

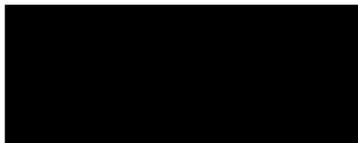
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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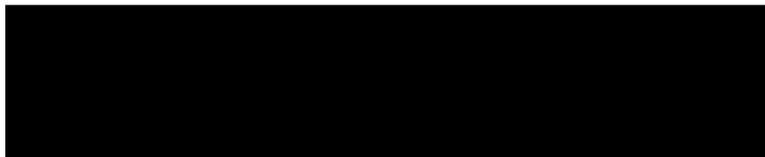
Petitioner:

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 June 25, 2003, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. As required by statute, the petition was accompanied by an Application for Alien Employment Certification (Form ETA 750), approved by the U.S. Department of Labor (DOL). The employment-based immigrant visa petition was initially approved by the VSC director on December 2, 2005. However, on November 23, 2010, the Director of the Texas Service Center (TSC) determined that the petitioner had obtained the approval of the Form ETA 750 by fraud or material misrepresentation and revoked the approval of the petition. The director also stated that the approved labor certification was invalidated and that the approval of the petition was automatically revoked pursuant to 8 C.F.R. § 205.1.¹ The matter is now before the Administrative Appeals Office (AAO) on appeal. 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 national chain restaurant.² It seeks to permanently employ the beneficiary in the United States as a cook in one of the petitioner’s locations in Tewksbury, Massachusetts. The beneficiary being sponsored is classified as a skilled worker 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).³ As noted above, the petition was initially approved in December 2005, but the approval was revoked in November 2010. The director found multiple inconsistencies in the record pertaining to the beneficiary’s work experience in the United States and Brazil. Specifically, the director found that the beneficiary’s prior employer in Brazil, [REDACTED] was not registered with

¹ Under 8 C.F.R. § 205.1, an employment-based immigrant visa 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) the petitioner is no longer in business.

² According to its website (<http://www.applebees.com>), there are currently over 1990 Applebee’s restaurants operating system-wide in 49 states, 15 international countries and one U.S. territory. The [REDACTED] system employs approximately 28,000 employees company-wide.

³ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

the Brazilian government until November 1992.⁴ Based on this finding, the director concluded that the beneficiary could not have worked there from January 2, 1991, and that the petitioner must have submitted false documentation regarding the beneficiary's prior work experience in Brazil.

The director also found that the beneficiary failed to list his employment at [REDACTED] on his Biographic Information (Form G-325), where he was required to include his employment abroad.⁵ In addition, the director found that the beneficiary's claim that he had worked for the petitioner since 1996 on his Biographic Information (Form G-325) was not consistent with other evidence of record. Specifically, the director noted that the beneficiary failed to list his employment with the petitioner since 1996 on part B of the Form ETA 750.

On appeal, counsel for the petitioner asserts that the director's finding of fraud or willful misrepresentation against the petitioner is not supported by the evidence in the record, and that there is no good and sufficient cause to revoke the approval of the petition, as required by Section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155. Counsel states in his appellate brief that the fact that the beneficiary's employer in Brazil did not register its business until after the beneficiary worked there does not mean that the beneficiary misrepresented his work experience. Counsel further notes that the employer's failure to register its business in Brazil until after the beneficiary worked there was not the beneficiary's fault and was beyond his control. According to counsel, the beneficiary would still have the requisite two years of experience in the job offered and would qualify for the position offered even if the director's argument regarding the [REDACTED] registration were valid.⁶

On appeal, the petitioner submits the following evidence to demonstrate that the petitioner employed the beneficiary from 1996, and that the beneficiary worked as a cook in Brazil for at least two years:

⁴ According to the CNPJ printout, [REDACTED] ME was registered with the Brazilian government on November 30, 1992. The CNPJ printout can be accessed online at the following website address: <http://www.receita.fazenda.gov.br/> under [REDACTED] (last accessed on April 21, 2011).

⁵ In connection with his application to adjust status to legal permanent residence, the beneficiary filled out and signed the Form G-325.

⁶ CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ number. As noted by the director, 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.

- The beneficiary's Forms W-2 for the years 1996 issued by [REDACTED] in Kansas and for the years 1997, 1998, and 2001-2008 issued by [REDACTED] in Kansas and Massachusetts;⁷ and
- A signed statement dated December 1, 2010 from [REDACTED] managing partner of [REDACTED] who stated that [REDACTED] employed the beneficiary as a cook from "01/02/91 – 12/30/1994" (January 2, 1991 – December 30, 1994), and that it was not possible to register the business until November 30, 1992.

The record also contains a signed statement of [REDACTED] dated March 15, 2001 that the petitioner submitted with the petition stating that [REDACTED] employed the beneficiary as a cook from January 2, 1991 to December 30, 1994.

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.⁸

The director revoked the approval of the petition, in part, because the beneficiary is not qualified to perform the services of the position as of the priority date. The AAO agrees.

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 Department of Labor (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The name of the job title or the position for which the petitioner sought to hire is "cook." The DOL classified this job description as a restaurant cook under Standard Industrial Classification (SIC) and Standard Occupational Classification (SOC) 5812 and 35-2014.⁹ Under section 14 of the Form ETA 750, part A, the petitioner specifically required each applicant for this position to have a minimum of two years experience in the job offered. Under the job description, the

⁷ Both companies [REDACTED] have the same employer identification number [REDACTED]. The petitioner listed the same [REDACTED] on the Form I-140 petition. In 2009, however, the beneficiary's Form W-2 was issued by [REDACTED] with an [REDACTED].

⁸ 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).

⁹ The SIC Code can be found online at <http://www.osha.gov/pls/imis/sicsearch.html>. The SOC Code can be accessed online at the following website address: <http://www.bls.gov/soc/home.htm>.

petitioner wrote: “be able to prepare and cook various dishes according to menu and customers requests and also clean up the working area at end of shift.”

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (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 April 16, 2001, he represented that he worked for a restaurant in Brazil called “██████████” from January 2, 1991 to December 30, 1994. The record contains two similar signed statements dated March 15, 2001 and December 1, 2010, both from ██████████ generally stating that the beneficiary worked as ██████████ from January 2, 1991 to December 30, 1994. No other evidence, such as copies of paystubs, accounting records, or payroll records, was submitted to show and corroborate the petitioner’s claim that the beneficiary worked as a ██████████ from 1991 to 1994.

Further, the beneficiary failed to list the employment with ██████████ on the Form G-325A (Biographic Information), at the section of the Form where the beneficiary is instructed to list his last occupation abroad. On appeal, counsel states that the beneficiary should not be found to have fraudulent intentions because of his failure to list the work experience of ██████████ on the Form G-325A. As discussed further below, the AAO agrees that this omission does not rise to the level of fraud and misrepresentation. Nevertheless, USCIS relies upon completed forms, petitions, and applications for evidence of consistency in the beneficiary’s work history. The failure of the beneficiary to provide his last employer and last residence abroad¹⁰ is not without consequence, as USCIS requires objective, independent evidence to resolve any inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (stating that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and that any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies); *also see Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)) (stating that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings). Here, as stated earlier, the beneficiary’s prior employer in Brazil – ██████████ – was not officially registered until November 30, 1992, creating an inconsistency in the record that the petitioner has failed to resolve with independent, objective evidence.

¹⁰ The G-325A also fails to list the beneficiary’s last residence abroad.

Under these circumstances and based on the evidence submitted, the AAO finds that the beneficiary did not have the requisite work experience in the job offered before the priority date and is not qualified to perform the services of the position.¹¹ Further, neither signed statements from [REDACTED] complies with the regulation at 8 C.F.R. § 204.5(i)(3)(ii)(A),¹² in that neither sufficiently describes the experience or training received by the beneficiary while he worked there. Thus, the AAO determines that the revocation of the previously approved petition is based on good and sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155.

The remaining issue is whether the director's finding of fraud or material misrepresentation against the petitioner is supported by the evidence in the record.

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."

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term "willfully" means knowing 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). To be considered material, the misrepresentation must be one which "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 Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

¹¹ The CNPJ registration would have given the beneficiary's prior employer in Brazil [REDACTED] a tax identification number, which also registers employees with the National Institute of Social Security in Brazil. *See Doing Business in Brazil – World Bank Group*, <http://www.doingbusiness.org/data/exploreconomies/brazil/> (accessed June 28, 2011). The petitioner's argument that the beneficiary cannot submit any written records of employment at Lamir Alimentos is not consistent with the level of commercial requirements to do business in Brazil.

¹² The regulation at 8 C.F.R. § 204.5(i)(3)(ii)(A) specifically 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."

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 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.

In this case, the beneficiary claimed on part B of the Form ETA 750 that he worked as [REDACTED] in Brazil from January 2, 1991 to December 30, 1994. That claim is consistent with the signed statements submitted by [REDACTED], the managing partner of [REDACTED], that the beneficiary was employed as [REDACTED] from January 2, 1991 to December 30, 1994. The fact that the business in Brazil was not registered with the Brazilian government until after the beneficiary claimed he worked there is not sufficient for the director to conclude that the petitioner willfully misrepresented that the beneficiary was qualified for the position. The record does not contain evidence relating to the Brazilian employment establishing that either the beneficiary or the petitioner knowingly and intentionally misrepresented the beneficiary's claimed employment experience. The record does not establish that the petitioner or the beneficiary submitted falsified documents.

In summary, the evidence of record currently does not support the director's finding of fraud or willful misrepresentation in connection with the beneficiary's qualifications for the position or involving the labor certification. Consequently, the director's invalidation of the labor certification is withdrawn. See 20 C.F.R. § 656.31(d). Therefore, the I-140 petition is not automatically revoked under 8 C.F.R. § 205.1.

Nevertheless, the petition, as noted above, remains unapprovable, as the record does not establish that the beneficiary had the requisite work experience in the job offered before the priority date.

Thus, the director's decision will be affirmed and the petition's approval will remain revoked under 8 C.F.R. § 205.2.¹³

Beyond the decision of the director, the AAO additionally finds that the petitioner has failed 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. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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, the Form ETA 750, as noted earlier, was filed and accepted for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$13.01 per hour or \$27,060.80 per year (based on a 40-hour work per week). Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to demonstrate that it has the continuing ability to pay \$13.01 per hour or \$27,060.80 per year from April 30, 2001 until the beneficiary receives legal permanent residence.

The record contains copies of the following evidence pertaining to the petitioner's ability to pay:

- The beneficiary's Forms W-2 for the years 1996-1998 and for 2001-2009;¹⁴

¹³ The regulation at 8 C.F.R. § 205.2 states:

(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 [USCIS].

- [REDACTED] annual reports for 2003 and 2004.¹⁵

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the Form I-140 petition, the petitioner claimed to have started his business in 1985, to currently employ 106 workers, and to have gross annual income of \$3 million dollars.

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

¹⁴ The AAO notes that the beneficiary seems to have used various social security numbers to receive wages from the petitioner. From 1996 to 1998 and from 2001 to 2003, the beneficiary used [REDACTED] as his social security number. In 2001, the beneficiary also used [REDACTED] as his social security number. Beginning in 2004, the beneficiary used [REDACTED] as his social security number. With the exception of [REDACTED] all social security numbers mentioned above seem to belong to the beneficiary (based on LexisNexis, Accuriat, and Clear databases). The beneficiary's Forms W-2 from 2001-2003 have been altered in that the beneficiary's social security number is scratched through, and the beneficiary's social security number ending in 2913 is handwritten on the forms.

¹⁵ The petitioner, [REDACTED] is a subsidiary of [REDACTED]. *See, www.seefinfo.com*. The petitioner has its own EIN and has not been shown to be part of a controlled corporate group with [REDACTED]. [REDACTED] are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled.

Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120). The record does not identify the petitioner as filing its taxes as part of the [REDACTED] controlled corporate group. As such, in order to establish that it has the ability to pay the wage, the petitioner must submit copies of its own tax returns filed under its own [REDACTED].

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.

Based on the evidence submitted, we find that the beneficiary received the following wages from the petitioner:¹⁶

- \$14,045.76 in 2001¹⁷ (\$13,015.04 less than the proffered wage);
- \$19,471.27 in 2002 (\$7,589.53 less than the proffered wage);
- \$15,697.29 in 2003 (\$11,363.51 less than the proffered wage);
- \$28,196.09 in 2004 (exceeds the proffered wage);
- \$28,803.09 in 2005 (exceeds the proffered wage);
- \$15,171.66 in 2006 (\$11,889.14 less than the proffered wage);
- \$10,218.35 in 2007 (\$16,842.45 less than the proffered wage); and
- \$467.61 in 2008 (\$26,593.19 less than the proffered wage); and
- \$0 in 2009 (\$27,060.80 less than the proffered wage).¹⁸

The W-2s submitted are *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of \$27,060.80 per year for 2004 and 2005. 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 also be able to pay the difference between the actual wage and the proffered wage from 2001 to 2003 and from 2006 to 2009.

The petitioner can either pay these amounts stated above through either its net income or net current assets. If the petitioner chooses to demonstrate the ability to pay 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.*

¹⁶ The AAO will only consider the wages received from the priority date since the petitioner is obligated to demonstrate the ability to pay from the priority date.

¹⁷ In 2001, the beneficiary received two (2) Forms W-2 from the petitioner: \$919.26 from one W-2 and \$13,126.50 from the other.

¹⁸ The beneficiary's wage received in 2009 apparently came from [REDACTED] with an [REDACTED] a distinct and separate entity from the petitioner. Consistent with *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980) and *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the AAO cannot accept and consider any evidence from other entity separate from the petitioner as evidence of the petitioner's ability to pay.

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).

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).

The petitioner has submitted partial copies of the 2003 and 2004 annual reports of [REDACTED] to establish its ability to pay the beneficiary's wage. As noted above, the petitioner must submit copies of its own tax returns to establish the ability to pay. Thus, the annual reports of [REDACTED] will not be considered.

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.¹⁹

¹⁹ 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

However, the petitioner fails to submit copies of its federal tax returns, annual reports, or audited financial statements for the years 2001-2003 and 2006-2009. Due to this lack of evidence, the AAO cannot find that the petitioner 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 Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 [REDACTED] 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence of 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 *Sonogawa*, 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*. After a review of the relevant evidence, 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

cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

has the ability to pay the proffered wage continuously from the priority date, specifically from 2001-2003 and 2006-2009.

The director's revocation of approval of the petition for good and sufficient cause will be affirmed, for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 finding of fraud or material misrepresentation against the petitioner is withdrawn; the director's decision to invalidate the labor certification and the automatic revocation of approval of the petition are withdrawn. The director's revocation of approval of the petition is affirmed for good and sufficient cause. The petition's approval remains revoked.