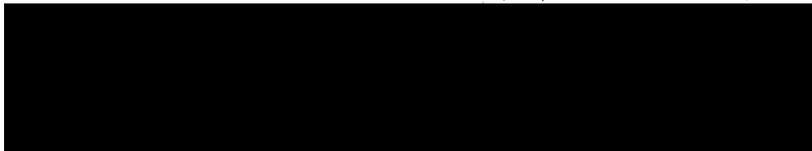


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
PUBLIC COPY

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:

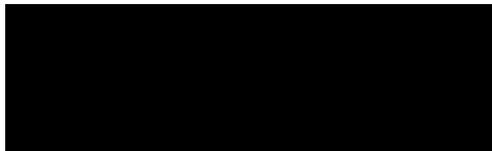
Petitioner:



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 19, 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 November 5, 2001. The director of the Texas Service Center ("the director"), however, revoked the approval of the immigrant petition on June 2, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act ("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 [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on November 5, 2001 by the VSC, but that approval was revoked in June 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures. The director also found that the beneficiary did not have the required experience as a cook as of the priority date. For these reasons, 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 has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of 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.

---

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

<sup>2</sup> 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.

Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had it not followed the DOL recruitment requirements.

With respect to the director's insistence on documentary proof of recruitment, counsel states that the petitioner, at the time when it filed the Form ETA 750 with the DOL for processing, was not required to retain any documentary evidence relating to its recruitment efforts once the labor certification had been approved. Counsel also states that, eight years after the petition was approved, the petitioner no longer has such evidence.

Insofar as the beneficiary's qualifications for the position offered, counsel asserts that the beneficiary was employed as a cook in Brazil for more than two years, from 1989 to 1993. Counsel states that the beneficiary worked at [REDACTED] before [REDACTED] officially registered its business with the Brazilian government in 1990. Further counsel argues that even if [REDACTED] was not open until 1990, the beneficiary would still have more than two years of experience in the job offered because he concluded his employment with [REDACTED] in 1993, three years after its creation date.

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.<sup>3</sup>

Preliminarily, as a procedural matter, the AAO finds that the director erred in revoking the approval of the petition under the authority of 8 C.F.R. § 205.1. The regulation at 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.

---

<sup>3</sup> 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).

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. 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 unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, 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 [REDACTED] filed the petition in this case, the director on February 17, 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. The petition will remain revoked, however, as the petitioner has not established that the beneficiary was qualified to perform the services of the occupation as of the priority date and that the petitioner had the ability to pay, as more fully discussed below.

Another issue 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, counsel submitted the following evidence:<sup>4</sup>

- A letter dated March 12, 2009 from [REDACTED] stating that the beneficiary has been working for the petitioner since 1995, and that the petitioner complied with all DOL recruitment regulations and requirements when filing the labor certification for the beneficiary;
- A copy of an advertisement for the position of "cooks" published in the *Cape Cod Times* on Sunday, March 4, 2001; and
- A copy of the advertisement rates from the *Cape Cod Times*.

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 internal postings and a statement indicating that such postings was submitted to the DOL. Second, the director indicated that the letter dated March 12, 2009 from [REDACTED] was not sufficient to prove that there were no available U.S. workers for the position offered at the time and that the petitioner met the DOL recruiting requirements. Thus, the director

---

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

concluded that the aggregate of the record did not establish that the petitioner had met all DOL advertising and recruiting requirements.

The AAO disagrees in part with the director's conclusion. First, 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. The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL.<sup>5</sup> *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 (2001). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local Employment Service office serving the area where the alien beneficiary proposes to be employed, who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process an Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2001). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2001).

---

<sup>5</sup> As there was no requirement to keep such records, the director may not make an adverse finding against the petitioner if it claims it does not have the documentation. 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).

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 signed the Form ETA 750 on December 19, 2000. The advertisement for the position offered was published on Sunday, March 4, 2001. The Form ETA 750 was filed with the DOL for processing on April 10, 2001.

Based on the evidence submitted and the stated facts above, the AAO notes that the petitioner placed the advertisement approximately one month prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time. Nevertheless, the AAO is concerned that the recruitment may not have been conducted properly as the petitioner started to recruit U.S. workers by placing the advertisement in the newspaper about two-and-a-half months after it signed the Form ETA 750.<sup>6</sup> This suggests that [REDACTED] (the attorney 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, interviewing U.S. candidates, or deciding whether to refer candidates for consideration).

On appeal, counsel argues that the AAO cannot sustain a revocation of approval of a Form I-140 petition unless there was good and sufficient cause specified in the director's NOIR.

In this case, we find that although the evidence suggests that recruitment procedures may not have been followed, the director failed to raise the specific issue of the petitioner's attestation on the labor certification application that recruitment had been completed in the Notice of Intent to Revoke. Due to lack of notice and the opportunity to respond, the AAO will not conclude that the DOL recruitment procedures were not followed. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and is withdrawn.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. On appeal, counsel contends that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.

The AAO disagrees with counsel's contention. If the petitioner or its previous counsel deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated. In this case, however, the factual record does not establish that the petitioner failed to follow the DOL recruitment procedures.

---

<sup>6</sup> By signing the Form ETA 750, the petitioner stated under penalty of perjury that the recruitment was complete.

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

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

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.<sup>7</sup>

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that

---

<sup>7</sup> It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

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

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. - (i) In general. - Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Here, as noted above, the evidence of record is not sufficiently developed to support the director's finding of fraud or willful misrepresentation in connection with the labor certification process.

In summary, the AAO withdraws the director conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the director's finding of fraud and/or material misrepresentation against the petitioner.

The director found the evidence insufficient to establish that the beneficiary was qualified as a cook as of the priority date.

The AAO agrees. First, the letter of employment from [REDACTED] by itself is not sufficient to show that the beneficiary worked as a cook for at least two years since it does not describe the training or experience of the beneficiary, in accordance with 8 C.F.R. § 204.5(1)(3)(ii).<sup>8</sup>

In addition, in adjudicating the appeal the AAO observed that the record contains discrepancies between information provided on the Form ETA 750B and the evidence submitted relating to the beneficiary's work experience in Brazil.<sup>9</sup> The AAO also notes that there are inconsistencies between the beneficiary's Biographic Information (Form G-325) and [REDACTED] claim regarding the beneficiary's employment with the petitioner.<sup>10</sup> On November 9, 2010, the AAO alerted both the petitioner and the beneficiary to these inconsistencies in the Request for Evidence and Notice of Derogatory Information (RFE/NDI). The AAO afforded the petitioner and the beneficiary 30 days to respond.

In response to the AAO's RFE/NDI, the petitioner submitted the following evidence to show that the beneficiary had been employed by the petitioner since 1995:

- A signed statement from [REDACTED] (no date) stating that the beneficiary has been working for the petitioner since 1995 and that any other indication stating otherwise is a mistake;
- Copies of paystubs issued to the beneficiary by the petitioner in 1995, 1997, 1998, 1999, 2000, and 2001;

---

<sup>8</sup> The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, "Any requirements of training or experience for skilled workers, professional, 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.

<sup>9</sup> On the Form ETA 750, Part B, the beneficiary claimed he worked as a cook at [REDACTED] located in Goiania, Brazil, from February 1994 to November 1998. The letter of employment from [REDACTED] however, stated that the beneficiary worked as a cook from 1989 to 1993. [REDACTED] according to the employment letter, is located at [REDACTED] Goiania, GO.

<sup>10</sup> On the Form G-325, which the beneficiary filed along with the Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary claimed he had been working for the petitioner since 1999. [REDACTED] however, states in her letter dated March 12, 2009 that the beneficiary has been working for her restaurant since 1995.

- Copies of Forms W-2 issued to the beneficiary by the petitioner for the years 1997 through 2000 and 2002 through 2004;<sup>11</sup>

Upon review of the evidence submitted, the AAO finds that there are inconsistencies in the testimony of the beneficiary and of the petitioner that the beneficiary has been continuously employed by the petitioner since 1995. For 1995, the record contains copies of two paystubs dated June 9, 1995 and June 16, 1995. These paystubs list the beneficiary's employee number as 22. The next dated paystubs in the record are issued in 1997, and the beneficiary's employee number is 17. The break in records and the change of employee number do not suggest continuous employment with the petitioner.

The petitioner also submitted the following evidence to show that the beneficiary had at least two years of work experience in the job offered before the priority date:

- A sworn statement dated July 14, 2009 from [REDACTED] describing how she first met the beneficiary and eventually hired him as a cook in her restaurant;<sup>12</sup>
- A declaration from [REDACTED], stating that the beneficiary worked as a cook from 1989 to 1993;
- A sworn statement dated March 18, 2009 from the beneficiary describing his and his sister's efforts to track down the owner of [REDACTED]
- A notarized statement from the beneficiary's sister, [REDACTED] stating that [REDACTED] is no longer at the address where it was when the beneficiary worked between 1989 and 1993 and that she cannot locate where the owner of the business since she has left suddenly without leaving an address or telephone number;
- A copy of [REDACTED] showing that the business was officially registered with the Brazilian authority on 21/03/1990 (March 21, 1990);<sup>13</sup>

<sup>11</sup> The AAO notes that the social security number listed on the Forms W-2 for the years 1997 to 2000 is different from the social security number listed on the Forms W-2 for the years 2002 through 2004.

<sup>12</sup> [REDACTED] describes the beneficiary's skills as follows, when he was initially hired:

As soon as he started, it was clear that he was a very experienced cook. His knife skills were impressive. He is particularly skilled at food presentation and décor, skills that are invaluable for the elaborate buffets for brunches and weddings that were a staple of our work at [REDACTED]. He can carve trees out of pineapples and do amazing things setting up buffets that really show his artistic and creative skills with food.

<sup>13</sup> [REDACTED] is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a [REDACTED]. The Department of State has determined that the [REDACTED] 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

- A copy of a document called "Simplified Certificate" for [REDACTED] issued by the State of Goia Secretary of Industry and Commerce;
- A copy of an article called "Informal Urban Economy – 2003" by Brazilian Institute of Geography and Statistics;
- A notarized statement from [REDACTED] stating that he along with his brother, the beneficiary, worked at [REDACTED] before the restaurant was officially registered with the Brazilian government and that he worked there from 1989 to 1991 as a kitchen assistant and waiter; and
- A notarized statement from [REDACTED] stating that he worked at [REDACTED] as the beneficiary's assistant.

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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 10, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, [REDACTED] and southern style dishes, including Jambalya, Remoulade Sauce, Etouffee, blackened seafood, and other dishes, using a variety of spices and cooking techniques." The DOL determined that the job description and title are consistent with the DOT job code 313.361-014, cook (hotel and restaurant).<sup>14</sup> 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.

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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on December 19, 2000, he represented that he worked 40 hours a week at [REDACTED] as a cook in Brazil from February 1994 to November 1998. This information, as noted above, is inconsistent with the letter of employment from [REDACTED] which states that the

---

company to that Brazilian company's registered creation date.

<sup>14</sup> The DOT job code can be found online at: <http://www.occupationalinfo.org> (last accessed August 17, 2011).

beneficiary worked as a cook from 1989 to 1993, and with the statements from the petitioner, which state that the beneficiary has been working for the petitioner in the U.S. since 1995.

The beneficiary stated in the Form G-325 (Biographic Information) that his last address in Brazil of more than one year was in "Belo Horizonte, B.H."<sup>15</sup> While it is not dated, the beneficiary's Form G-325 does not include living in the city of Goiania, GO, after his employment at [REDACTED] and before he left for the United States in August 1994. It is improbable that the beneficiary worked in Goiania, GO, where [REDACTED] was located, and lived in Belo Horizonte, Minas Gerais (MG), between 1989 and 1993. These inconsistencies in the record pertaining to where the beneficiary lived and worked in Brazil along with other inconsistencies in the record as noted above are not overcome by independent objective evidence.

With respect to the AAO's request for the petitioner and/or the beneficiary to submit independent objective evidence to demonstrate the veracity of the beneficiary's employment with [REDACTED], the beneficiary claims he cannot produce anymore documentation since the business [REDACTED] does not exist anymore and the owner has disappeared.<sup>16</sup>

USCIS regulations at 8 C.F.R. §§ 103.2(b)(2)(i) and (ii) allow USCIS to accept secondary proof in the event that the primary evidence is not available. The regulations further state, "If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances." 8 C.F.R. § 103.2(b)(2)(i).

Here, neither the petitioner nor the beneficiary has demonstrated that the primary or the secondary evidence is unavailable. The record contains no evidence showing the efforts taken by the beneficiary to obtain independent objective evidence from the Brazilian government. For instance, the record does not contain 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

---

<sup>15</sup> There is no Belo Horizonte, B.H. according to <http://www.distancecalculator.globefeed.com>. According to the same source, the city of Belo Horizonte is in the State of Minas Gerais (MG). According to <http://www.distancecalculator.globefeed.com>, the distance between Goiania, GO and Belo Horizonte, MG, is 666.92 km (or 414.40 miles). The estimate road distance can be around 766.96 km (or 476.56 miles). (Last accessed February 16, 2012).

<sup>16</sup> In an affidavit dated March 18, 2009, the beneficiary stated that his sister, [REDACTED] recently went to [REDACTED] but found that the restaurant had been closed. The beneficiary also indicated that his sister then went to the house of [REDACTED] mother ([REDACTED]) and found out through [REDACTED] cousin that [REDACTED] had left Goiania and moved to Itaituba. According to the beneficiary, his sister also could not email [REDACTED] because the email address is no longer valid. The beneficiary claimed that he had sent multiple letters to [REDACTED] and none of them was returned. The last time he heard from [REDACTED] was in 2001, according to the beneficiary.

Brazil that would establish the beneficiary's employment at [REDACTED]. Therefore, the AAO finds that the beneficiary did not have the requisite work experience in the job offered as of the priority date and is not qualified to perform the duties of the position.

Additionally, the petition is not approvable because the record does not contain sufficient evidence establishing the petitioner's ability to pay the proffered wage from the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The AAO requested in its RFE/NDI that the petitioner established the ability to pay the proffered wage from the priority date, which it has not. Thus, the revocation of the approval of the petition will be affirmed.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

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

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 10, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.22 per hour or \$22,240.40 per year based on a 35 hour work week.<sup>17</sup>

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

---

<sup>17</sup> The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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.

In this case, the beneficiary, based on the evidence submitted, has been employed and paid by the petitioner since sometime before the priority date on April 10, 2001.<sup>18</sup> The beneficiary received the following wages from the petitioner between 2001 and 2009:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2001	Not submitted	\$22,240.40	N/A
2002	\$49,273.50	\$22,240.40	Exceeds the PW
2003	\$48,715.50	\$22,240.40	Exceeds the PW
2004	\$43,978.92	\$22,240.40	Exceeds the PW
2005	Not submitted	\$22,240.40	N/A
2006	Not submitted	\$22,240.40	N/A
2007	Not submitted	\$22,240.40	N/A
2008	Not submitted	\$22,240.40	N/A
2009	Not submitted	\$22,240.40	N/A

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 full proffered wage of \$22,240.40 per year in 2001 and from 2005 to 2009.

Additionally, as stated earlier in the AAO's RFE/NDI dated November 9, 2010, the petitioner, according to USCIS electronic databases, has filed 14 other employment-based immigrant petitions since 1998. Of the 14 petitions the petitioner filed, four had been approved and one had been denied due to abandonment before the priority date or April 10, 2001. The remaining eight petitions were adjudicated after the priority date, and they have either been approved or revoked due to fraud. One petition was received on June 17, 1999 and remains undecided.

<sup>18</sup> The AAO will only evaluate and consider the wages that the beneficiary received from the priority date. As noted above, 8 C.F.R. § 204.5(g)(2) only requires the petitioner to demonstrate the ability to pay from the priority date.

To meet the burden of proving by preponderance of the evidence that the petitioner has the continuing ability to pay, the petitioner is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of its immigrant visa beneficiaries.

The petitioner can show that it can pay the proffered wages of all of the beneficiaries through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long

term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>19</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to 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.

Here, the record includes no Forms W-2 or 1099-MISC or other evidence showing that the petitioner employed and paid the beneficiary in 2001 and from 2005 to 2009. In addition, no evidence has been submitted to demonstrate that the petitioner has the ability to pay the other beneficiaries. Nor has the petitioner submitted copies of its federal tax returns, audited financial statements, or annual reports of the petitioner for the years 2001 through 2009. On November 9, 2010 the AAO issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI) specifically advising the petitioner to submit evidence showing that the petitioner employed and paid the beneficiary from the priority date. It also advised the petitioner to submit copies of tax returns, audited financial statements, and/or annual reports for the years 2001 through 2009. None is submitted. We, therefore, conclude that the petitioner has not established that it has sufficient net income or net current assets to pay the proffered wage continuously from the priority date.

Though not raised on appeal, 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

---

<sup>19</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 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.

Here, the record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage in 2001 and from 2005 to 2009. The petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1994.<sup>20</sup> Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

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*. After a review of the evidence submitted, the AAO is not persuaded that the petitioner has that ability.

The petition will be denied for these 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 appeal is dismissed. The approval of the petition remains revoked.

---

<sup>20</sup> A search of the website of the Secretary of Commonwealth, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>) shows that [REDACTED] was incorporated on May 11, 1994.