3] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations 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).

Based upon information in the petition, the petitioner was reputedly established in January 1, 1996,[4] and to currently employ five workers. According to the 2001 and 2002 tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on March 14, 2007, the beneficiary did not claim to have worked for the petitioner. According to counsel, the petitioner has never employed the beneficiary.

On appeal, counsel asserts that the director misapplied the law and failed to consider the "totality of the circumstances" which show that the petitioner has the ability to pay the proffered wage.

Counsel submits no additional evidence on appeal. The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. Counsel requested an additional 90 days to submit "supplemental documentary evidence due to exigent circumstances, and a detailed brief." As of this date, approximately 26 months later, the AAO has received nothing further.

The petitioner filed the Form I-140 on April 26, 2007. The petitioner identified on that form is [redacted] located at [redacted], Washington, D.C., as identified by its federal Employer Identification Number (EIN)[5] which is [redacted]. That EIN is assigned to [redacted]

Therefore, an issue in this case is whether the petitioner is the predecessor-in-interest to another entity, [redacted] which has filed the appeal. Throughout the record, prior and substitute counsel make no claim of successorship, other than the captioning of the appeal as "[redacted]" although counsel has submitted tax returns and certain documentary filings in the name of [redacted]

The labor certification was accepted on April 30, 2001. The employer is stated on the labor certification as [redacted] located at [redacted] The Form ETA 750, Part B, submitted for the substituted beneficiary stated that the location of [redacted] was [redacted]. The petition identifies the petitioner as [redacted] and provides [redacted] However, counsel has taken the appeal in the name of another entity, [redacted] trading as [redacted]" [redacted] EIN is [redacted] Although not asserted by counsel, implicitly or otherwise, the AAO will analyze and review the evidence

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[4]According to the District of Columbia website, <http://mblr.dc.gov/corp/lookup/status.asp?id=166205>, [redacted] was incorporated on July 12, 1990; and, it is noted as "revoked" on that website as accessed on February 8, 2010. According to information obtained from the same website, [redacted] was established on January 29, 2002, and, it is noted as active.

[5] The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. *See* <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> accessed on November 19, 2009.

submitted to determination if there is sufficient proof that Namir, LLC is the successor to the petitioner.

Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986) is an AAO decision designated as precedent by the Commissioner concerning successor ships.[6] By way of background, *Matter of Dial Auto* involved a petition filed by [redacted] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted] filed the underlying labor certification. On the petition, [redacted] claimed to be a successor-in-interest to [redacted] The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

> Additionally, the *representations made by the petitioner* concerning the relationship between [redacted] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [redacted] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [redacted] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987).* Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added).

The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).[7] This is why the Commissioner said "[i]f the petitioner's claim is found to be true,

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[6] The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[7] The regulation at 20 C.F.R. § 656.30(d) (1987) states:

and it is determined that an actual successor ship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. No evidence was submitted that [redacted] purchased the assets of the petitioner or acquired the necessary rights and obligations of the predecessor necessary to carry on the business.

The successor must continue to operate the same type of business as the predecessor,[8] and the manner in which the business is controlled must remain substantially the same as it was before the

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> (d) After issuance labor certifications are subject to invalidation by the INS 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 evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

[8] The petition was filed April 23, 2007. Shortly after that, [redacted] filed for Chapter 7 bankruptcy in the District of Columbia and was discharged on June 16, 2007, according to information obtained from the website <https://risk.nexis.com/InvestigativePortal/Deflault.aspx?_cmd=SOURCE_DOCS_SEA...> as accessed January 29, 2010. Presumably, [redacted]. did not exist and do business after its bankruptcy liquidation.

ownership transfer. It is unclear if [redacted] continues to operate the same business, and no evidence was submitted concerning control.

The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. As will be discussed, tax returns were submitted for the petitioner and [redacted] but the tax returns did not demonstrate that either entity could pay the proffered wage. There is insufficient evidence submitted by the petitioner that [redacted] is the successor-in-interest to [redacted]

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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Since the petitioner and [redacted] are separate entities, evidence[9] submitted to show [redacted] ability to pay the proffered wage cannot be accepted.

Since as stated there is a lack of sufficient evidence in the record that [redacted] is the successor-in-interest to [redacted], the AAO finds that [redacted], is not an affected party and is not permitted to file the appeal. As the original petitioner appears to have been dissolved, the job offer is no longer bona fide. This is an additional reason for ineligibility.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, USCIS 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 Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the

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[9] [redacted] partial federal tax returns for 2003, 2004 and 2005, stated net income of $7,582.00, $5,082.00, and $14,304.00, respectively. Assuming for the sake of argument that [redacted] was the successor-in-interest to the petitioner, it has not demonstrated by its tax returns that it has the ability to pay the proffered wage.

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. Texas 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures

should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on September 6, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's partial Form 1120S and Form 1120[10] tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120S stated net income (Line 21) of $29,094.00.
- In 2002, the Form 1120 stated net income (Line 28) of $17,064.00.

Since the proffered wage is $24,689.60 per year, the petitioner did not have sufficient net income to pay the proffered wage in years 2002. In 2001, the petitioner did have sufficient net income to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage through an examination of the petitioner's net income in 2002 and onwards. As noted above, the petitioner, [redacted], did not submit tax returns for 2003 through 2006, even though this evidence was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel asserts that the petitioner's "totality of circumstances," based upon the evidence submitted, is another way to determine the petitioner's ability to pay the proffered wage from the priority date.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a

[10] Only the first two pages of the petitioner's tax returns were submitted. No Schedule K or L statements were submitted by the petitioner.

petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner is a restaurant that had reputedly been in business since 1996 in Washington, D.C. For years 2001 and 2002, the petitioner had gross receipts respectively in the amounts of $185,532.00, and $540,313.00. The petitioner paid out $26,154.00 and $80,697.00, in wages and salaries during those years. The petitioner stated that it employed a total of five employees in 2007. There is no information in the record concerning the petitioner's finances, pay roll, business reputation, or prospects from 2002 until its bankruptcy in 2007 that would demonstrate that the petitioner's business could continue or that its finances were stable. Presumably, after 2007 the petitioner and its business ceased to exist.[11]

Although the director in his RFE dated July 26, 2007, requested, among other evidence, the petitioner's tax returns for 2001, 2002, 2003, 2004 2005, and 2006, the petitioner chose to submit only partial copies for 2001 and 2002, so there is no information concerning the petitioner's net assets, net liabilities or net current assets upon which to evaluate the petitioner's ability to pay the proffered wage. Finally, the Immigrant Petition for Alien Worker (Form I-140) indicated that the proffered position was a new position. Although the director did not inquire into this question in the request for evidence dated July 26, 2007, the validity of the job offer would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization. In this case, the addition of the cook position would create additional payroll expense, further reducing the petitioner's ability to pay. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

A review of the record confirms that the job offer is not realistic and cannot be satisfied by the petitioner since the petitioner has been declared a bankrupt and its corporate status revoked by the District of Columbia. *See Matter of Great Wall*, 16 I&N Dec. 142. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from 2002 and onwards.

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[11] Even if the appeal, for sake of argument, could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

Beyond the director's decision, an additional issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on April 30, 2001.

According to the terms of the labor certification, the applicant must have two years of experience in the job offered. According to Form ETA 750, Part A, item 13, the offered job duties are described as "Prepare and cook from scratch meat, poultry, seafood, vegetables, soups and sauces using Italian style recipes."

The beneficiary set forth her credentials on the labor certification, dated March 14, 2007, and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she has had most recently been employed at the [redacted] Iran, from March 1999 to April 2004, as a cook and described her job duties as "Prepare and cook from scratch meat, poultry, seafood, vegetables, soups and sauces using Italian style recipes."

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that Form dated March 26, 2007, under a section eliciting information about the beneficiary's last occupation abroad, she represented that she was unemployed for the last five years (i.e. March 26, 2001 to March 26, 2007) above a warning for knowingly and willfully falsifying or concealing a material fact.

The beneficiary's reputed employment statement found in the labor certification is described as an "Italian style recipes" cook in Iran until April 2004, and, the beneficiary's sworn statement that she was unemployed from January 2002 until January 2007 are in conflict. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner, as substantiation of the beneficiary's employment history in Tehran, Iran, submitted a translation and copy of a hand written employment reference from [redacted] of the [redacted] in Tehran, Iran dated April 11, 2007. According to that unsworn letter statement, the beneficiary "worked in this Restaurant from 03/30/1999 to 04/21/2004. She [the beneficiary] worked as a Chef in Iranian and European foods." There is no mention in the letter that the beneficiary used Italian style recipes in food preparation. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, the beneficiary's job duties are different from those required by the labor certification. The address of the employer is missing from the statement which prevents the reference from being readily verified. Therefore, the statement is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. Further, there is no correlative evidence to support the beneficiary's employment history such as cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns.

The preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding as the beneficiary's own sworn statements in the labor certification and the Form G-325 are in conflict and the sole employment reference does not confirm the beneficiary's allegation that she is experienced in Italian style recipes in food preparation. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.