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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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Date: AUG 2 2 2012

Office: TEXAS SERVICE CENTER

FILE: [redacted]

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 BENEFICIARY:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 May 24, 2012 the director revoked the approval of the petition, invalidated the previously approved labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a).[1] Upon review, the AAO will affirm the director's decision.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary 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).[2] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750).[3] The petition was initially approved by the Director, Vermont Service Center, on March 18, 2005 before the Director, Texas Service Center, revoked the approval of the petition on July 22, 2009. The petitioner subsequently appealed the decision of the Director, Texas Service Center (the director), to the AAO. Upon review, the AAO withdrew the director's July 22, 2009 decision and remanded the matter to the director for issuance of a new detailed Notice of Intent to Revoke (NOIR) and decision.

On remand, the director sent a NOIR on January 11, 2012. In the January 11, 2012 NOIR, the director advised the petitioner to describe its interactions with Mr. Dvorak[4] with respect to the

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[1] Under 8 C.F.R. § 103.4(a)(1) certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact."

[2] 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.

[3] This petition involves the substitution of the labor certification beneficiary. The original beneficiary was "Rinat Latypov." Upon filing the Form I-140 petition, the petitioner requested that the original beneficiary be substituted by the beneficiary in the instant case. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[4] Mr. [redacted] was the petitioner's and the beneficiary's counsel originally. He helped the petitioner in the labor certification process. He also helped the petitioner file the Form I-140 petition in 2005. He was under U.S. Citizenship and Immigration Services (USCIS) investigation for allegedly submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions, when the director initially sent a NOIR on February 9, 2009. Mr. [redacted] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. Mr. [redacted]

recruitment procedures including interviewing and consideration of candidates and to outline the specific steps it took to conduct good faith recruitment, e.g. other than the advertisements in the *Boston Herald*. The director asked the petitioner to identify the recruitment source by name, to state how many candidates were interviewed, to explain whether and how the petitioner conducted interviews and determined that no other U.S. candidate was eligible for the position, and to specify whether and for how long the company posted an in-house posting notice recruiting for the position. The director requested the petitioner to submit copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the U.S. Department of Labor (DOL) requirements to ensure that no United States worker was qualified, willing and available to take the position.

The director also identified 40 other employment-based petitions that the petitioner filed since 2001 and noted that none of the evidence submitted is sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until all of the beneficiaries, including the beneficiary in the instant case, receives their lawful permanent residence.

No additional evidence was submitted, and the director issued the Notice of Certification (NOC) on May 24, 2012. In the NOC, the director found that: (a) the petitioner did not conduct good faith recruitment in advertising for the proffered position (that there was fraud or willful misrepresentation involving the labor certification) and (b) the petitioner failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, the director revoked the approval of the petition and invalidated the approved Form ETA 750 labor certification.

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.

As set forth in the director's May 24, 2012 NOC, the issues in this case are (a) whether the petitioner conducted the recruitment in accordance with Department of Labor (DOL) regulations, whether there was fraud or willful misrepresentation involving labor certification process and (b) 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.

a) <u>Good Faith Recruitment and Invalidation of the Labor Certification</u>

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representations in this matter will be considered. He will be referred to throughout this decision by name.

The record contains the following evidence to demonstrate that the petitioner complied with DOL recruitment procedures:[5]

- Copies of the newspaper tear sheets for the position offered, published in the *Boston Sunday Herald* on the following days and dates: Sunday, January 28, 2001; Sunday, February 4, 2001; Sunday, February 25, 2001; and Sunday, March 4, 2001; and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* addressed to Mr. Dvorak stating that the job ads would also be posted online on jobfind.com for 30 days.

The AAO acknowledges that before 2005, employers filing a Form ETA 750 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).

Here, the record reflects that the Form ETA 750 was submitted to DOL for processing on February 28, 2001, and that DOL certified the Form ETA 750 on February 7, 2002. Since there was no requirement to keep recruitment records once the labor certification was approved before 2005, USCIS may not make an adverse finding against the petitioner, if the petitioner no longer retains any documentation.

Moreover, the AAO notes that the DOL at the time the petition was filed in 2001 accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2001). 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) (2001). 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) (2001).

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

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[5] The evidence above was submitted by Mr. [redacted] after the director issued the February 9, 2009 NOIR.

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).

Based on the evidence submitted (i.e. the copies of the advertisement published in the *Sunday Boston Herald* before the priority date, i.e. on January 28, 2001; February 4, 2001; and February 25, 2001), the petitioner conducted a reduction in recruitment process, which was allowed at the time.

However, the record contains evidence that undermines the *bona fides* of the recruitment process and puts at issue the petitioner's identity. USCIS, pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

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).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. 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. 582, 591-592 (BIA 1988).

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 by 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.[6]

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, or after the petition is automatically revoked, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having "sought to procure" an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regard to the current proceeding, 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 [she] 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. A material issue in this case is whether the labor certification is valid. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. 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:

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[6] 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 has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

> (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 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.

Here, the director in the January 11, 2012 NOIR identified anomalies involving the recruitment process. The director stated that the petitioner signed the Form ETA 750 on January 31, 2001 prior to conducting recruitment by placing advertisements on February 4, 2001; February 25, 2001; and March 4, 2001.[7] By signing the Form ETA 750, the petitioner essentially stated under penalty of perjury that the recruitment was complete. Based on the evidence submitted in this case, if the petitioner conducted the recruitment under the reduction in recruitment procedures, the petitioner had to have completed the recruitment efforts and declared that its efforts to recruit U.S. workers yielded no results by January 31, 2001 (the date the petitioner signed the Form ETA 750). Nevertheless, based on the evidence submitted, the petitioner placed three other advertisements after it signed the Form ETA 750 on January 31, 2001.

The petitioner's premature signature, therefore, raises the likelihood that the DOL's recruitment procedures were not followed and that the petitioner or Mr. [redacted] (the attorney who represented the petitioner in filing the Form I-140) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, merely signed the Form ETA 750 and let Mr. [redacted] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates, or making the decision on whether to refer recruits to the petitioner).

In addition, the director in the January 11, 2012 NOIR questioned the identity of the petitioner. The director specifically indicated that the petitioner's Employer Identification Number (EIN) as listed on the Form I-140 petition (EIN 33-0506681) does not belong to any United States taxpayer or entity.[8] The director requested the petitioner to identify whether it was a franchise operation or part of one of the five Papa Ginos' entities at the address listed for the petitioner.

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[7] The AAO notes that one advertisement for the position of cooks was placed in the newspaper on January 28, 2001 – three days before the petitioner signed the Form ETA 750.

[8] A search of EIN # [redacted] in the public records does not produce the name of any U.S. entity.

The director indicated that USCIS may find fraud if the petitioner failed to respond to the January 11, 2012 NOIR. The petitioner did not respond to the January 11, 2012 NOIR and did not contest the director's finding of fraud on certification. The AAO finds sufficient evidence in the record to find fraud or willful misrepresentation against the petitioner involving the labor certification and that the labor certification should be invalidated.

The director has laid out in specific details of the problems that appear on the approved labor certification and requested that the petitioner submit additional evidence to rebut his conclusion that the labor certification was falsified. No evidence or explanation has been submitted to rebut the director's finding that the recruitment process was not conducted in accordance with DOL regulations, or that the petitioner is not a valid U.S. entity.

Such additional evidence is material because, if it were provided, it would demonstrate that the petitioner is a valid U.S. entity, and that the recruitment was conducted in accordance with DOL procedures. The petitioner's failure to submit additional evidence creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14). 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)).

Based on the noted inconsistencies in the evidence supporting the petition, and considering that the petitioner received the NOIR and did not address such inconsistencies, and that the petitioner failed to respond to the NOIR, the AAO finds that the petitioner has deliberately concealed and willfully misrepresented facts about the validity of the labor certification.[9] Although the

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[9] The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility

petitioner in this case presented an approved labor certification, the labor certification appears to have been approved erroneously.

If the DOL had initially known the true facts, it would have denied the employer's application for labor certification, as the Form ETA 750 was falsified. In other words, the concealed facts, if known, would have resulted in the outright denial of the Form ETA 750. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). The DOL was unable to make a proper investigation of the facts when determining eligibility for the benefit sought, because the petitioner shut off a line of relevant inquiry by submitting a fraudulent or falsified document. Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By submitting a fraudulent document to USCIS, the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. *See* also *Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, it is proper for USCIS to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182.

For these reasons, we find that much of the petitioner's documentation with respect to the labor certification has been falsified, a finding that the petitioner did not challenge in that the petitioner did not respond to the director's NOIR dated January 11, 2012 or to the NOC dated May 24, 2012. The director's decision to invalidate the certified Form ETA 750 is affirmed as evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. *See* 20 C.F.R. § 656.30(d).

b) <u>The Petitioner's Ability to Pay</u>

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 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).

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and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on February 28, 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.[10]

To show that the petitioner has the ability to pay $12.57 per hour or $22,877.40 per year from February 28, 2001 and continuing until the beneficiary receives lawful permanent residence, the petitioner submitted the following evidence:

- A copy of a paycheck dated June 17, 2005 issued to the beneficiary in the amount of $267.33;
- Various internet printouts on a company called "Papa Gino's Holdings Corporation, Inc." downloaded from the following website addresses: http://www.hoovers.com; http://www.bizjournals.com; http://biz.yahoo.com/ic; http://www.csgis.com; and
- A list of business locations, as shown at http://www.papaginos.com/locations.html, with the following hand notation: "168 restaurants."

The evidence submitted above is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wages of the beneficiaries identified in the director's January 11, 2012 NOIR from the priority date until each beneficiary, including the beneficiary in the instant case, receives or received his or her permanent residence.[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

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[10] 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).

[11] As noted by the director in the January 11, 2012 NOIR, Papa Ginos has filed 40 other employment-based immigrant visa petitions for alien beneficiaries other than the beneficiary in this case. Consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages not only for the current beneficiary but for the other immigrant visa beneficiary until either one or more of these circumstances apply: (a) each beneficiary receives his or her legal permanent residence (LPR), (b) unless and until we revoke the petition, or (c) unless and until the petitioner withdraws the petition. No additional evidence as requested has been received.

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 petitioner's ability to pay the proffered wage.

No evidence has been submitted to show that the beneficiary was employed and paid by Papa Ginos or the petitioner, with EIN [redacted] Further, the petitioner failed to demonstrate that there is an organization with the EIN [redacted] Moreover, a search in the website of the Massachusetts Department of State, Corporations Division (http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp), reveals that there are five entities located at [redacted] MA (the location which was listed on the Form I-140): Papa Gino's Acquisition Corp. (ID number 330491264); [redacted] Franchising Corp. (ID number [redacted]; Papa Gino's of American Franchising Limited Partnership (ID number [redacted] Papa Gino's Inc. (ID number [redacted]; and [redacted] Card Services Inc. (ID number [redacted] It is not clear from the evidence of record, which if any of these five entities originally filed the petition on behalf of the beneficiary in the instant case. The petitioner failed to identify whether it is part of the corporate network of [redacted] doing business at [redacted] MA, or whether it operated as a franchise. As noted earlier, the petitioner's failure to submit additional evidence creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14).

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of $12.57 per hour or $22,877.40 per year from February 28, 2001 until the beneficiary obtains legal permanent residence. The petitioner can show that it can pay $22,877.40 per year through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

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[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

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, however, contains no evidence showing the petitioner's net income or net current assets from 2001. The petitioner failed to submit evidence such as copies of its federal tax returns, annual reports, or audited financial statements for the years 2001 and thereafter. Due to this lack of evidence, the AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date.

The various internet printouts showing the basic financial information (gross sales and revenue in 2003) for [redacted] Holding Corporation, Inc. cannot be accepted as evidence of the petitioner's ability to pay, because the petitioner has not established itself as the [redacted] Holding Corporation, Inc. Moreover, the petitioner has not identified who the employer is that originally filed the petition on behalf of the beneficiary in 2001. The submission of evidence suggesting that [redacted] Holding Corporation, Inc. is the petitioner is a gross misrepresentation.

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.

(such as taxes and salaries). *Id.* at 118.

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.* Given that the petition's approval has been revoked and the fact that the petitioner failed to respond to any of the director's Notices of Intent to Revoke, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

Section 205 of the Act, 8 U.S.C. § 1155, states:

> The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition.

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).

For the reasons stated above, the AAO finds that the petitioner has failed to demonstrate by preponderance of the evidence that it conducted good faith recruitment, and that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives her lawful permanent residence. The AAO affirms the director's finding of fraud and willful misrepresentation against the petitioner and the invalidation of the labor certification. The director had good and sufficient cause to revoke the approval of the petition as required by section 205 of the Act, 8 U.S.C. § 1155.

The revocation of the approval of the petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision to revoke the approval of the petition is affirmed.

FURTHER ORDER: The AAO finds that the petitioner knowingly misrepresented a material fact by submitting fraudulent documents in an effort to procure a benefit under the Act and the implementing regulations.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number P2001-MA-01309656, filed by the petitioner is invalidated.