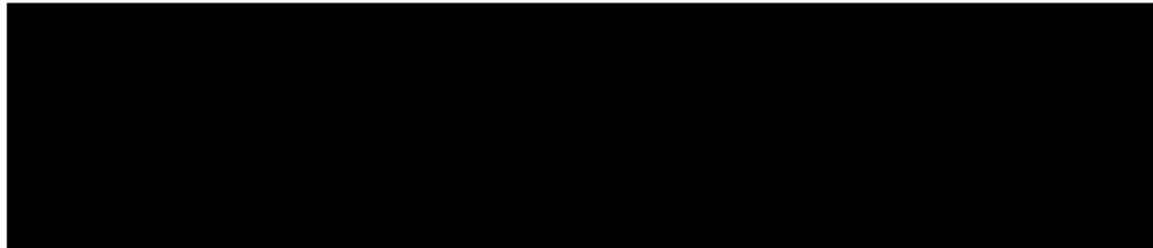


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



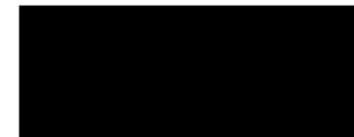
U.S. Citizenship  
and Immigration  
Services



B6

Date: **AUG 13 2012**

Office: TEXAS SERVICE CENTER FILE:

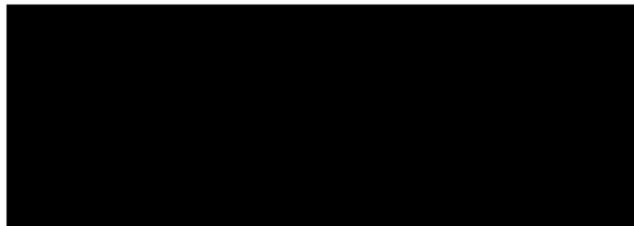


IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On March 21, 2012 the Director, Texas Service Center, revoked the approval of the petition and certified the decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4(a). The matter is now before the AAO on certification. The director's decision will be withdrawn. The petition will be remanded to the Texas Service Center director for further action, consideration, and the entry of a new decision.

### **1. Facts and Procedural History**

The petitioner is a restaurant.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a cook, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>2</sup> 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 February 18, 2003.

However, on February 11, 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 ██████████ the petitioner's attorney].<sup>3</sup>

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<sup>1</sup> ██████████ states in a letter dated February 23, 2012, "The company [referring to the petitioner] provides contract management, food, laundry, and facilities services to a variety of industries, including healthcare, retirement, education, and business institutions."

<sup>2</sup> 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.

<sup>3</sup> The AAO notes that ██████████ was under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions at the time the NOIR above was sent. ██████████ has been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. On February 6, 2012 ██████████ sent a letter to USCIS Texas Service Center requesting his withdrawal from this case. His representation in this matter will be considered; he will not be sent a copy of this decision, however. He will be referred to throughout this decision as previous counsel or by name.

The director advised the petitioner in the February 11, 2009 NOIR to submit additional evidence to show that (a) the petitioner complied with all of the DOL recruiting requirements and (b) the beneficiary 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 February 11, 2009 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 March 25, 2001;
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A sworn statement dated February 26, 2009 from [REDACTED] Partner Manager, stating that the beneficiary worked as a cook specializing in typical dishes, regional dishes, seafood, and Brazilian cuisine at Restaurante Itaparika – CNPJ [REDACTED] from January 10, 1997 to March 28, 1999;<sup>4</sup>
- A copy of the business registration of Aguiar Ramos Comercial Ltda d.b.a. Itaparika Restaurantes with CNPJ number of [REDACTED]<sup>5</sup>
- Pictures of Restaurante Itaparika;
- A signed statement dated March 3, 2009 from the beneficiary declaring that she worked as a cook at Itaparika Restaurant, situated at Av. Zeze Diogo 6801 – Praia do Futuro – Fortaleza – CE – Brazil – zip code 60180-000, from January 10, 1997 to March 28, 1999;
- A copy of the Restaurante Itaparika's Menu (the menu can be found online at <http://www.itaparika.com.br/cardapio.htm>); and
- A letter dated February 19, 2009 from Jennifer Bombard stating that the name of the petitioner has been changed from Sodexho to Sodexo and that the beneficiary has been employed as a cook by the petitioner since 2000.

Upon review of the evidence submitted above, the director issued Notice of Revocation (NOR) on July 23, 2009 finding that the beneficiary did not have the requisite experience in the job offered before the priority date and that the petitioner failed to comply with the DOL recruitment requirements. With respect to the beneficiary's qualification, the director stated that the beneficiary's own statement that she worked as a cook in Brazil is self-serving and carries little weight. Further, the director indicated that the sworn statement dated February 26, 2009 from

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<sup>4</sup> The AAO notes that [REDACTED] Managing Partner, earlier submitted a letter of employment in support of the Form I-140 petition stating that the beneficiary worked as a cook specializing in typical, regional, seafood, and Brazilian food from January 10, 1997 to March 28, 1999. This letter was dated March 27, 2001.

<sup>5</sup> 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.

█ does not lift the doubts that have been cast on the validity of the letter of employment dated March 27, 2001 initially submitted by █ in support of the Form I-140 petition.

Concerning the DOL recruitment requirements, 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. The director also noted that the submission of the copy of the letter dated February 14, 2001 addressed to █ from the *Boston Herald* showed that █ 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 participated in the consideration of U.S. applicants for the job.<sup>6</sup> 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 4, 2009 the petitioner through a new counsel, █ of █ & █ filed an appeal.

On January 30, 2012 the director issued a decision indicating that the appeal was untimely. The appeal, however, was considered as a motion to reopen or reconsider and was granted. The director withdrew the decision issued on July 23, 2009 (the NOR) and reinstated the approval of the petition.

On the same day (January 30, 2012), the director sent another Notice of Intent to Revoke (NOIR) to the petitioner. In this second NOIR, the petitioner was advised by the director to show that the person signing the appeal (Form I-290B) is authorized to file the appeal and to demonstrate that the recruitment procedures were followed and that the recruitment was conducted in good faith. Regarding the beneficiary's qualifications for the job offered, the director noted that the description of the job duties of the beneficiary on the letter of employment dated March 27, 2001 and the sworn statement dated February 26, 2009 from █ do not show that the beneficiary qualifies for the position offered. The director also noted that the beneficiary failed to include her employment abroad on the Form G-325 (Biographic Information), which she filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485).

Moreover, the director asked the petitioner to submit evidence showing that the petitioner still has the intention to employ the beneficiary as the petition remains pending at this time.

Current counsel, █ of Immigration Advocates (will be referred as "counsel" from now on), provided a response to the director's second NOIR on March 5, 2012. To show

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<sup>6</sup> The copy of the decision can be found at <http://www.uscis.gov> under Administrative Decisions, decisions issued in 2005 (File name: MAR172005\_08B6203.pdf).

that [REDACTED] has the authority to sign the appeal, counsel submits the following evidence:

- A certificate of authority dated February 21, 2012 issued by [REDACTED] Corporate Secretary, Sodexo, Inc., stating that [REDACTED] is a Vice President and as such is authorized to execute agreements and government forms on behalf of the Corporation [referring to Sodexo, Inc.] and its wholly owned subsidiaries and thereby to legally bind the Corporation and its wholly subsidiaries; and
- Internet articles showing [REDACTED] as Vice President and General Counsel of Sodexo Marriot Services.

To show that the petitioner conducted recruitment procedures in good faith and in accordance with the DOL regulations, counsel submitted the following evidence:

- A signed statement dated February 23, 2012 from [REDACTED] who states that:
  - ✓ He was the general manager of the petitioner from 2001 to 2003;
  - ✓ He supervised the beneficiary and filed the labor certification application (Form ETA 750) on the beneficiary's behalf;
  - ✓ He tried various methods of recruiting including advertising in newspapers, using the internet, word of mouth, and having an employee referral program since the company constantly had many openings including cooks;
  - ✓ Only the employee referral program worked (the other methods did not work);
  - ✓ He remembered posting a notice at the location where the beneficiary worked and signing a lot of paperwork;
  - ✓ He never individually met [REDACTED] but was certain that [REDACTED] was not involved in the actual recruitment process, such as interviewing or screening applicants;
  - ✓ He cannot recall the specifics of any telephone or written interactions with [REDACTED] since 11 years have passed;
  - ✓ He no longer works for the petitioner; and
  - ✓ He tells the truth as he has no motive to state anything other than the truth.
- A copy of the newspaper tear sheet for the position offered, published in the *Boston Sunday Herald* on January 25, 2001;

To show that the beneficiary qualifies for the position counsel submitted the following evidence:

- A sworn statement dated February 17, 2012 from [REDACTED] stating that:
  - ✓ The beneficiary worked as a cook at our company [referring to Restaurante Itaparika] from January 10, 1997 to March 28, 1999;
  - ✓ Restaurante Itaparika is located at Av. Zeze Diogo No. 6801, Praia do Futuro, Fortaleza Ceara, Brazil;

- ✓ Restaurante Itaparika no longer has the work contract for the beneficiary as the beneficiary worked in the form of "Services Rendered;"<sup>7</sup>
- ✓ The Brazilian laws only require the owner to save contract employment documents for five years, and
- ✓ Restaurante Itaparika destroys all employment documents after seven years.
- A signed statement dated February 17, 2010 from [REDACTED] stating that:
  - ✓ He is the accountant for Restaurante Itaparika;
  - ✓ The beneficiary worked as a cook for approximately two years and two months;
  - ✓ The beneficiary worked in the form of Services Rendered;
  - ✓ The Brazilian laws only require the owner to save contract employment documents for five years, and
  - ✓ Restaurante Itaparika destroys all employment documents after seven years.
- A signed statement dated February 14, 2012 from [REDACTED] stating that he has been working at Restaurante Itaparika for 18 years as a waiter/supervisor and that he worked with the beneficiary from 1997 to beginning of 1999, and that the beneficiary was a cook; and

To explain why the beneficiary did not include her employment abroad on the Form G-325, she submits the following evidence:

- A signed statement dated March 1, 2012 stating that she did not think she needed to include her last employment abroad since she was a student before she came to the United States.

To demonstrate that the petitioner still intends to employ the beneficiary, counsel submits the following evidence:

- A letter dated February 12, 2012 from [REDACTED] Human Resources, stating that the beneficiary has been employed since November 10, 2000 as a cook and that she works at one of Bose locations in Massachusetts; and
- A letter dated February 23, 2012 from [REDACTED] and Associate General Counsel, explaining the history of the company.<sup>8</sup>

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<sup>7</sup> The translator adds this caveat regarding working in the form of Services Rendered, "No equivalent meaning exists in the United States."

<sup>8</sup> [REDACTED] states that Sodexo USA Inc. merged with Marriott Management Services, Inc. to form Sodexo Marriott Services, Inc. in March 1998. In June 2001, Sodexo Alliance purchased all outstanding shares of Sodexo Marriott Services and subsequently renamed the company Sodexo. Subsequently the company changed its name from Sodexo to Sodexo.

On March 21, 2012 the director revoked the approval of the petition and certified the decision to the AAO for review. The director concluded that the beneficiary's two years and two months of experience as a cook performing the duties of specializing in typical regional and seafood and Brazilian food in general does not establish that the beneficiary has at least two years of experience as a cook performing the duties of making all different kinds of dishes.

## **2. The Beneficiary's Qualifications**

The name of the job title or the position for which the petitioner seeks to hire is "Cook." The petitioner described the job duties on the Form ETA 750, part 13, as follows: "Prepare all kinds of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered. This does not mean that the beneficiary has to possess two years' experience in the exact job duties of the job offered, i.e. prepare all kinds of dishes. There are no other special requirements under part 15 of the Form ETA 750A. Thus, if the beneficiary was a full-time cook for two years before the Form ETA 750 was filed with the DOL,<sup>9</sup> then she would qualify for the position offered.

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).

In response to the director's decision, counsel contends that the beneficiary had the requisite work experience in the job offered before the priority date and submits the following additional evidence:

- A sworn statement dated March 13, 2012 from [REDACTED] stating that the beneficiary worked as a cook from January 10, 1997 to March 28, 1999 and her duties were listed as follows: use recipes to make various dishes; manage quantities of products and warn the responsible person when needing more products; turn or mix foods

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<sup>9</sup> The record reflects that the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001.

to assure they cook well; wash, peel, cut, chop, and take out seeds of fruits and vegetables; use spices while cooking; cut chickens, fish, and seafood; weigh, measure, and mix ingredients; prepare salads, sauces, marinades meat, fish, rice, pastas, vegetables, and other foods; prepare foods using methods of steam cooking, roasting, and grilling; use the controls to regulate the temperature of the stove; stay observing the foods and examine to make sure they do not cook too much; put food on plates to serve; communicate with clients when necessary in order to maintain satisfaction; and maintain work space clean and hygienic and clean when necessary; and

- A list of duties of cook signed by [REDACTED] on April 17, 2012.

The AAO determines that all of the employment verification letters submitted here comply with the regulation at C.F.R. § 204.5(l)(3)(ii)(A),<sup>10</sup> in that they include the name, address, and position of the authors and specific descriptions of the duties or training received by the beneficiary. The record is internally consistent, and the director's conclusion that the letters of employment are inconsistent is withdrawn. Thus, the AAO finds that the beneficiary has the requisite work experience in the job offered and that she qualifies for the position offered.

Nevertheless, the petition is currently not approvable as the petitioner has not overcome the 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 AAO will return the petition to the director for the issuance of a new Notice of Intent to Revoke (NOIR) consistent with the analysis below. 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 (9<sup>th</sup> 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

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<sup>10</sup> The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) 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.

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). The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted earlier, the record shows that the Form ETA 750 was received for processing on April 30, 2001 by the DOL. The rate of pay or the proffered wage set by the DOL on the Form ETA 750 is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week). Therefore, the petitioner is required to demonstrate the ability to pay \$13.01 per hour or \$23,678.20 per year from April 30, 2001 and continuing until the beneficiary receives lawful permanent residence.

The petitioner has already submitted copies of the following evidence to demonstrate the ability to pay:

- A letter dated May 16, 2002 signed by [REDACTED] stating that Sodexo in North America employs more than 111,000 people, supervises 60,000 employees for its clients, operates 5,000 sites and is considered to be a market leader; and
- A copy of Sodexo Alliance's Consolidated Balance Sheet, Consolidated Income Statement, and Cash Flow for 2001-2002.

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary from the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. The AAO notes that [REDACTED] was not the company's financial officer; he was the company's general manager from 2001 to 2003. In addition, the record contains no copies of the acceptable evidence to demonstrate the ability to pay, i.e. annual reports, federal tax returns, or audited financial statements.

The AAO also notes that the record contains no evidence that the Consolidated Balance Sheet, Consolidated Income Statement, and Cash Flow for 2001-2002 are audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements.

Moreover, it is not clear whether those Consolidated Balance Sheet, Consolidated Income Statement, and Cash Flow of Sodexo Alliance are from the petitioner. If the petitioning business (Sodexo Operation, LLC with Employer Identification Number (EIN) 16-0812661) changed its business structure or if the business was acquired by another business during the beneficiary's qualifying time period, the petitioner must establish that the successor entity is a successor-in-interest to the original petitioning business.

█ stated in a letter dated February 23, 2012 that Sodexo USA Inc. merged with Marriott Management Services, Inc. to form Sodexo Marriott Services, Inc. in March 1998, that in June 2001, Sodexo Alliance purchased all outstanding shares of Sodexo Marriott Services and subsequently renamed the company Sodexo, and that after the purchase the company changes its name from Sodexo to Sodexo.

The record reflects that the petitioner is Sodexo Operation, LLC, EIN █. No evidence has been submitted to show that either Sodexo Alliance or Sodexo Marriott Services is the same as Sodexo Operation, LLC. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the successor entity – whether that be Sodexo Inc. or Sodexo Alliance) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new

organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

To establish successorship, the director should request the following evidence:

- Evidence of transfer of ownership or assumption of rights, duties, and obligations between the petitioner and its successor business(es);
- Evidence showing that the nature of the current business did not change when the petitioner changed the structure of the business organization or when the petitioner was bought by another organization; and
- Evidence showing that the beneficiary will be performing the same job duties as before the change or the acquisition.

Additionally, a review of USCIS records reveals that the petitioner has previously filed seven immigrant petitions, including one for the beneficiary in the instant proceeding, since 2002. The table below shows the details of the petitions the petitioner has filed since 2002:

Receipt Number	Beneficiary (Last Name)	Filing Date	Decision	Date Adjusted to LPR:
		02/27/02	Revoked <sup>11</sup>	-
		06/20/05	Approved	09/13/06
		09/27/02	Approved <sup>12</sup>	05/25/06
		09/19/02	Approved	10/23/07
		01/29/02	Approved	07/09/07
		10/17/02	Approved	09/13/07
		06/15/02	Revoked <sup>13</sup>	-

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of not only the current beneficiary but also of all other beneficiaries listed above from the date of filing each respective labor certification application until the date the beneficiary obtains lawful permanent residence, or until the other beneficiaries obtain permanent residence or until their respective petitions' approvals were revoked.

On remand, the director should issue a new NOIR requiring the petitioner to demonstrate financial ability to pay the beneficiary's proffered wage from April 9, 2001 until the beneficiary obtains lawful permanent residence. The acceptable evidence to demonstrate that ability, pursuant to 8 C.F.R. § 204.5(g)(2) are:

<sup>11</sup> Revoked as of September 28, 2010.  
<sup>12</sup> This is the beneficiary in the instant case.  
<sup>13</sup> Revoked as of 03/21/2012.

- Forms W-2 or 1099-MISC issued to the beneficiary during the relevant period from the priority date; and
- The petitioner's annual reports, federal tax returns, or audited financial statements during the relevant period from the priority date.

As noted earlier, the director may request and the petitioner submit other evidence not listed above. The director may also consider the petitioner's totality of circumstances if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) specifically outlining the defects in the petition, as stated above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision.

**ORDER:** The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. The petition is remanded to the director for issuance of a new, detailed decision.