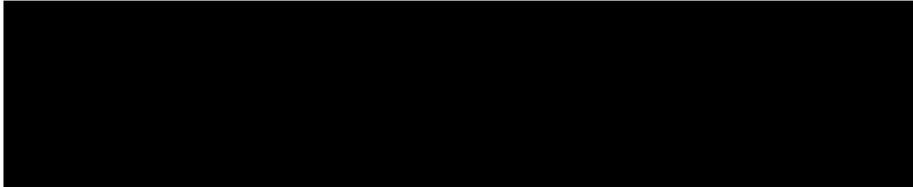


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Washington, DC 20529-2090



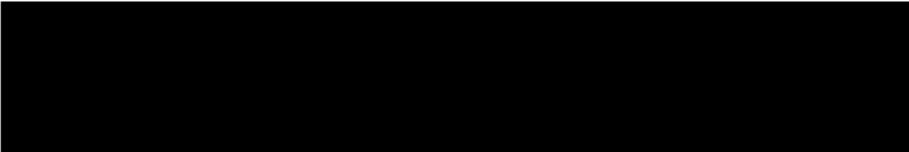
U.S. Citizenship  
and Immigration  
Services



B6

Date: Office: TEXAS SERVICE CENTER FILE: 

**AUG 27 2012**

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:

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.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** On May 20, 2009 the Director of the Texas Service Center (the director) revoked the approval of the immigrant petition, and the petitioner subsequently appealed the director's decision. Upon review, the Administrative Appeals Office (AAO) withdrew the director's May 20, 2009 decision and remanded the matter to the director for issuance of a new detailed decision. On May 23, 2012 the director issued a new decision and certified it to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the May 23, 2012 decision in part and withdraw the decision in part.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). In the Notice of Certification (NOC), the director found that: (a) the petitioner did not conduct good faith recruitment in advertising for the proffered position; (b) the beneficiary did not have the requisite work experience in the job offered as of the priority date; and (c) the petitioner failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, the director revoked the approval of the petition and invalidated the approved Form ETA 750 labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon certification.<sup>2</sup>

As set forth in the director's NOC dated May 23, 2012, the issues in this case are (a) whether the petitioner conducted the recruitment in accordance with Department of Labor (DOL) regulations; (b) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; (c) whether the beneficiary had the requisite work experience in the job offered prior to the priority date; and (d) whether the director's decision to revoke the approval of the petition is based on good and sufficient cause, as required by section 205 of the Act; and (e) whether there was fraud or willful misrepresentation involving the labor certification, and whether the director's decision to invalidate the labor certification is supported by evidence of record.

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<sup>1</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>2</sup> The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

a) **Whether the petitioner conducted the recruitment in accordance with DOL regulations.**

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

- Copies of the newspaper tear sheets for the position offered, published in the *Cape Cod Times* on Sunday, February 4, 2001; and Sunday, April 15, 2001; and
- A copy of the fee schedule for advertising with the *Cape Cod Times*.

The DOL at the time the petition was filed in 2001 accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2001). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2001). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2001).

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

Based on the evidence submitted (i.e. the copies of the advertisement published in the *Cape Cod Times* on February 4, 2001; and April 15, 2001), the petitioner appeared to have conducted recruitment under the reduction in recruitment process, which was allowed at the time.

The director in the Notice of Intent to Revoke (NOIR) dated March 1, 2012 identified that the Form ETA 750 was not dated when it was signed, and that box 21 of the Form ETA 750, part A – which asks the petitioner to describe the recruitment efforts and results – was empty. The director requested the petitioner to outline the specific steps that the petitioner took to conduct good faith recruitment, e.g. other than the advertisements in a newspaper of general circulation. The petitioner was also asked 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.

No response and/or additional evidence were submitted by the petitioner.

The AAO acknowledges that before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Here, the record reflects that the Form ETA 750 was submitted to DOL for processing on April 24, 2001, and that DOL certified the Form ETA 750 on January 4, 2002. Since there was no requirement to keep recruitment records once the labor certification was approved before 2005, USCIS may not make an adverse finding against the petitioner, for the sole reason that documents verifying recruitment procedures were not submitted.

The facts that the Form ETA 750 was not dated when it was signed and that box 21 of the Form ETA 750A (the description of the recruitment efforts and results) was empty are not sufficient to determine that the petitioner failed to follow recruitment procedures. Therefore, the director's conclusions that the petitioner did not conduct good faith recruitment, and that there was fraud or willful misrepresentation in the recruitment process justifying the invalidation of the labor certification are withdrawn. Nonetheless, the petition is not approvable for the reasons stated below.

**b) Whether or not 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 DOL on April 24, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.<sup>3</sup>

To show that the petitioner has the ability to pay \$12.57 per hour or \$22,877.40 per year from April 24, 2001 and continuing until the beneficiary receives her lawful permanent residence or until she ported to another similar employment,<sup>4</sup> the petitioner submitted a copy of its federal tax return on the Form 1120S (U.S. Income Tax Return for an S Corporation) for the year 2000.

The director in the March 1, 2012 NOIR stated that the petitioner's federal tax return for 2000 alone is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If

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<sup>3</sup> 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).

<sup>4</sup> The petitioner's former counsel, [REDACTED] claimed, in responding to the director NOIR dated February 24, 2009, that the beneficiary no longer worked for the petitioner and had ported in accordance with section 204(j) of the Act. The record contains letters dated March 9, 2009 from [REDACTED] who stated that the beneficiary has been employed by [REDACTED] since May 2008 as [REDACTED].

the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

No evidence has been submitted to show that the beneficiary was employed and paid by the petitioner. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of \$12.57 per hour or \$22,877.40 per year from April 24, 2001 until the beneficiary obtains legal permanent residence or until she ported to another similar employment pursuant to section 204(j) of the Act.<sup>5</sup>

The petitioner can show that it can pay \$22,877.40 per year through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubedu 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.

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<sup>5</sup> Section 204(j) of the Act provides relief to the alien beneficiary who changes jobs after his/her 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 (4<sup>th</sup> Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5<sup>th</sup> 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 (9<sup>th</sup> 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).

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.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 the priority date. No evidence such as copies of the business' federal tax returns, annual reports, or audited financial statements for the years 2001 and thereafter until the beneficiary ported to another similar employment in 2008 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 of the beneficiary in this case 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 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 *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 or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *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*. Given that the petitioner'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.

c) **Whether or not the beneficiary has the requisite work experience in the job offered before the priority date.**

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 24, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook." 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.

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 24, 2001 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 show that the beneficiary had the requisite work experience in the job offered before April 24, 2001, the petitioner submitted the following evidence:

- An affidavit from [REDACTED] signed by [REDACTED] on January 23, 2001 stating that the beneficiary was a cook from February 20, 1997 to June 18, 1999.
- A signed statement dated March 20, 2009 from the beneficiary stating that she was a cook with [REDACTED] from 20/02/1997 (February 20, 1997) to 18/06/1999 (June 18, 1999); and

- A business registration printout (CNPJ) of [REDACTED] doing business as [REDACTED]

The AAO agrees with the director that the letter of employment for the beneficiary from [REDACTED] does not comply with the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(B), in that it does not contain a description of the beneficiary's duties. Simply stating that the beneficiary worked as a cook 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.

Further, the beneficiary, according to her Form G-325 (Biographical Information) that she filed in conjunction with her Application to Register Permanent Residence or Adjust Status (Form I-485), stated that she lived in the city of Maringa, Parana, Brazil between 1995 and 1999. The restaurant [REDACTED], according to all of the evidence submitted, is located in the city of Londrina, Parana, Brazil. It is unlikely that the beneficiary lived in Maringa, Parana, and worked in Londrina, Parana, between 1997 and 1999.<sup>8</sup>

In addition, the beneficiary failed to include her employment with [REDACTED] on the Form G-325.

The director in the March 1, 2012 NOIR advised the petitioner to submit independent objective evidence to resolve the inconsistencies in the record as noted above. No evidence has been submitted. We agree with the director that the petitioner has failed to establish by a preponderance of the evidence that the beneficiary has the requisite work experience in the job offered before the priority date.

**d) Whether the director's decision to revoke the approval of the petition is based on good and sufficient cause.**

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.

<sup>7</sup> In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ number. Cadastro Nacional da Pessoa Juridica or CNPJ is a unique number given to every business registered with the Brazilian authority; it is similar to Employer Federal Identification Number (FEIN) in the United States.

<sup>8</sup> The distance between Maringa, Parana, and Londrina, Parana, according to <http://www.distancecalculator.globefeed.com>, is 80.21 km (or 48.84 miles). The estimate road distance can be around 92.24 km (or 49.84 miles). (Last accessed January 5, 2012).

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. The director in the March 1, 2012 NOIR specified the problems in the record pertaining to the beneficiary's prior work experience as a cook in Brazil and asked the petitioner to remedy the problems by submitting independent objective evidence to demonstrate the beneficiary's employment in Brazil. Moreover, 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 March 1, 2012 or to the director's Notice of Certification dated May 23, 2012

resolving the specific deficiencies/problems 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 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.

e) **Whether the director's decision to invalidate the labor certification is supported by evidence of record.**

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

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

As noted above, the AAO does not find evidence of fraud or willful misrepresentation involving the labor certification with respect to whether the petitioner followed recruitment procedures.

The beneficiary claims throughout these proceedings that she worked as a cook in Londrina, Parana, Brazil from February 1997 to June 1999. The evidence submitted, however, does not reflect that she lived in Londrina, Parana, Brazil, during the time period specified above. The director found fraud involving the labor certification with respect to the beneficiary's qualifications.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of

the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

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

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or by willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.<sup>9</sup>

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

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<sup>9</sup> It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [she] determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

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

Here, while the petitioner failed to contest the facts found by the director indicating that the beneficiary claims to have worked about 50 miles away from where she lived in Maringa, Parana, there is no evidence that the petitioner knew that the beneficiary's documents may have been falsified. The AAO finds insufficient evidence to find fraud on the part of the petitioner involving the labor certification. Therefore, the director's invalidation of the labor certification is 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 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-01315311, is withdrawn.