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



U.S. Citizenship
and Immigration
Services



B6

Date: **FEB 08 2012** Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On December 17, 2001, 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 February 4, 2002. The director of the Texas Service Center, however, revoked the approval of the immigrant petition 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.

1. Facts and Procedural History

The petitioner is a catering company. It seeks to employ the beneficiary permanently in the United States as a cook, DOT job code 131.362-014, 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).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The VSC director initially approved the petition on February 4, 2002.

On September 8, 2008, the director of USCIS, Texas Service Center ("the director") sent a Notice of Intent to Revoke (NOIR) to the petitioner. The director found numerous problems including fraud and willful misrepresentation in *other* I-140 petitions and labor certification applications that the petitioner's former attorney of record, [REDACTED] filed.² Because of these other petitions and since [REDACTED] filed the petition in this case, the director reopened the matter. In the September 8, 2008 NOIR, the director noted inconsistencies in the evidence submitted concerning the beneficiary's prior work experience in Brazil as a cook. First, the director found that the employment verification letter dated August 2, 2001 from [REDACTED] contained the following CNPJ number: [REDACTED]³. This CNPJ number, according to the director, did not belong to [REDACTED] where the

¹ 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.

² Previous counsel, [REDACTED] will be referred to as previous or former counsel or by name throughout this decision.

³ Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ or Cadastro Nacional da Pessoa Jurídica is similar to the federal tax ID or employer ID number in the United States. The director indicated in the Notice of Revocation 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.

beneficiary claimed on part B of the Form ETA 750 that he worked from January 1993 to January 1996, but to a sole proprietor named [REDACTED] doing business as (d.b.a.) [REDACTED]. The director also noted that the beneficiary could not have possibly worked for this business [referring to [REDACTED] from January 1993, since the company, according to the CNPJ database, was not registered with the Brazilian government until August 20, 1993.⁴

In response to the director's September 8, 2008 NOIR and to show that the beneficiary had the requisite work experience in the job offered, [REDACTED] former counsel for the petitioner, submitted the following evidence:

- A sworn statement dated October 7, 2008 from the beneficiary certifying that he worked under [REDACTED] as a cook from January 1993 to January 1996 and that he did not know why [REDACTED] decided to register his business in August 1993;
- A signed statement dated September 30, 2008 from [REDACTED] stating that he formerly owned [REDACTED] and that he employed the beneficiary from January 1993 to January 1996; and
- Various articles and studies concerning the Brazilian economy in the 1990s in support of counsel's contention that there were many informal businesses (businesses that were not registered with the Brazilian government) in Brazil during 1990s.

On March 3, 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. The director concluded that the petitioner had failed to submit concrete evidence showing that the restaurant [REDACTED] existed and conducted business from January 1993. The director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2(c).

On April 7, 2009 the petitioner appealed the director's decision. On appeal, current counsel for the petitioner – [REDACTED] – contended that the director had improperly revoked the approval of the petition. Specifically, counsel asserted that USCIS could not retroactively use and apply section 205 of the Act as amended on December 17, 2004 to revoke the petition that had already been approved in February 2002. Citing *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), counsel further claimed that the statute in effect at the time of the visa approval specifically required the Attorney General to notify the State Department of the visa

⁴ The AAO notes that the record does not contain a printout from the CNPJ indicating when or if [REDACTED] was officially registered with the Brazilian government. Its claimed owner, [REDACTED], states in his letter dated September 30, 2008 that the business was registered in August 1996. As noted by the director, the CNPJ number [REDACTED] belongs to [REDACTED] operating a sole proprietorship.

⁵ Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision.

revocation before the beneficiary came to the United States.⁶ In this case, counsel noted that since the beneficiary had already been in the United States when the decision to revoke was issued in 2009, the Attorney General should not be able to revoke the approval of the visa petition.

Counsel also argued that the general 30-day deadline for the filing of an appeal should have been applied in this case since the Attorney General had no authority to invoke the visa revocation procedures for an alien beneficiary who was already present in the United States. Counsel declared that the appeal was timely filed.

Counsel also contended that the director did not have good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. Citing *Ana Intern, Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Full Gospel Portland Church v. Thornburgh*, 703 F. Supp. 441, 445 (D.C. Cir. 1988), counsel stated that the director's conclusion was not supported by substantial evidence. According to counsel, the director's conclusion – simply because a Brazilian company is not registered with the Brazilian government, it must not have existed – was speculative and erroneous.

Further, counsel indicated that the issuance of a NOIR after more than six years after the petition was approved violated due process. Counsel stated, "By waiting so long after labor visa approval to issue the Notice of Intent to Revoke has placed the petitioner in the impossible position of obtaining evidence which has long since been lost, expunged or destroyed, or gaining affidavits from people who have moved away or died."

On July 21, 2009 the director rejected the appeal as untimely filed, consistent with 8 C.F.R. § 205.2(d). Further, the director concluded that the appeal did not meet the requirements for a motion to reopen or reconsider.

⁶ At the time the visa petition in this case was approved in February 2002, section 205 of the Act, 8 U.S.C. § 1155, read as follows:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1229a of this title.

On December 27, 2010 the director withdrew the decision issued on March 3, 2009. On April 4, 2011 the director sent the petitioner another NOIR. In this NOIR, the director indicated that the instant case might involve fraud since the petition was filed by [REDACTED], who is under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions in other cases. The director generally stated that in many of the other petitions filed by [REDACTED], the respective petitioners have been found not to follow the DOL recruitment procedures. Because of these findings in other cases and since [REDACTED] filed the petition in this case, the director advised the petitioner to submit additional evidence to demonstrate that the petitioner complied with all of the DOL recruiting requirements.

The director again indicated in the April 4, 2011 NOIR that the employment verification letters dated August 2, 2001 and September 30, 2008 from [REDACTED] contained information that was not consistent with the information listed on the CNPJ printout. First, the director stated that the letters dated August 2, 2001 and September 30, 2008 from [REDACTED] contained a CNPJ number that does not belong to [REDACTED].

Second, the director stated that [REDACTED] according to the CNPJ information, is a grocery store, not a restaurant, and it was not established (officially registered with the Brazilian government) until August 1993. The director stated that [REDACTED] statement indicating that his business was registered in August 1996 is inconsistent with the CNPJ database, which shows that [REDACTED]'s sole proprietorship, [REDACTED] was registered in August 1993. The director also stated that the record contains no evidence to show that [REDACTED] conducted business from January 1993.

Third, the director noted that the address listed by the beneficiary on part B of the Form ETA 750 for [REDACTED] is different from the address listed in the CNPJ database and from that listed by [REDACTED] in his verification employment letters. The address cited by the beneficiary for [REDACTED] and that cited by [REDACTED] and the CNPJ database is [REDACTED] Brazil.

Further, the director stated that the petitioner has not established that it has 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, and (3) to show that the petitioner had the continuing ability to pay the proffered wage from the priority date.

On May 6, 2011, counsel responded to the director's April 4, 2011 NOIR, stating that he is the attorney of record for the beneficiary and that the petitioner [REDACTED] has been

⁷ As noted above, the CNPJ number [REDACTED] as shown on the employment verification letter dated August 2, 2001 belongs to [REDACTED] operating as a sole proprietor.

dissolved since 2007. He also claimed 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 an identical or similar position with another employer. Citing *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1988), counsel further contended that the allegations in the NOIR were conclusory, speculative, or irrelevant, and did not provide good and sufficient cause and could not support the issuance of a NOIR.

Counsel also asserted that the reasons why the director issued the NOIR were because of (a) general allegations of fraud against [REDACTED] with no specific link to the present case, and (b) lack of CNPJ Registration of the Brazilian employer. Both reasons, according to counsel, did not support the basis for revocation of the approval of the petition. Therefore, counsel 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 and asserted its allegations of fraud during the adjustment of status proceedings.

On November 3, 2011 the director revoked the approval of the petition and certified the matter to the AAO, pursuant to 8 C.F.R. § 103.4(a).⁸ 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. The director stated that no evidence had been submitted to resolve any of the inconsistencies in the record as noted earlier. The director certified his decision to the AAO for review.

2. Retroactivity of Section 205 of the Act, 8 U.S.C. § 1155

In his brief, counsel draws the AAO's attention to an opinion issued by the United States Court of Appeals for the Second Circuit, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004). In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, that USCIS may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.

According to the Form G-28 submitted on appeal, the petitioner is located in Needham, Massachusetts, an area within the jurisdiction of the First Circuit Court of Appeals. The holding

⁸ 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).

in the Second Circuit Court of Appeals, therefore, is not binding in this case. More importantly, *Firstland* is no longer a binding precedent.

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

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 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland* argument no longer has merit.

In addition, federal regulations affirmatively require an alien to establish eligibility for an immigrant visa at the time an application for adjustment of status is filed or when the visa is issued by a United States consulate. 8 C.F.R. § 245.1(a), 22 C.F.R. § 42.41.

If the beneficiary of an approved visa petition is no longer eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for "good and sufficient cause." Notwithstanding the USCIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

3. Good and Sufficient Cause

As a threshold matter, it is important to address whether the director adequately advised the petitioner of the basis for revocation of approval of the petition and whether the director's decision to revoke the approval of the petition was based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

As noted above, section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section

204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Before revoking the approval of any petition, however, the director must provide notice. The regulation at 8 C.F.R. § 205.2 reads:

(a) *General*. Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (Emphasis added).

Further, 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.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *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 un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director provided the petitioner with notice of the derogatory information specific to the current proceeding. In the most recent NOIR dated April 4, 2011 and the Notice of Certification dated November 3, 2011, the director specifically outlined the inconsistencies in the record pertaining to the beneficiary's prior work experience as a cook in Brazil. First, the director stated that the CNPJ number found on the employment verification letters from [REDACTED] belonged to a business called [REDACTED]. The director noted that the beneficiary, based on part B of the Form ETA 750, did not claim to have worked at [REDACTED], a grocery store; he only claimed he worked for [REDACTED] as a cook from January 1993 to January 1996.

Second, the director indicated, based on the evidence submitted, that [REDACTED] is not the same business as [REDACTED]. The director further stated that it is not clear whether the beneficiary worked full-time or part-time for [REDACTED].

Third, the director claimed that none of the employment verification letters submitted by [REDACTED] included a specific description of the experience or training received by the beneficiary, as required by 8 C.F.R. § 204.5(g)(1).⁹

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. No evidence has been submitted to resolve the inconsistencies in the record and to show that the petitioner has the continuing ability to pay the proffered wage. Based on the unexplained and un rebutted inconsistencies in the record, the director's decision to initiate revocation of the approval of the petition was, therefore, based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155.

4. Beneficiary's qualification for the job offered

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

⁹ In pertinent part, 8 C.F.R. § 204.5(g)(1) states:

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

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

Here, the Form ETA 750 was filed and accepted for processing by the DOL on March 26, 2001. 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.

As noted earlier, the beneficiary claimed on part B of the Form ETA 750 that he worked for a restaurant in Brazil called [REDACTED] from January 1993 to January 1996. The evidence submitted to demonstrate that employment, however, does not support or corroborate the beneficiary's claim. The CNPJ number listed on the sworn statements dated August 2, 2001 does not belong to [REDACTED] but to a business called [REDACTED]. Further, a review of the CNPJ number reveals that Merceria Souza is not a restaurant but a grocery store, and it has an address different from that listed by the beneficiary on part B of the Form ETA 750. Moreover, none of the employment verification letters submitted by [REDACTED] contains sufficient description of the experience or training received by the beneficiary, as required by 8 C.F.R. § 204.5(g)(1).

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). The record does not contain independent objective evidence such as the beneficiary's government-issued identification card or his Brazilian booklet of employment and social security or other proof of employment in Brazil to resolve these inconsistencies. For these reasons, the AAO agrees with the director that the petitioner has failed to establish that the beneficiary had the requisite work experience in the job offered as of the priority date.

5. Ability to Pay

Further, 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 March 26, 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.¹⁰

To show that the petitioner has the continuing ability to pay \$12.57 per hour or \$22,877.40 per year from March 26, 2001, the petitioner submitted copies of the following evidence:

- A letter dated October 15, 2001 addressed to the Immigration and Naturalization Service Vermont Service Center and signed by [REDACTED] stating that the petitioner employed over 400 employees in 2000, that the business, over the period of seven years, had been successful, that the gross sales in the last seven years had consistently reached or exceeded \$3 million, that the gross sales in the year 2000 were over \$5.2 million, that the total income for the year 2000 was \$3.64 million, that the employees' wages for the year 2000 were over \$2.03 million, and that the petitioning business would not produce its tax return since it was privately held.

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.

Here, there is no evidence establishing the beneficiary's employment with the petitioner during the qualifying period from the priority date.

¹⁰ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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 12.57 per hour or \$22,877.40 per year from March 26, 2001 until the beneficiary obtains his 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.¹¹

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.*

¹¹ We note that the beneficiary has transferred to new employment as noted by [REDACTED] in his response to the director's April 4, 2011 NOIR. 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). However, section 204(j) benefits do not accrue to an alien for whom the petition's approval has been revoked.

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 the plaintiff's 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 new employer (the employer to which the beneficiary ported) may not shield the beneficiary from the revocation of the Form I-140 simply because the beneficiary ported to another employer. Once the petition's approval is revoked based on good and sufficient cause, the petition's approval no longer remains valid, and the beneficiary may not port from the invalid petition.

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.¹² A corporation's year-end current assets are

¹² 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

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 2001. No evidence such as copies of the business' federal tax returns, annual reports, or audited financial statements for any year during the qualifying period 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.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

The letter dated October 15, 2001, from [REDACTED] stating that the company employed more than 400 workers in 2000 by itself is not acceptable in this case as evidence of the petitioner's ability to pay. Given the record as a whole and the fact that the petitioner has dissolved and is no longer in business, and that the petition's approval is revoked, the AAO declines to exercise its discretion to accept the letter from [REDACTED]. As noted earlier, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiary it is seeking to employ.

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

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

relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual 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 is revoked and the fact that the petitioner is dissolved, 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 is affirmed.