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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

[redacted]

B6

Date: JUL 2 4 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 PETITIONER:

SELF-REPRESENTED

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: The preference visa petition was approved by the Director, Vermont Service Center, on April 24, 2002; however, on March 21, 2012 the Director, Texas Service Center, revoked the approval of the immigrant petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review. Upon review, the AAO will affirm the director's decision in part and withdraw the director's decision in part.

1. Facts and Procedural History

The petitioner is a bakery company.[1] It seeks to employ the beneficiary permanently in the United States as a baker, 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 accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The Vermont Service Center director initially approved the petition on April 24, 2002.

However, on February 18, 2009 the director of the Texas Service Center ("the director") sent the petitioner Notice of Intent to Revoke (NOIR) stating:

> The Service [U.S. Citizenship and Immigration Services or USCIS] 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 Mr [redacted], the petitioner's attorney].[3]

The director advised the petitioner in the NOIR to submit additional evidence to show that (a) the petitioner complied with all of the DOL recruiting requirements and (b) the beneficiary

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[1] The petitioner's name is Panera Bread. The petitioner claimed in the Form I-140 petition that its address is at 7930 Big Band Boulevard, St. Louis, MO.

[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 raining or experience), not of a temporary nature, for which qualified workers are not available in the United States.

[3] The AAO notes that Mr. [redacted] was under USCIS investigation at the time the NOIR was sent for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. Mr. [redacted] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. His representations in this matter will be considered; however, he will not be sent a copy of this decision. He will be referred to throughout this decision as previous counsel or by name.

possessed two years of work experience in the job offered before the labor certification application was filed with the DOL.

Responding to the director's NOIR, Mr. [redacted] submitted the following evidence:

- A copy of the newspaper tear sheet for the position offered, published in the *Boston Sunday Herald* on Sunday, February 11, 2001;
- A copy of a letter dated February 14, [redacted] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A statement dated March 9, 2009 from Mr. [redacted] stating that the beneficiary worked as his company "Padaria Bom Pao" (Bom Pao Bakery) as a baker from March 15, 1994 to January 5, 1998;[4] and
- A copy of the business registration of Ronaldo Faustino Ribeiro ME with CNPJ number of [redacted] showing that the business has been "inapta" since 18/09/2004 (September 18, 2004).

Mr. [redacted] also claimed that the beneficiary no longer worked for the petitioner and had ported in accordance with section 204(j) of the Act. Accompanying this claim was a letter dated March 11, 2008 from [redacted] Payroll Benefits Specialist, stating that the beneficiary is currently employed by Whole Foods Market as a store baker and has been working for Whole Foods Market since June 26, 2006.

Upon review of the evidence submitted above, the director issued a Notice of Revocation (NOR) on May 6, 2009 finding that the petitioner failed to follow the regulations set by the DOL when applying for labor certification on behalf of the beneficiary. Specifically, the director stated that the petitioner failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. Further, the director stated that the submission of the copy of the letter dated February 14, 2001 addressed to Mr. [redacted] from the *Boston Herald* showed that Mr. [redacted] paid for and created the advertisement for the job offered. The director cited an AAO decision, *In re EAC 02 185 51755*, which stated that where an agent or legal representative of an employer paid for and created the job advertisement for the job offered the agent/legal representative may have impermissibly

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[4] The AAO notes that the petitioner previously submitted a letter from Mr. [redacted] Ribeiro in support of the Form I-140 petition stating that the beneficiary baked cakes and all kinds of bread at his company, Padaria Bom Pao, from March 15, 1994 to January 5, 1998. This letter was dated March 10, 2001.

[5] Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States.

participated in the consideration of U.S. applicants for the job.[6] The director also concluded that the beneficiary did not have the requisite experience in the job offered before the priority date. In summary, the director indicated that the documents submitted in response to the NOIR were in themselves a willful misstatement of material facts, constituting fraud.

On December 29, 2010 the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5). The director withdrew the decision issued on May 6, 2009 (the NOR) and reinstated the approval of the petition.

On December 6, 2011 the director sent another Notice of Intent to Revoke (NOIR) to the petitioner. In this NOIR, the director advised the petitioner to describe its interactions with Mr. [redacted] with respect to the 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 DOL requirements to ensure that no United States worker was qualified, willing and available to take the position.

Regarding the beneficiary's qualifications for the job offered, the director found that:

(1) Neither the letter of employment dated March 10, 2001 nor the statement dated March 9, 2009 from Mr. [redacted] complied with the regulation at 8 C.F.R. § 204.5(g)(1),[7] in that neither includes a specific description of the job duties; and
(2) The beneficiary failed to include her employment abroad on the Form G-325 (Biographic Information), which she filed along with her Application to Register for Permanent Residence or Adjust Status (Form I-485).

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[6] The copy of the decision can be found at http://www.uscis.gov under Administrative Decisions, decisions issued in 2005 (File name: [redacted].

[7] In pertinent part, 8 C.F.R. § 204.5(g)(1) states:

> 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.

See also 8 C.F.R. § 204.5(l)(3)(ii)(A).

To resolve the deficiencies in the record, the director requested the petitioner to submit independent objective evidence, such as copies of paystubs, payroll records, tax documents, financial statements, and other evidence to show employment of the beneficiary at [redacted] ME, including a copy of a government issued identification card showing where the beneficiary worked and lived between 1994 and 1998.

With respect to the petitioner's ability to pay, the director 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 the beneficiary receives her lawful permanent residence.

Moreover, the director stated in the NOIR dated December 6, 2011 that the petitioner is required to maintain its intention to employ the beneficiary as the petition remains unapproved at this time. The director requested that the petitioner provide an original letter stating that the petitioner intends to employ the beneficiary.

The director indicated that if the petitioner does not intend to employ the beneficiary the petition is considered moot, although it will not prevent a determination of fraud or misrepresentation.

The petitioner did not respond to the director's December 6, 2011 NOIR.

On March 21, 2012 the director revoked the approval of the petition, invalidated the labor certification, and certified the matter to the AAO, pursuant to 8 C.F.R. § 103.4(a). In the Notice of Certification, the director concluded that (1) the petitioner failed to follow DOL recruitment procedures in recruiting U.S. workers, (2) the beneficiary did not have the requisite work experience in the job offered as of the priority date, and (3) the petitioner failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date.

We find, after reviewing the evidence of record, that the director had good and sufficient cause to revoke the approval of the petition. Further, we agree with the director that the petitioner failed to demonstrate that the beneficiary qualifies for the position offered and that the petitioner has the ability to pay the proffered wage from the priority date. We will withdraw the director's decision to invalidate the labor certification, however, as evidence of record does not support the finding of fraud or willful misrepresentation involving the labor certification.

2. Sufficiency of Notice to the Petitioner

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

> The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er]

> 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).

However, before the director can revoke the approval of the petition, the regulation requires that notice must be provided to the petitioner. More specifically, 8 C.F.R. § 205.2 reads:

> (a) *General.* Any Service [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 Service [USCIS]. (emphasis added).

In addition, 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

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *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 unrebutted, 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, the director provided the petitioner with notice of the derogatory information specific to the current proceeding. In the NOIR dated December 6, 2011 the director specifically requested the petitioner to outline the specific steps it took to conduct good faith recruitment and to submit corroborating evidence such as copies of the in-house posting notice and the advertisements in the newspapers.

The copies of the advertisements submitted by Mr. [redacted] do not show that the petitioner followed the DOL recruitment requirements. An advertisement was placed on February 11, 2001, about two months before the petitioner filed the Form ETA 750 with the DOL for processing on April 12, 2001. This is consistent with reduction in recruitment, which was allowed at the time.[8]

However, the director in the Notice of Certification noted an anomaly in this case. The petitioner, based on the evidence submitted, began recruiting (by advertising in the newspapers) on February 11, 2001. The record reflects that the petitioner signed the Form ETA 750 on February 5, 2001. By signing the Form ETA 750 on February 5, 2011, the petitioner stated under penalty of perjury that the recruitment was complete. The fact that recruitment was not complete when the petitioner signed the Form ETA 750 suggests that Mr. [redacted] (the attorney who represented the petitioner in filing the Form I-140 petition) might have been impermissibly involved in the recruiting process (if the petitioner, for instance, signed the Form ETA 750 and let Mr. [redacted] take over the recruitment efforts by allowing Mr. [redacted] to place the advertisement and interview U.S. candidates or decide not to refer any applicants to the petitioner for consideration).

The petitioner did not respond to the director's NOIR dated December 6, 2011, nor has it provided an explanation or submitted evidence to resolve the anomaly described above by the director in the Notice of Certification.

Further, in the NOIR dated December 6, 2011 and the Notice of Certification dated March 21, 2012, the director outlined the inconsistencies in the record pertaining to the beneficiary's prior work experience as a baker in Brazil. First, the director noted that neither of the employment verification letter from [redacted] ME included a specific description of the experience or training received by the beneficiary, as required by 8 C.F.R. § 204.5(g)(1). Second, the director indicated that the beneficiary failed to include her employment abroad on the Form G-325 (Biographic Information).[9]

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[8] 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) (2001).

[9] The AAO notes in reviewing the case that the beneficiary claimed in her Form G-325 that she lived in [redacted] Brazil from 1987 to January 1999. [redacted] according to the evidence submitted, is located in Mantena, Minas Gerais, Brazil. The straight-line distance between [redacted] according to http://www.distancecalculator.globefeed.com, is 102.29 km (the estimated travel road/distance can be around 117.63 km to 127.86 km) (last accessed June 22, 2012). Based on these stated facts we conclude that it is not likely that the beneficiary lived in [redacted] and worked in Mantena, [redacted] between 1994 and 1998. This is not one of the inconsistencies in the

Moreover, in the NOIR dated December 2, 2011 and the Notice of Certification dated January 6, 2012 the director specifically advised the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date.

The petitioner has not submitted any independent objective evidence in response to the director's NOIR dated December 6, 2011 or to the director's Notice of Certification dated March 21, 2012 resolving the specific inconsistencies and the deficiencies described above. Such evidence, if provided, would have shed more light on the beneficiary's work experience in Brazil and his qualifications for the proffered job. It would also demonstrate whether the petitioner followed the DOL recruitment procedures and whether the petitioner has the ability to pay the proffered wage from the priority date. The director provided the petitioner with specific derogatory notice and the opportunity to respond. The director's NOIR and the decision to revoke the approval of the petition are based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

3. The Beneficiary's Qualifications

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.

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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 12, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Baker." 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.

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record pertaining to the beneficiary's qualification mentioned by the director in either the NOIR dated December 6, 2011 or the Notice of Certification dated March 21, 2012. The petitioner should address this inconsistency in any further filings.

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 12, 2001 (the priority date) is material in this case, since the beneficiary must qualify for the job offered in the labor certification as of that date for visa eligibility.

To demonstrate that the beneficiary possessed the requisite work experience in the job offered the petitioner, as stated above, submitted only two letters of employment from Mr. [redacted] Padaria Bom Pao (one is dated March 10, 2001 and the other March 9, 2009), neither of which includes a sufficient description of the job duties or training of the beneficiary.

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

> 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.

Simply stating that the beneficiary worked as a baker or that the beneficiary baked cakes and all kinds of bread is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion. The director specifically issued the notice to the petitioner to allow the petitioner an opportunity to respond or submit additional evidence to overcome the deficiencies. The petitioner did not submit any response. Thus, the AAO agrees with the director that the record does not establish that the beneficiary qualifies to perform the duties of the position. The record does not establish that he had the requisite work experience in the job offered before the priority date.

4. <u>Ability to Pay</u>

Moreover, the petition is not approvable because the record does not contain sufficient evidence to demonstrate that the petitioner has the continuing 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 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 12, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is $12.61 per hour or $22,950.20 per year based on a 35 hour work week.[10]

To show that the petitioner has the continuing ability to pay $12.61 per hour or $22,950.20 per year from April 12, 2001, the petitioner submitted copies of the following evidence:

- A copy of a NASDAQ stock quote for Panera Bread Company on November 21, 2001,
- A press release regarding Panera Bread Company's third quarter earnings dated November 7, 2001, and
- An unaudited financial report for the forty weeks ending October 6, 2001 for Panera Bread Company.

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 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.

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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).

No evidence has been submitted to show that the beneficiary was employed and paid by the Panera Bread Company (the petitioner). Further, no evidence has been submitted to demonstrate that the corporate office of the Panera Bread Company is the petitioner.[11]

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 $12.61 per hour or $22,950.20 per year from April 12, 2001 until the beneficiary obtains legal permanent residence, or until the beneficiary ported to work for another employer in a similar job, assuming that section 204(j) of the Act applies in this instant proceeding.[12]

The petitioner can show that it can pay these amounts 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.*

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[11] We note that the petitioner in this case may be a franchisee of the Panera Bread Company. The record contains no evidence to show that the corporate headquarters of the Panera Bread Company filed the Form I-140 petition.

[12] As noted earlier, Mr. [redacted], in response to the director's first Notice of Intent to Revoke (NOIR) dated February 18, 2009, stated that the beneficiary had ported to work for another employer, pursuant to section 204(j) of the Act, which provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. This section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

On the subject of porting, the AAO notes that where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

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.[13] A corporation's year-end current assets are

[13] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets"

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. No evidence such as copies of the business' federal tax returns, annual reports, or audited financial statements for the years 2001 and thereafter has been submitted. 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.

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

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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.

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.

5. Invalidation of the Labor Certification

Finally, the director, as stated earlier, invalidated the labor certification because there was fraud or willful misrepresentation involving the labor certification. 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.

Upon *de novo* review, the AAO finds that evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification.[14] Therefore, the director's decision to invalidate the certified Form ETA 750 will be withdrawn.

Nonetheless, the revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The

[14] The AAO notes that the director invalidated the labor certification because the petitioner failed to respond to the director's NOIR dated December 6, 2011. The record contains insufficient evidence to support the director's conclusion that there was fraud or willful misrepresentation.

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 previously approved petition is affirmed.

FURTHER ORDER: The decision to invalidate the alien employment certification, Form ETA 750, ETA case number P2001-MA-01315683, is withdrawn.