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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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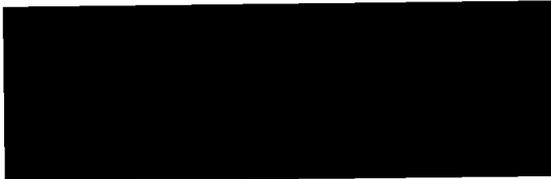
Date: **SEP 28 2011**

Office: TEXAS SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On July 5, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on March 5, 2003. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on April 27, 2009, and the petitioner subsequently appealed the director’s decision to revoke the petition’s approval. 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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on March 5, 2003 by the VSC, but that approval was revoked in April 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and that the documents submitted in response to the director’s Notice of Intent to Revoke (NOIR) were in themselves a willful misstatement of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding.

¹ 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.

² Current counsel of record, [REDACTED], will be referred to as counsel throughout this decision. Previous counsel, [REDACTED], will be referred to as previous or former counsel or by name.

Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements. In summary, counsel notes that director revoked the approval of the petition merely because [REDACTED] was the attorney initially representing the petitioner and the beneficiary in the instant proceeding.

With respect to the director's insistence on documentary proof of recruitment, counsel states that the petitioner, at the time when it filed the Form ETA 750 with the DOL for processing, was not required to retain any documentary evidence relating to its recruitment efforts once the labor certification had been approved. Counsel also states that, eight years after the petition was approved, the petitioner no longer has such evidence.

Finally, counsel states that United States Citizenship and Immigration Services (USCIS) erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. This regulation, according to counsel, only applies to automatic revocation and is therefore the wrong regulation to revoke the petition in the instant proceeding.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

As a procedural matter, the AAO agrees with counsel that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues raised on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of

³ 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 Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. The regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] 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, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the Notice of Intent to Revoke (NOIR), the director wrote:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel, ██████████].

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by ██████████ who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by previous counsel, the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on February 16, 2009

issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be withdrawn. The petition will remain revoked, however, as the petitioner has not established the ability to pay, as more fully discussed below.

Another issue on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner's previous counsel () submitted the following evidence:⁴

- Two copies of tear sheets from the *Cape Cod Times* advertisements, published on Sunday, February 11, 2001, and on Sunday, April 1, 2001;⁵ and
- A copy of the advertisement rates from the *Cape Cod Times*.

Upon review of the evidence submitted, the director determined that the newspaper advertisements alone were of little value without other evidence showing the results of the petitioner's recruitment efforts. Specifically, the director stated, "Evidence needed to support this petition should have been available and submitted at the time of the original submission.

The AAO disagrees with the director's conclusion. First, the director in the NOIR did not notify the petitioner to specifically submit copies of the results of the recruitment efforts. As noted above, without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS, id.*

⁴ This evidence was submitted in response to the director's Notice of Intent to Revoke (NOIR).

⁵ One tear sheet shows that the petitioner was trying to hire cooks, the other shows the petitioner was trying to hire a cook.

Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the supporting documentation eight years after the labor certification was approved.⁶ The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Moreover, the DOL at the time the petition was filed accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

Here, the record reflects that the petitioner signed the Form ETA 750 on February 27, 2001 and filed it with the DOL for processing on April 24, 2001. The DOL subsequently approved the Form ETA 750 on December 21, 2001.

⁶ However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Based on the evidence submitted and the stated facts above, it appears that the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [REDACTED] filed the petition in the instant proceeding. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or its previous counsel deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, however, the factual record does not establish that the petitioner failed to follow the DOL recruitment procedures. Similarly, there has been insufficient development of the facts upon which the director can rely to find that the petitioner and/or [REDACTED] engaged in fraud or material misrepresentation.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or

other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁷

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary 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 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any 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 Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

Matter of S & B-C-, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is

⁷ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Here, as noted above, the evidence of record is not sufficiently developed to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process or that the beneficiary engaged in fraud or material misrepresentation in the presentation of his credentials to the petitioner and through the petitioner to USCIS. Thus, the director's finding of fraud or misrepresentation is withdrawn.⁸

In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation against the petitioner.

Further, in light of the new evidence submitted by counsel in response to the AAO's Notice of Derogatory Information and Request for Evidence (NDI/RFE), the AAO determines that the beneficiary possessed the requisite work experience in the job offered before the priority date and that he qualifies to perform the duties of the position.

In adjudicating the appeal, the AAO observed that the record lacked conclusive evidence as to whether or not the beneficiary qualified to perform the duties of the position – whether he

⁸ The AAO, however, notes that there are anomalies in the recruitment process. A review of the record reveals that the petitioner signed the Form ETA 750 prior to the completion of the recruitment efforts (the petitioner, as noted above, signed the Form ETA 750 on February 27, 2001; the first ad was placed on Sunday, February 11, 2001, and the second on Sunday, April 1, 2001). This suggests that [REDACTED] (the petitioner's attorney at the time) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, signed the Form ETA 750 and allowed [REDACTED] take over the recruitment efforts. As we are dismissing the appeal on other grounds, we will not request the petitioner at this time to explain the petitioner's certification under penalty of perjury that the recruitment was complete (and yielded no result) before it was actually complete. The AAO may further address this issue upon any reopening of the petition.

worked as a cook for at least two years in Brazil as he claimed in part B of the Form ETA 750. On July 28, 2010, the AAO alerted both the petitioner and the beneficiary to that problem in the record in the NDI/RFE. The AAO afforded the petitioner and the beneficiary 30 days to respond.

In response, the petitioner submitted the following evidence to show that the beneficiary possessed the requisite work experience in the job offered before the priority date:

- A copy of the beneficiary's Labor ID and Workforce Development, showing that he worked as a cook as a contract worker at Saito & Cia Ltda. from March 8, 1994 to January 31, 1997;
- A copy of Saito & Cia's CNPJ showing that the business was also known as (or doing business as) Seqsabe Motel, and that it was officially registered with the Brazilian authority on 08/30/1983 (August 30, 1983);⁹
- A copy of an affidavit dated June 5, 2009 from [REDACTED] one of the owners of Saito & Cia Ltda., stating the beneficiary worked as a cook at her establishment from March 8, 1994 to January 31, 1997;
- A joint affidavit dated August 17, 2010 from [REDACTED] stating that the business is registered with the National Registry of Legal Entities (Department of Treasury) and it is part of a group of hotels which is classified as provider of hospitality services, under a title of international kitchen (cozinha internacional), that the letter of employment initially submitted along with the Form I-140 was signed by [REDACTED] and that the beneficiary was employed as a cook from March 8, 1994 to January 31, 1997;
- A copy of the beneficiary's employment record, indicating the beneficiary's employment as a cook starting on March 8, 1994;
- A copy of Saito & Cia Ltda.'s articles of incorporation; and
- A copy of Saito & Cia Ltda.'s menu.

The record also contains a letter from [REDACTED] that the petitioner submitted along with the petition. The letter generally stated that the beneficiary was a cook from March 1994 to January 1997.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

⁹ CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 24, 2001. The name of the job title or the position for which the petitioner seeks to hire is “cook.” Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, “Prepare all types of meat, poultry, etc.” The DOL determined that the job description and title are consistent with the O*Net-SOC job code 35-2014, Cook, Restaurant.¹⁰ Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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, Madany v. Smith*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on February 27, 2001, he represented that he worked 40 hours a week at “Seqsabe Cozinha Industrial” as a cook from March 1994 to January 1997. The additional evidence submitted on appeal – copies of the beneficiary’s Labor ID and Workforce Development, the CNPJ printout, the affidavits of the [REDACTED] – is consistent with the letter submitted along with the petition and with the beneficiary’s claim in the Form ETA 750, part B, and further resolves the inconsistencies in the record regarding the nature of the business establishment in Brazil and the signature(s) of its owners. Viewed together, the evidence submitted is sufficient to demonstrate that the beneficiary worked as a cook in Brazil for at least two years and thus, he possessed the requisite work experience in the job offered before the priority date.

Nevertheless, the petition is currently not approvable because the record does not contain sufficient evidence establishing the petitioner’s ability to pay the proffered wage from the priority date.

The regulation at 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 either in the

¹⁰ The O*Net-SOC job code can be found online at: <http://www.onetonline.org> (last accessed August 17, 2011).

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, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 24, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.¹¹

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, United States Citizenship and Immigration Services (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 Sonogawa*, 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 petitioner's ability to pay the proffered wage.

The beneficiary claimed in his Biographical Information (Form G-325) that he worked for the petitioner from 1997 to the date he signed the form (June 12, 2003). [REDACTED] the owner and president of the petitioning business, states in a signed statement dated June 12, 2009 that the beneficiary was employed as a cook for a period of several years ending in 2004. However, the record contains no evidence that the beneficiary was employed by the petitioner from 1997 to 2004.

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

¹¹ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

(Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the AAO determines that [REDACTED] signed statement alone without other supporting documentation is not reliable and does not establish the veracity of the assertions.

When the petitioner fails to employ and pay the beneficiary an amount at least equal to the proffered wage during the relevant time frame, USCIS next examines 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record contains no relevant evidence to demonstrate the petitioner’s ability to pay \$12.57 per hour or \$22,877.40 per year from April 24, 2001 until the beneficiary obtains lawful permanent residence.¹³

We also note that the petitioner has filed multiple immigrant-visa petitions in the past. [REDACTED] stated in his signed statement dated June 12, 2009 that his company had filed approximately 10 visa petitions for qualified foreign workers when U.S. workers were not available.¹⁴ The AAO requested the petitioner in the NDI/RFE to list all the names of the beneficiaries, the status of each petition, and the proffered wage and job title of each beneficiary on each petition. In response to the AAO’s NDI/RFE, counsel states, “We respectfully urge the AAO to wait an additional 30 days, or until September 26, 2010 for the documentation requested of the petitioner.” No additional evidence has been received or submitted to date.

¹² According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹³ The record contains the following evidence: a copy of the petitioning business’ federal tax return filed on Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2000; copies of the business’ bank statements for 2001; and several Forms W-2 for the year 2001 issued to various employees who no longer work for the petitioner. The AAO in the NDI/RFE stated that none of the evidence mentioned above can be accepted as evidence of the petitioner’s ability to pay the proffered wage.

¹⁴ A review of USCIS electronic records reveals that the petitioner has filed 10 petitions in the past including one for the beneficiary in the instant proceeding.

Since the petitioner failed to submit additional evidence as requested, the AAO concludes that the petitioner has failed to establish that it has the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent residence.

Finally, 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 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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. Upon review, the AAO is not persuaded that the petitioner has that ability. For this reason, the approval of the petition cannot be reinstated. 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.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.