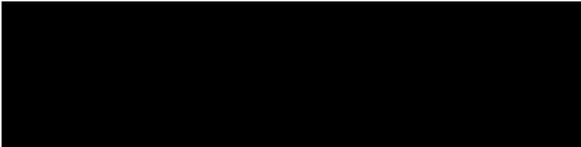


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: FEB 21 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On September 27, 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 August 18, 2004. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition on May 13, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed. The AAO will also invalidate the Form ETA 750, Application for Alien Employment Certification.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscaper/gardener 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 submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on August 18, 2004, but that approval was later revoked in May 2009. The director determined that the petitioner did not engage in an authentic recruitment effort for U.S. workers and failed to follow the U.S. Department of Labor (DOL) recruitment procedures. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, current counsel for the petitioner – [REDACTED] – contends that the director improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have good and sufficient cause as required by section 205 of the Immigration and Nationality Act ("the Act"); 8 U.S.C. § 1155 to revoke the approval of the petition. For instance, counsel states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding.

Further, counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had the petitioner not followed the DOL recruitment requirements.

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2, the director's denial will be considered under that provision under the AAO's *de novo* review authority.

One of the issues raised on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, 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),

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, in the Notice of Intent to Revoke (NOIR), the director wrote:

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's previous counsel, ██████████]

The director advised the petitioner in the 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. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by previous counsel, 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 on March 20, 2009 issued the NOIR, advising 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.

The AAO finds that while the director appropriately reopened the approval of the petition by issuing the NOIR, the director's NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of derogatory information, the director's decision will be

withdrawn. Approval of the petition will not be reinstated, however, as the petitioner has not established its eligibility for the preference visa.

Another issue raised on appeal is whether the director properly concluded that the petitioner did not comply with the recruitment procedures of the DOL.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner's previous counsel [REDACTED] submitted the following evidence:⁴

- Copies of advertisements for the position of [REDACTED] in the [REDACTED]
- A copy of the advertisement rates from the [REDACTED]

Upon review of the evidence submitted, the director noted several deficiencies in the record regarding the recruitment efforts. First, the director indicated that the petitioner failed to submit copies of the in house postings, or alternatively, an affidavit indicating that the petitioner in fact did comply with that internal posting requirement. Second, the director noted that that the petitioner could not have conducted the recruitment properly, because all of the advertising was conducted after the petitioner signed the application on December 26, 2000.⁵

The director in the NOIR did not notify the petitioner to specifically submit any copies of the results of the recruitment efforts, including the copy of the in-house posting. As noted above, without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS, id.*

Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the supporting documentation over five years after the labor certification was approved.⁶ At the time the petitioner filed the labor certification application with the DOL for processing in April 2001,

⁴ This evidence was submitted in response to the director's Notice of Intent to Revoke (NOIR).

⁵ The director stated in the Notice of Revocation:

Additionally, the petitioner signed the labor certificate on December 26, 2000. This signature serves to effectively claim all requirements to recruit a U.S. worker for the proffered position were met by them [sic].

⁶ However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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

The DOL at the time the petition was filed accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2003). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Employment Service Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003).

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

Here, the record reflects that the petitioner advertised the position on Sunday, January 25, 2001; Sunday, February 11, 2001; and Sunday, February 18, 2001. Shortly thereafter, the Form ETA 750 was filed with the DOL for processing on April 6, 2001. The DOL approved the Form ETA 750 on July 30, 2002. Based on the evidence submitted and the stated facts above, the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time.

In revoking the approval of the petition, the director stated that the petitioner could not have conducted the recruitment properly, because all of the advertising was conducted after the petitioner signed the application on December 26, 2000. In essence, the director determined that by signing the Form ETA 750, the petitioner stated under penalty of perjury that the recruitment was complete, and no more advertising should have been published. By placing advertisements after the petitioner signed the Form ETA 750, the director inferred that [REDACTED] who represented the petitioner in filing the Form I-140 petition) might have been impermissibly involved in the recruiting process, if the petitioner, for instance, merely signed the Form ETA 750 and let [REDACTED] take over the recruitment efforts (for instance, by placing the advertisement and interviewing U.S. candidates or deciding not to refer any candidates to the petitioner for consideration).

On appeal, counsel stated that [REDACTED] simply had the petitioner sign the Form ETA 750 in advance before the petitioner placed the advertisements.⁷

The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers.

The petitioner should have submitted this report to the DOL with its request for reduction in recruitment. By signing the petition before recruitment started, the AAO determines that the petitioner failed to follow recruitment procedures of the DOL. The petitioner could not have certified recruitment was complete in accordance with the regulations when it signed the Form ETA 750.⁸ The petitioner has not provided sufficient evidence to show that it actively participated in the recruitment of U.S. workers, nor that it conducted recruitment efforts in accordance with the DOL regulations at the time. The AAO, therefore, agrees with the director that the petitioner failed to conduct recruitment and we affirm the director's conclusion that the petitioner failed to follow the DOL recruitment requirements.

Additionally, the AAO finds that the petitioner did not execute the Form ETA 750 as required by the regulations. The regulation at 8 C.F.R. § 103.2(a)(2) (2004) stated:⁹

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an

⁷ Specifically, counsel stated, "The former attorney merely prepared the application [referring to the Form ETA 750] in advance and then waited to file it only after it received confirmation from the petitioner that no available, able, willing, and qualified U.S. workers responded to the ad."

⁸ The record reflects that [REDACTED] did not sign the Form ETA 750, further casting doubt on the *bona fides* of the recruitment process.

⁹ The regulation cited at 8 C.F.R. § 103.2(a)(2) is the pre-PERM regulation applicable to the instant case.

application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

On October 6, 2010, the AAO issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI), indicating that the signature on the 2001 Monthly Budget for the [REDACTED] did not match the signature on the Form I-140 petition and on Form G-28 dated the August 7, 2002. In response to the AAO's RFE/NDI, [REDACTED] states in a signed statement that he consented to have [REDACTED] represent him and his organization in the labor certification process, and that he did not sign the Form ETA 750, part A.¹⁰ Because of [REDACTED] admission that he did not sign the Form ETA 750, the petition, at the time it was filed, was therefore not supported by a labor certification authorized by the petitioner. For this reason, the AAO will invalidate the labor certification for fraud or misrepresentation in the labor certification process. See 20 C.F.R. § 656.31(d).¹¹

Further, the petition is currently not approvable because the record does not contain sufficient evidence to establish the petitioner's ability to pay the proffered wage from the priority date. Nor does the record demonstrate that the beneficiary had the requisite work experience in the job offered before the priority date.

With respect to the petitioner's ability to pay, U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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

¹⁰ [REDACTED] states, "I hereby confirm that [REDACTED] (the official name of the original petitioner - [REDACTED]) consented to the legal representation by [REDACTED] on the Form ETA 750 Application for Alien Employment Certification and the Form I-140 immigrant visa petition on behalf of [REDACTED] and "It was an oversight that the Form ETA 750 Part A was not signed by me."

¹¹ 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.

accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

Here, the ETA Form 750 was accepted for processing by the DOL on April 6, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$11.08 per hour or \$20,165.60 per year based on a 35 hour work week.¹²

To demonstrate that the petitioner had the continuing ability to pay \$11.08 per hour or \$20,165.60 annually from April 6, 2001, the petitioner originally submitted the following document:

- A copy of [REDACTED] individual tax return filed on the IRS Tax Form 1040 for the year 2001;
- A document called [REDACTED] and
- A copy of the beneficiary's Form W-2 issued by [REDACTED] for the year 2003.

The evidence in the record of proceeding shows that the petitioner was a business owned by [REDACTED] as a sole proprietor in 2001. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 10 people.¹³

In adjudicating the appeal, the AAO observed that the Employer Identification Number (EIN) listed on [REDACTED] tax return was different from the IRS tax number or EIN listed on the Form I-140 petition and on the beneficiary's 2003 W-2.¹⁴ On September 30, 2010, the AAO issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) advising the

¹² 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).

¹³ Later in a signed statement issued in response to the AAO's Request for Evidence and Notice of Derogatory Information dated October 6, 2010, [REDACTED] states that his business employs approximately 15 to 35 individuals on a seasonal basis.

¹⁴ The EIN listed on [REDACTED] the IRS tax number listed on the Form I-140 and the EIN listed on the beneficiary's 2003 [REDACTED]. The [REDACTED] number [REDACTED]

petitioner to explain why the EIN listed on [REDACTED] tax return was different from the IRS tax number or EIN listed on the Form I-140 petition and on the beneficiary's W-2:

In response to the AAO's RFE/NDI, [REDACTED] issued a signed statement in which he states that the petitioner was originally [REDACTED] before it changed its business structure from a limited liability corporation [REDACTED] to a corporation in 2005, and at the same time changed its name from [REDACTED]. Further, [REDACTED] states, "Except for these structural and name changes, no other changes were made to the nature of the petitioner's business or to the job being offered to the beneficiary on the labor certification. Counsel in her response to the AAO's RFE/NDI indicates, "It should be emphasized that the predecessor transferred all of its assets, rights, and obligations to the successor, [REDACTED] and "No other changes were made to the nature of the petitioner's business or to the job being offered to the beneficiary on the labor certification."

To show that [REDACTED] is the successor-in-interest to [REDACTED] (the original petitioner) and to demonstrate that [REDACTED] both have the continuing ability to pay the proffered wage, counsel submits the following evidence:

- A letter dated October 18, 2010 from [REDACTED] stating that the change from [REDACTED] was made when a 10% partner was added to the business and that [REDACTED] is still operational not as a landscaping company but as a holding company for equipment assets;
- A copy of the Articles of Organization of [REDACTED];
- A copy of the Stockholders' Agreement for [REDACTED];
- Copies of the federal tax returns of [REDACTED] filed on IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2006 through 2009;
- Copies of the beneficiary's Forms W-2 issued by [REDACTED] from 2007 to 2009;
- Copies of the beneficiary's Forms W-2 issued by [REDACTED] from 2003 to 2007; and
- Copies of the federal tax returns of [REDACTED] filed on IRS Forms 1065, U.S. Return of Partnership Income, for the years 2002 and 2003 and for 2005-2009.¹⁵

The evidence submitted above shows that the petitioner changed its business structure from a sole proprietorship to a limited liability company [REDACTED] in 2002. It does not, however, show that the business changed its name and/or structure to a corporation in 2005. The AAO, therefore, finds that there is no successor relationship between [REDACTED]

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership

¹⁵ The 2004 tax return of [REDACTED] is not submitted and therefore, is not part of the record.

to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Here, the record contains no evidence of transfer of ownership or assumption of rights, duties, and obligations between [REDACTED]. Nowhere in the Articles of Organization or the Stockholders' Agreement does it state that [REDACTED] will receive the transfer of ownership from [REDACTED] or that [REDACTED] will assume the rights, duties, and obligations of [REDACTED].

In addition, [REDACTED] assertions that nothing changed except the structure and the name of the business are misleading. Based on the evidence submitted, the AAO finds that [REDACTED] [REDACTED] are two separate and distinct entities. Further, the AAO determines that [REDACTED] did not change its structure when [REDACTED] was created; nor did it change its name. [REDACTED] was established when [REDACTED] formed the corporation with [REDACTED] in 2005.

Counsel [REDACTED] claims in response to the AAO's RFE/NDI that [REDACTED] transferred all of its assets, rights, and obligations to [REDACTED]. No supporting documentation, however, has been submitted to corroborate the veracity of the claim. In *Matter of Dial Auto*, *id.* the petitioner in that case *represented* that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this was, in fact, true; the Commissioner, consequently, dismissed the appeal and denied the petition. Similarly, in this case, counsel's statement alone is not reliable. 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)). Further, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits

[USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Because [REDACTED] is not the successor-in-interest to [REDACTED] the AAO will not consider either the net income or the current assets of [REDACTED] as evidence of the petitioner's ability to pay. In summary, the AAO will not accept any evidence from [REDACTED]

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

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

The beneficiary claimed in his Biographic Information (Form G-325) that he worked for the petitioner from 2000 to the date he signed the form (filed on October 4, 2002). The record, however, contains no evidence that the beneficiary was employed by the petitioner from 2000 to 2002, and from 2008 forward.¹⁶

The beneficiary received the following wages from the petitioner between 2003 and 2007:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2003	\$39,412.50	\$20,165.60	Exceeds the PW
2004	\$51,734.00	\$20,165.60	Exceeds the PW
2005	\$53,655.00	\$20,165.60	Exceeds the PW
2006	\$55,549.50	\$20,165.60	Exceeds the PW
2007	\$14,543.50 ¹⁷	\$20,165.60	(\$5,622.10)

Thus, the petitioner has demonstrated that it has the ability to pay the proffered wage from 2003 to 2006, but not in 2001, 2002, and from 2007 forward. In order for the petitioner to meet its

¹⁶ The evidence indicates that the beneficiary was employed by [REDACTED] from 2003 to 2007 and by [REDACTED] starting from 2007.

¹⁷ The beneficiary received \$39,614.00 in 2007 from [REDACTED], but as stated earlier, we will not consider any wages from [REDACTED] as evidence of the petitioner's ability to pay.

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 \$20,165.60 in 2001 and 2002 and from 2008 forward, and \$5,622.10 in 2007. The petitioner can show the ability to pay those amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, 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).

The record before the director closed on November 5, 2010 upon receipt by the director of the petitioner’s submissions in response to the AAO’s RFE/NDI. As of that date, the petitioner’s 2010 federal income tax return was not yet available. Therefore, the petitioner’s income tax return for 2009 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the years 2001 and 2002, and from 2007 forward, as shown below:

Tax Year	Net Income (Loss)¹⁸ – in \$	Remainder of the PW – in \$
2001	Not Available ¹⁹	20,165.60
2002	9,214	20,165.60
2007	(24,162)	5,622.10
2008	0	20,165.60
2009	0	20,165.60

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in any of the years shown above.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. As noted above, the petitioner was structured as a sole proprietorship in 2001 and as a limited liability corporation beginning in 2002. Net current assets for a limited liability corporation are the difference between the petitioner’s current assets and current liabilities.²⁰ A limited liability corporation’s year-end current assets are shown on

¹⁸ For a sole proprietorship, USCIS considers net income to be the figure shown on Adjusted Gross Income (Line 33 of the IRS Form 1040 1998-2001) minus any reliable annual household expenditure. For a [REDACTED] USCIS considers net income to be the figure shown on Line 22 of the IRS Form 1065; however, if the [REDACTED] has income, credits, deductions, or other adjustments, USCIS should not use the figure on line 22 of the Tax Form 1065 as net income, but rather, consider net income to be the figure shown on Line 1, top of page 4 (or page 5 on 2008-2010 returns) of the IRS Form 1065. In this case, since there are income, credits, deductions, or other adjustments, the net income is found on Line 1, top of page 4 of the IRS Form 1065.

¹⁹ The AAO does not consider the 2001 Monthly Budget for the [REDACTED] to be reliable. In his signed statement submitted in response to the AAO’s RFE/NDI, [REDACTED] stated, “The 2001 Monthly Budget for [REDACTED] may have been signed by another party familiar with my family’s financial status.” There is no explanation as to who signed the document and how that person was related to [REDACTED] and how he/she was familiar with the [REDACTED] budget.

²⁰ 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

Schedule L, lines 1 through 6 of the Form 1065. Its year-end current liabilities are shown on lines 15 through 17 of the Form 1065. If the total of the [redacted] 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.

A sole proprietor's year-end current assets are, on the other hand, not shown on his or her tax returns. Instead, the sole proprietor's adjusted gross income, personal assets and liabilities can be considered as part of the proprietor's ability to pay. In this case, the record contains no information regarding the sole proprietor's assets and liabilities.

The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2001 and 2002, and from 2007 to 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>Remainder of the PW – in \$</i>
2001	Not Available	20,165.60
2002	(54,246)	20,165.60
2007	(393,612)	5,622.10
2008	(184,500)	20,165.60
2009	(171,552)	20,165.60

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in any of the years above. Based on the net income and net current asset analysis above, the AAO finds that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary may receive lawful permanent residence, particularly in 2001 and 2002 and from 2007 to 2009.

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

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.

reputation as a couturiere. 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 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.

We acknowledge that the petitioner has been in a competitive field since 1980; however, the record is devoid of evidence regarding the petitioner's reputation. 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*. Upon review, the AAO is not persuaded that the petitioner has that ability.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

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

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 6, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Landscape Gardener." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Under direction of owner, execute all types of landscaping projects, including preparation of ornamental gardens, pool areas, grading, seeding, sodding, cultivating, maintaining, etc. Construct small walls and lay elementary walks; maintain and overhaul equipment, prune, transplant, etc.

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 or two years in a related occupation as a stonemason.

On the Form ETA 750, part B, signed by the beneficiary on December 26, 2000, he represented that he worked 35 hours a week as a stonemason for a landscaping company in Brazil called [REDACTED] from January 1996 to December 1998. Under the job description, the beneficiary stated, "I performed all kinds of landscape projects including walls, stone walls, bricks, etc." Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment dated January 23, 2001 from [REDACTED], stating that the beneficiary worked at [REDACTED] from January 1, 1996 to December 31, 1998.

In adjudicating the appeal, the AAO observed that [REDACTED] is not a landscaping company but a company providing accounting services.²¹ Further, the AAO found that the letter of employment from [REDACTED] did not include a specific description of the experience or the training as prescribed by the regulation at 8 C.F.R. § 204.5(g)(1). Moreover, the beneficiary failed to include his work experience abroad on the Form G-325 (Biographic Information), which he filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485). The AAO issued an RFE/NDI on October 6, 2010 alerting both the petitioner and the beneficiary to the problems stated above and requested both the petitioner and the beneficiary to submit independent objective evidence to resolve the problems in the record pertaining to the beneficiary's past work experience in Brazil. The AAO afforded the beneficiary 30 days to respond.

In response to the AAO's RFE/NDI, counsel submits the following evidence:

- A sworn statement dated October 12, 2010 from [REDACTED], stating that even though [REDACTED] is an accounting office, it had full-time work for the beneficiary as a stonemason for two years between 1996 and 1998 building the office and the sidewalks;
- A sworn statement dated October 28, 2010 from the beneficiary stating that he worked as a stonemason for [REDACTED] from January 1, 1996 to December 31, 1998; that [REDACTED] is an accounting office, not a landscaping company; that it was a mistake that [REDACTED] typed "landscaping" under the type of business on the Form ETA 750, part B; and that the failure to include his employment abroad on the Form G-325 is due to his carelessness not reviewing the form before signing it;

²¹ The AAO finds this information by looking at the business registration information of [REDACTED]

The record also includes a sworn statement dated April 7, 2009 from [REDACTED] stating that he worked with the beneficiary as a mason from 1996 to 1998.

Based on the evidence submitted, the AAO determines that the beneficiary did not have the requisite two years of work experience in the job offered or two years of work experience in a related occupation as a stonemason before the petitioner filed the labor certification application. In the RFE/NDI, the AAO requested the petitioner and/or the beneficiary to submit independent and objective evidence, such as pay stubs, payroll records, tax documents, or financial statements or other evidence of payments by [REDACTED] to the beneficiary, and a description of job duties performed at [REDACTED]. The petitioner failed to submit contemporaneous or other independent objective evidence of his employment with [REDACTED].

The AAO has stated that any evidence that either the petitioner or the beneficiary creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's decision. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Since neither the beneficiary nor the petitioner submits such evidence, the AAO is not persuaded that the beneficiary had the requisite work experience in the job offered or in the related occupation as a stonemason before the priority date.

The appeal will be dismissed and the petition's approval shall remain revoked for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

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