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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

[redacted]

Date: FEB 0 3 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the 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 May 20, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on October 24, 2002. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition, invalidated the labor certificate, and certified the decision for review to the Administrative Appeals Office (AAO) on November 3, 2011. Upon review, the AAO will affirm the director's decision. The AAO will also enter a separate administrative finding of material misrepresentation against the beneficiary.

1. Procedural History

The petitioner is a pastry and coffee shop.[1] It seeks to employ the beneficiary permanently in the United States as a baker, DOT job code 526.381-010, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As noted above, the VSC director initially approved the petition on October 24, 2002.

However, USCIS found that the beneficiary was not qualified for the position, as there were inconsistencies in the record relating to his work experience. The director reopened the matter by sending a Notice of Intent to Revoke (NOIR) to the petitioner on September 3, 2008. In that NOIR, the director questioned the beneficiary's prior work experience in Brazil as a baker. The director found that the employment verification letter from Big Pao Panificadora Ltda. (Big Pao) contained a CNPJ number of a sole proprietor called '[redacted]'.[3] The director also stated that the beneficiary could not have possibly worked for Big Pao from 1995 to 1997, since the company, according to the CNPJ database, was not registered with the Brazilian government until June 10, 1999.[4]

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[1] The petitioner operates a Dunkin' Donuts.

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

[3] Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ or Cadastro Nacional da Pessoa Juridica is similar to the federal tax ID or employer ID number in the United States. The director noted that the U.S. 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.

[4] The AAO notes that the company the director was referring to in the September 3, 2008 NOIR

In response to the director's September 3, 2008 NOIR and to show from the date of filing that the beneficiary had the requisite work experience in the job offered, (), counsel for the petitioner at the time, submitted the following evidence:

- A declaration from an unnamed representative of Big Pao indicating that the beneficiary worked as a baker from January 10, 1995 to April 23, 1997;
- A sworn statement dated September 30, 2008 from the beneficiary certifying that he worked at the business named Panificadora Big Pao between January 10, 1993 and April 23, 1997;
- A sworn statement dated September 22, 2008 from , who stated that the beneficiary worked at Panificadora Big Pao from January 10, 1995 to April 23, 1997 before the company was registered with the Brazilian government;
- A certificate of business registration for (sole proprietor); and
- Various articles and studies concerning the Brazilian economy in the 1990s.

Upon review, the director sent another NOIR on May 6, 2009. The director advised the petitioner in the second NOIR that the instant case might involve fraud since the petition was filed by , who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions.[5] The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since filed the petition in this case, the director advised the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

A new counsel responded to the director's May 6, 2009 stating that she represented the beneficiary,[6] and that there was no fraud or misrepresentation on the part of the beneficiary. She stated that the petitioner had submitted substantial evidence to show that the beneficiary

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is the company owned by It is not clear when Big Pao was officially registered with the Brazilian government. We also cannot determine the relationship between and Big Pao, if any.

[5] Previous counsel, , will be referred to as previous or former counsel or by name throughout this decision.

[6] The new counsel's name is . She will be referred to as throughout this decision.

qualified for the position offered, as described on the certified Form ETA 750. To show that the beneficiary had the requisite work experience in the job offered, counsel for the beneficiary submitted the following evidence:

- A letter from the beneficiary confirming his employment at Big Pao and affirming the authenticity of evidence submitted to prove the employment; and
- Two sworn statements dated May 29, 2009, one from and the other from , both of whom attested to the beneficiary's employment as a baker at Panificadora Big Pao (Big Bread Bakery) from 1995 to 1997. Each also stated that he was a regular customer of Panificadora Big Pao and frequently met the beneficiary while having coffee.

On June 22, 2009 the director revoked the approval of the petition, finding that the beneficiary did not have the requisite work experience in the job offered as of the priority date. Further, the director determined that the petitioner had failed to follow the DOL recruitment requirements and that it had obtained the approval of the Form ETA 750 by fraud or by material misrepresentation. Moreover, the director rejected the evidence submitted by counsel for the beneficiary, stating that the petitioner had not executed a Notice of Entry of Appearance as Attorney or Representative (Form G-28) to allow to represent the petitioner. The director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On December 27, 2010, the director withdrew the June 22, 2009 Notice of Revocation (NOR), and on April 4, 2011 issued another NOIR. The director indicated in this April 4, 2011 NOIR that the employment verification letter from Big Pao contained information that was not consistent with other information in the record. First, the director stated that the letter from Big Pao contained a CNPJ number that belonged to , a sole proprietor, doing business as Frios e Carnes. Second, the director stated that Frios e Carnes, according to the certificate of the business registration that was submitted earlier, was a butcher shop, not a bakery store. Third and lastly, the director indicated that the location or address of Frios e Carnes was different from the address of Big Pao as listed by the beneficiary on part B of the ETA Form 750.[7]

Further, the director stated that none of the evidence submitted thus far had established that (1) the petitioner conducted the recruitment efforts in accordance with the DOL regulations and (2) the petitioner had the continuing ability to pay the proffered wage from the priority date. The director advised the petitioner to submit additional evidence: (1) to resolve the inconsistencies in the record pertaining to the beneficiary's prior work experience as a baker in Brazil, as noted above, (2) to demonstrate that the petitioner complied with the DOL recruitment requirements,

[7] Frios e Carnes, as shown on the business registration certificate, is located at Rua Matatias Gomes, 139A, Sao Pedro, Zip Code 35020340, Governador Valadares, MG (Minas Gerais). Big Pao, as shown on part B of the Form ETA 750, is at Rua Israel Pinheiro, 470, Gov. Baladares, Brazil.

and (3) to show that the petitioner had the continuing ability to pay the proffered wage from the priority date.

On May 6, 2011 present counsel responded to the director's April 4, 2011 NOIR, stating that he is the new attorney of record for the beneficiary.[8] He also stated that the beneficiary had transferred to new employment as permitted under section 204(j) of the Act, which allowed a beneficiary of an approved I-140 petition to change employment to the same or a similar position with another employer. Citing *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1988), further contended that the allegations in the NOIR were conclusory, speculative, and/or irrelevant, and did not provide good and sufficient cause for revocation and could not support the issuance of a NOIR.

also asserted that the reasons why the director issued the NOIR were because of (a) general allegations of fraud against with no specific link to the present case, and (b) lack of CNPJ Registration of the Brazilian employer. Both reasons, according to , do not constitute an adequate basis to revoke the approval of the petition. Therefore, objected to the issuance of the NOIR and further argued that the beneficiary's inability to present objections and appeal the issuance of the NOIR constituted a serious denial of due process. The beneficiary through his counsel requested that USCIS withdraw the NOIR.

On November 3, 2011 the director, pursuant to 8 C.F.R. § 103.4(a), revoked the approval of the petition and certified the matter to the AAO.[9] In the Notice of Certification, the director concluded that (1) the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date and (2) the beneficiary did not have the requisite work experience in the job offered as of the priority date. Concerning the beneficiary's work experience in Brazil, the director stated that no evidence had been submitted to resolve any of the inconsistencies in the record as noted earlier and added that it was unlikely that the beneficiary could work in Governador Valadares, Minas Gerais and live in Cacoal, Rondonia between 1995 and 1997.[10] For these reasons, the director determined that the documentation submitted to establish the beneficiary's previous employment involved material misrepresentation. Accordingly, the certified Form ETA 750 was invalidated.

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[8] The present counsel's name is . He will be referred to as or as counsel throughout this decision.

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

[10] The distance between Governador Valadares, Minas Gerais and Cacoal, Rondonia is, according to the director, approximately 1,400 miles.

2. **Affected Party**

As a threshold issue, before the AAO adjudicates the subject matter of the certification, we must determine whether the beneficiary and his counsel have legal standing in this proceeding.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), in pertinent part, states,

> For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. **It does not include the beneficiary of a visa petition**. (Emphasis added).

Further, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states, "An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed."

The explicit language of the regulation states that the beneficiary does not have legal standing in this matter. [redacted] and [redacted] only represented the beneficiary; neither has been authorized to represent the petitioner. Hence, neither the beneficiary nor either of his counsels, [redacted] and [redacted], are entitled to represent the petitioner in this proceeding.

We are aware of the beneficiary's desire to continue the adjudication of his Application to Register Permanent Residence or Adjust Status (Form I-485), after the Form I-140 was approved under section 204(j) of the Act, as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 ("AC21") (Public Law 106-313). [redacted] (the beneficiary's present counsel) states that the beneficiary transferred to new employment, pursuant to section 204(j) of the Act, and that denying the opportunity for the beneficiary to raise his objection in this proceeding constitutes a serious denial of due process.

Given the novel issue raised by [redacted], i.e., whether the beneficiary may take the place of the petitioner of a Form I-140 petition in a situation where the beneficiary has "ported" to work for another employer, as allowed by section 204(j) of the Act, the AAO will, at this time, address this issue.

To address the issue, it is important to analyze section 204(j) of the Act as amended by section 106(c) of AC21. AC21 added the following to section 204(j) of the Act:

> Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Further, section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states:

> Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Counsel for the beneficiary seems to suggest that the beneficiary may take the place of the petitioner with respect to the approved I-140 petition by virtue of the portability provisions of AC21. That is, once the Form I-140 petition was approved, the Form I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began new employment in a similar position as the job offered by the petitioner, counsel implies that the beneficiary assumes the right to answer for the petitioner in the revocation proceeding.[11]

Absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j).

The statutory language of section 204(j) of the Act provides no benefit or right for the beneficiary or the new employer to "substitute" himself or itself for the petitioner. Section 204(j)

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[11] The record does not reflect that the beneficiary has ported to work for another employer, in a same or similar occupation.

of the Act, as amended by section 106(c) of AC21, simply states that the underlying I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's Form I-485 adjustment application took 180 days or more to process. Section 204(j) of the Act, as amended by section 106(c) of AC21, does not mention the rights of the beneficiary or a subsequent employer and does not provide the beneficiary or other employers the ability to take over already adjudicated immigrant petitions.

Furthermore, in cases where the underlying I-140 approval was not valid to begin with, such as in cases of fraud or willful misrepresentation, or where the I-140 was approved in error by USCIS because either the petitioner or the beneficiary did not qualify for the preference classification sought, a revocation under section 205 will negate any claim to section 204(j) portability. Although section 204(j) of the Act provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act.

In a case pertaining to the revocation of approval of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under this interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* In the current matter, the beneficiary may not shield himself from the revocation of the Form I-140 simply because he has ported to another employer, in the same circumstances as where an alien may not port from an invalid petition.[12]

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[12] Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge's

Counsel has failed to show that under section 204(j) of the Act, as amended by section 106(c) of AC21, the beneficiary has now become an affected party, in these proceedings.[13]

3. **Sufficiency of Notice to the Petitioner**

With respect to the director's decision to revoke the approval of the petition, 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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien's application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when "an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status." *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions. For these reasons, counsel's implication that the petition remained valid as the beneficiary ported to another employer pursuant to section 204(j) of the Act is not persuasive, and cannot be accepted.

[13] The evidence of record indicates that the beneficiary received notice of each of the director's Notices of Intent to Revoke dated September 3, 2008, May 6, 2009 and April 4, 2011. Alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano*, 19 I&N Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). However, since a fraud finding affects an alien's admissibility, and directly impacts his ability to procure benefits in any future proceedings, the AAO will consider the representations of the beneficiary's counsel for the limited purpose of considering whether he misrepresented material facts in order to obtain an immigration benefit. *Cf. Matter of Obaigbena*, 19 I&N Dec. 533, 536 (BIA 1988). This issue is discussed below.

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 has provided the petitioner with notice of the derogatory information specific to the current proceeding. In the NOIR dated April 4, 2011 and the Notice of Certification dated November 3, 2011, the director specifically outlines the inconsistencies in the record pertaining to the beneficiary's prior work experience as a baker in Brazil. First, the director states that the CNPJ number found on the employment verification letter from Big Pao belongs to a sole proprietor named "[redacted]." Second, the director states that the employment verification letter from Big Pao does not include a specific description of the experience or training received by the beneficiary, as required by 8 C.F.R. § 204.5(g)(1).[14]

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

Third, the director indicates that there are inconsistencies between the beneficiary's statement and the statements provided by Big Pao and regarding the beneficiary's employment with Big Pao. In his sworn statement dated September 30, 2008 the beneficiary stated he worked at the business named Panificadora Big Pao from January 10, 1993 to April 23, 1997. On the other hand, the verification employment letter from Big Pao and the sworn statement dated September 22, 2008 from state that the beneficiary worked at Panificadora Big Pao from January 1995 to April 1997.

The director specifically notes that the address listed on the employment verification letter from Big Pao is different from the address listed on part B of the Form ETA 750. The director states that the information regarding where the beneficiary worked between 1995 (or 1993) and 1997 is not consistent with the information of record about where he lived during the same time period. The director indicated that on the Form G-325, which the beneficiary signed under penalty of perjury and submitted in connection with the application to adjust status to lawful permanent resident status (Form I-485), he stated he lived in the city of Cacoal, Rondonia, Brazil, from 1990 to 1997. The employment verification letters from Big Pao and indicate that the beneficiary worked in Governador Valadares, Minas Gerais, from 1995 to 1997. According to the director, the distance between the city of Governador Valadares, Minas Gerais, and Cacoal, Rondonia, is about 1,400 miles.[15] Therefore, the director concludes that it is not likely that the beneficiary lived in Cacoal, Rondonia and worked in Governador Valadares, Minas Gerais between 1995 (or 1993) and 1997.

Finally, the director looks at the certificate of business registration of and observes that the activities listed on that certificate of business registration include: "General commercial business with merchandise in predominance of food products – minimarket, grocery store, commercial steak house and butcher shop." The director determines that there is no evidence that the beneficiary worked for a bakery store in Brazil.

In addition, in the NOIR dated April 4, 2011 and the Notice of Certification dated November 3, 2011 the director specifically advised the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date.

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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

[15] The distance between Cacoal, Rondonia and Governador Valadares, Minas Gerais, according to http://www.distancecalculator.globefeed.com, is 2,246.80 km (or 1,396.10 miles). (Last accessed December 20, 2011).

The petitioner has not submitted any evidence in response to the director's NOIR dated April 4, 2011 or to the director's Notice of Certification dated November 3, 2011 outlining the specific deficiencies described above. Such evidence, if provided, would have shed more light on the beneficiary's work experience in Brazil and his qualifications for the proffered job. It would also demonstrate whether the petitioner 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.

4. **Beneficiary's qualifications for the job offered / Immigration Fraud / Invalidation of the Labor Certification**

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 17, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Bakers." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:[16]

> Mix & bakes ingredients to produce all type of pastries. Measures ingredients, prepare batters and dough. Rolls, cuts, & shapes dough to form products.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

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[16] As noted by the director, the job duties portion of the labor certification was amended without the DOL stamp and date of amendment. The record does not establish when the amendment occurred. The rate of pay also shows an uninitialed amendment. As the petition will be denied on other grounds, we will not further address these irregularities at this time.

Whether or not the beneficiary had the prerequisite work experience for the proffered position as of April 17, 2001 (the priority date) is material in this case, since the beneficiary must qualify for the job offered in the labor certification.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

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

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or by willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.[17]

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[17] 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.

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

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

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

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. In the present matter, we find that much of the petitioner's documentation with respect to the beneficiary's qualifications has been falsified, a finding that the petitioner did not challenge in that the petitioner did not respond to the director's NOIR dated April 4, 2011 or the Notice of Certification dated November 3, 2011. Nor did the beneficiary produce independent objective evidence to resolve the inconsistencies in the record pertaining to where the beneficiary lived and worked between 1995 and 1997 when appearing through counsel in response to the director's notices.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the beneficiary has the required two years of experience for the position offered. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

> (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.

As noted earlier, the director, before issuing the Notice of Certification dated November 3, 2011 and revoking the approval of the petition, gave the petitioner specific notice of derogatory information relating to the beneficiary's prior work experience in Brazil. The director specifically listed the inconsistencies in the record and gave the petitioner an opportunity to respond and to submit additional evidence to resolve the inconsistencies in the record. The beneficiary received the notices and responded through his counsel.

No such evidence has been submitted. Such evidence is material because, if it were provided, it would demonstrate whether the beneficiary had the prerequisite qualifications as specified on the labor certification. The petitioner's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for dismissing the petition. *See* 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the noted inconsistencies, and considering that the beneficiary received notice of the inconsistencies and did not resolve them in his appearances through both counsel, and that the petitioner failed to respond, the AAO finds that the petitioner and the beneficiary have deliberately concealed and misrepresented facts about the beneficiary's prior work experience from January 1995 (or 1993) to April 1997.

On the true facts, the beneficiary is inadmissible. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." *See* section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C).[18] As a third preference employment-based immigrant, the beneficiary's

[18] The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law

proposed employer was required to obtain a permanent labor certification from the DOL in order for the beneficiary to be admissible to the United States. *See* section 212(a)(5) of the Act. Although the petitioner in this case obtained a permanent labor certification, the DOL issued this certification on the premise that the alien beneficiary was qualified for the job opportunity. The resulting certification was erroneous and is subject to invalidation by USCIS. *See* 20 C.F.R. § 656.30(d). Moreover, to qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum work experience requirements. *Compare* 8 C.F.R. § 204.5(g) *with* § 204.5(1)(l)(3)(ii)(B). The petitioner did not establish the beneficiary's qualifications in this case, as the beneficiary does not possess two years' work experience as a cook. On the true facts, the beneficiary is not admissible as a third preference employment-based immigrant, and as such the misrepresentation of his credentials was material to the instant proceedings.

Even if the beneficiary were not inadmissible on the true facts, he fails the second and third parts of the materiality test. The petitioner's use of forged or falsified work experience documents shuts off a line of relevant inquiry in these proceedings. Before the DOL, this misrepresentation prevented the agency from determining whether the essential elements of the labor certification application, including the actual minimum requirements, should be investigated more substantially. *See* 20 C.F.R. § 656.17(i). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary qualifications prior to being hired by the employer. *See Super Seal Manufacturing Co.*, 88-INA-417 (BALCA Apr. 12, 1989) (*en banc*). In addition, the DOL may investigate the alien's qualifications to determine whether the labor certification should be approved. *See Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). Where an alien fails to meet the employer's actual minimum requirements, the labor certification application must be denied. *See Charley Brown's*, 90-INA-345 (BALCA Sept. 17, 1991); *Pennsylvania Home Health Services*, 87-INA-696 (BALCA Apr. 7, 1988). Stated another way, an employer may not require more experience or education of U.S. workers than the alien actually possesses. *See Western Overseas Trade and Development Corp.*, 87-INA-640 (BALCA Jan. 27, 1988).

In this case, the DOL was unable to make a proper investigation of the facts when determining certification, because the petitioner shut off a line of relevant inquiry by submitting fraudulent or

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governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

falsified documents. If the DOL had known the true facts, it would have denied the employer's labor certification, as the beneficiary was not qualified for the job opportunity at issue. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

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

By signing the Form ETA 750, and submitting fraudulent work experience letters and affidavits, the petitioner has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. For these reasons, the AAO agrees with the director that the labor certification has been obtained through willful and material misrepresentation.

Further, the director found that because there was fraud or willful misrepresentation involving the labor certification, the labor certification is invalidated. The AAO agrees. 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.

The director's decision to invalidate the certified Form ETA 750 is affirmed as there is fraud or willful misrepresentation involving the labor certification.

Further, the AAO finds that the beneficiary does not qualify to perform the duties of the position, as he did not have the requisite work experience in the job offered before the priority date. The director has specifically issued the notice to the petitioner to allow the petitioner an opportunity to respond or submit additional evidence to overcome the alleged misrepresentation. The petitioner did not submit any response. Neither did any of the beneficiary's counsels provide

independent objective evidence to overcome, fully and persuasively, the director's finding that the beneficiary submitted falsified documents. By signing the Form ETA 750, part B, and submitting a forged or fraudulent work experience letters and affidavits, the beneficiary has sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. This finding of material misrepresentation shall be considered in any future proceeding where admissibility is an issue.

5. **Ability to Pay**

Moreover, the petition is not approvable because the record does not contain sufficient evidence to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 17, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is $12.61 per hour or $22,950.20 per year based on a 35 hour work week.[19]

To show that the petitioner has the continuing ability to pay $12.61 per hour or $22,950.20 per year from April 17, 2001, the petitioner submitted copies of the following evidence:

- An Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2000;[20] and

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[19] 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).

[20] Since the petitioner is only required to establish the ability to pay from the priority date (April 17, 2001), the tax return for the year 2000 will not be considered for this purpose.

- A Form W-2 issued to the beneficiary by the petitioner for 2001.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Based on the Form W-2 submitted, the petitioner paid the beneficiary $27,631.77 in 2001. This payment represents *prima facie* proof of the petitioner's ability to pay in 2001, but not in 2002 and thereon until the beneficiary receives his legal permanent residence or until he ports to another similar employment.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of $12.61 per hour or $22,950.20 per year from 2002[21] until the beneficiary obtains legal permanent residence, or until the beneficiary ported to work for another employer in a similar job, assuming that section 204(j) of the Act applies in this instant proceeding.[22]

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[21] As noted, the petitioner established the ability to pay in 2001.

[22] As noted earlier, section 204(j) of the Act provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007). As noted above, section 204(j) benefits do not accrue to an alien for whom the petition's approval has been revoked.

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[23] 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 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 contains no evidence showing the petitioner's net income or net current assets from 2002.[24] No evidence such as copies of the business' federal tax returns, annual reports, or audited financial statements for the years 2002 and thereafter has been submitted. Due to this lack of evidence, the AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date.

Finally, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the

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

[24] As noted, the petitioner has established the ability to pay in 2001.

petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* Given that the petition's approval has been revoked and the fact that the petitioner failed to respond to any of the director's Notices of Intent to Revoke, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

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 and to invalidate the alien employment certification, Form ETA 750, ETA case number [redacted], is affirmed.

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

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number [redacted] filed by the petitioner is invalidated.