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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: **JUL 24 2012** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center, on January 9, 2002, but the approval was later revoked by the Director, Texas Service Center, on February 21, 2012. The decision to revoke the approval of the petition is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4(a). The AAO will affirm the director's decision.

1. Facts and Procedural History

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was approved by the Director, Vermont Service Center, on January 9, 2002.

On February 18, 2009, the director of Texas Service Center (the director) sent a Notice of Intent to Revoke (NOIR) requesting the petitioner to submit additional evidence to demonstrate that the petitioner conducted good faith recruiting efforts and that the beneficiary had the requisite work experience as a cook before the priority date.

In response to the director's NOIR, counsel for the petitioner at the time, [REDACTED],² submitted the following evidence:

- Copies of the newspaper tear sheet for the position offered, published in the *Boston Sunday Herald* on Sunday, February 11, 2001;
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days;
- A copy of the beneficiary's Social Security Card showing that she worked as a cook for Restaurante Panoramico Vila Olimpica from January 2, 1994 to February 5, 1998;
- A sworn statement dated February 27, 2009 from Restaurante Panoramico Vila Olimpica stating that the beneficiary worked as a cook from January 2, 1994 to February 5, 1998;³ and

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 The AAO notes that [REDACTED] was under U.S. Citizenship and Immigration Services (USCIS) investigation at the time the NOIR was sent for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. His representations in this matter will be considered; however, he will not be sent a copy of this decision. He will be referred to throughout this decision as previous counsel or by name.

- Pictures of Restaurante Panoramico Vila Olimpica.

also claimed that the beneficiary no longer worked for the petitioner and had ported in accordance with section 204(j) of the Act. Accompanying this claim was a letter dated March 5, 2009 from Sandwich Express Cafeteria, Myshqeri Corp., stating that the beneficiary is currently a full-time cook and her current salary is \$315 per week.⁴

Upon review of the evidence submitted, the director noted several deficiencies in the record regarding the recruitment efforts. First, the director stated that the petitioner failed to submit copies of the in-house postings, or alternatively, failed to state that a copy of such postings was submitted to the DOL as proof of compliance. Second, the director stated that the submission of the copy of the letter dated February 14, 2001 addressed to from the *Boston Herald* showed that had paid for and created the advertisement for the job offered and impermissibly participated in the consideration of the U.S. applicants. Finally, the director noted that the petitioner signed the Form ETA 750 on February 2, 2001. The director stated that the petitioner could not have declared that it had completed the recruitment efforts on February 2, 2001 when, according to the evidence submitted, the petitioner appeared to begin recruiting by placing an advertisement in the newspaper on February 11, 2001. For these reasons, the director concluded that the petitioner did not conduct good faith recruitment and accordingly, revoked the approval of the petition on May 5, 2009.

The beneficiary through her counsel, Ms. Julie A. Endy of Joyce and Associates,⁵ subsequently appealed the director's decision by filing a Form I-290B, Notice of Appeal or Motion to the AAO. On appeal, counsel contended that the director's decision to revoke the approval of the petition was not based on good and sufficient cause, as required by Section 205 of the Act, 8 U.S.C. § 1155.

She further contended that the beneficiary no longer worked for the petitioner and had ported to work for another employer in a substantially similar occupation as the job described in the certified Form ETA 750. Counsel stated that the petitioner had closed its business and that the beneficiary had no way of finding or getting in touch with the original owner of the business to defend against

³ The AAO notes that Restaurante Panoramica Vila Olimpica earlier submitted a letter of employment in support of the Form I-140 petition stating that the beneficiary worked as a cook from January 2, 1994 to February 5, 1998. This letter was dated January 22, 2001.

⁴ The AAO notes that the record also contains a letter dated January 18, 2006 from Debra Ronga Mirabile, Office Manager, stating that the beneficiary is currently an employee of La Ronga Bakery and her salary is approximately \$450 per week.

⁵ Ms. Endy will be referred to as counsel or by name throughout this decision. She also will not be sent this decision, as she does not represent the petitioner. *See infra*, footnote 7.

the revocation of the approval of the petition.⁶ Citing the portability provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as amended by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), Ms. Endy indicated that the beneficiary had a vested legal interest in this proceeding. Counsel essentially argues that the beneficiary in this case is the affected party as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B), and therefore, should have legal standing to appeal the revocation of the petition.

On September 14, 2009 the director rejected the appeal, stating that neither the beneficiary nor the beneficiary's counsel was entitled to file the appeal.⁷

⁶ On appeal, the beneficiary issued an affidavit dated June 1, 2009 in which she indicated that the business where she used to work had closed. Specifically, she states:

After I arrived in the United States, I started working for Sabatinos Cucina Italiana, a restaurant in Winchester, Massachusetts, which also specialized in Italian food. The owner, William Sabatino, is the one who agreed to sponsor me for a work visa in 2001. There were two Sabatinos (the one in Winchester and one in Saugus) and the owner, who was around 80 years old, ran both places himself. There was no manager. I worked for him from 2000 until around 2005 or 2006 when I left to pursue other employment.

In 2006, I heard that the Sabatinos in Winchester was finally sold and I believe now it's a Chinese restaurant. The location in Saugus had already been closed for a long time by then. I have no way how of getting in touch with Mr. Sabatino; I'm not even sure if he's still alive, given how old he was when I worked for him.

Regardless of the beneficiary's assertions that the petitioner had closed and that the beneficiary had no way of contacting the petitioner, a search of the website of the Secretary of the Commonwealth of Massachusetts, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>), reveals that the petitioner – Bassam's Enterprises, Inc. doing business (d.b.a.) as Sabatinos Italian Kitchen, Employer Identification Number [REDACTED] – is still active. (Last accessed July 2, 2012).

⁷ Procedurally, the director's decision to reject the appeal is erroneous. The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) (which includes petitions for immigrant visa classification based on employment at 8 C.F.R. § 103.1(f)(3)(iii)(B)), with one exception - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE). Moreover, the regulation 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) and the instructions on the Form I-290B direct

On January 20, 2011 the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5). The director withdrew the decision issued on May 5, 2009 (the NOR) and reinstated the approval of the petition.

On June 1, 2011 the director sent another Notice of Intent to Revoke (NOIR) to the petitioner, finding that that the petitioner had submitted sufficient evidence to establish that the beneficiary qualified for the position offered. The director, however, determined that the petition could not be approved because (a) the petitioner had not established by a preponderance of the evidence that it followed the DOL recruitment requirements, and (b) the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage from the priority date. Thus, the petitioner was advised by the director to submit independent objective evidence to demonstrate that the petitioner conducted good faith recruitment efforts in accordance with the DOL regulations and that the petitioner has the continuing ability to pay the proffered wage of the beneficiary from the priority date. The petitioner was given 30 days (33 days if the notice is received by mail) to respond.

No response was received.⁸

On February 21, 2012 the director revoked the approval of the petition and certified the matter to the AAO, pursuant to 8 C.F.R. § 103.4(a).⁹ In the Notice of Certification, the director concluded that (1) the beneficiary did not have the requisite work experience in the job offered as of the

the petitioner to submit its brief and/or additional evidence directly to the AAO, not to the director. Therefore, the AAO hereby withdraws the decision of the director to reject the appeal.

We note that the beneficiary through her counsel is not entitled to file the appeal in this proceeding.

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

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

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

Thus, the AAO would have rejected the appeal.

⁸ The AAO notes that the second NOIR dated June 1, 2011 was undeliverable and returned to USCIS unopened.

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

priority date, and (2) the petitioner had failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date.

We disagree with the director's conclusion that the beneficiary did not qualify for the position offered.

2. The Beneficiary's Qualifications

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 March 23, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook." The job description under section 13 of the Form ETA 750A is "Prepare all types of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) 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 February 2, 2001, she represented she worked 35 hours a week at Restaurante Panoramico Vila Olimpica as a cook from January 1994 to February 1998.

The AAO agrees with the director that neither the letter of employment dated January 22, 2001 nor the sworn statement dated February 27, 2009 from Restaurante Panoramico Vila Olimpica complies with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A),¹⁰ in that neither includes a description of the beneficiary's work experience or the training received. Simply stating that the

¹⁰ The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

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

beneficiary worked as a cook is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

However, the director did not provide the petitioner with notice of the derogatory information specific to the beneficiary's qualifications in the NOIR. Nothing in the NOIR dated June 1, 2011 indicated that there was a problem with the beneficiary's qualifications. In fact, the director in the NOIR dated June 1, 2011 determined that the beneficiary qualified for the position offered.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

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

However, the regulation at 8 C.F.R. § 205.2 states:

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

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 proceedings

Matter of Arias, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However,

where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Therefore, the AAO will withdraw the director's conclusion that the beneficiary does not qualify for the position offered.¹¹

Nonetheless, the petition cannot be approved since the petitioner has not established its continuing ability to pay the beneficiary's proffered wage until the beneficiary either obtains her lawful permanent residence or until she ported to another employer, pursuant to section 204(j) of the Act, 8 U.S.C. § 1154(j), as amended by section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313).

3. The Petitioner's Ability to Pay

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

¹¹ The AAO has not examined and makes no finding on whether the beneficiary is qualified to perform the services of the occupation as the petitioner did not receive notice of any deficiency in the beneficiary's qualifications.

As indicated above, the Form ETA 750 was accepted by the DOL for processing on March 23, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week).¹²

To show that the petitioner has the continuing ability to pay \$12.57 per hour or \$22,877.40 per year from March 23, 2001, the petitioner submitted copies of the following evidence:

- A copy of its completed federal tax returns filed on Form 1120, U.S. Corporation Income Tax Return, for the year 2000;¹³
- Copies of the beneficiary's paystubs for 2001 issued by Sabatino's Cucina Italiana with an address of [REDACTED]; and
- A copy of the Form W-2 of Sabatino's Cucina Italiana with an address of [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.

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 We note that the petitioner is only required to demonstrate the ability to pay from the priority date which is March 23, 2001. Therefore, the petitioner's 2000 tax return has little probative value. The AAO will not consider the petitioner's 2000 tax return when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

No evidence has been submitted to show that the beneficiary was employed and paid by the petitioner. The evidence submitted – the paystubs for the year 2001 and the Form W-3 Transmittal of Wage and Tax Statements 2000 – does not reflect that the company paying the beneficiary (Sabatino's Cucina Italiana with an address of [REDACTED] [REDACTED]) in 2000 or 2001 is the petitioner. The petitioner identified its Employer Identification Number (EIN) on the Form I-140 as [REDACTED]; whereas the EIN of Sabatino's Cucina Italiana with an address of [REDACTED] on the Form [REDACTED], a different entity.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of \$12.57 per hour or \$22,877.40 per year from March 23, 2001 until the beneficiary obtains legal permanent residence, or until the beneficiary ported to work for another employer in a similar job, assuming that section 204(j) of the Act applies in this instant proceeding.¹⁴

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

¹⁴ As noted earlier, both [REDACTED] claimed that the beneficiary had ported to work for another employer, pursuant to section 204(j) of the Act, which provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. This section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. See *Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); also see *Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

On the subject of porting, the AAO notes that where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. See *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).

receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁵ 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

¹⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record, however, contains no evidence showing the petitioner's net income or net current assets from 2001. No evidence such as copies of the business' federal tax returns, annual reports, or audited financial statements for the years 2001 and thereafter has been submitted.

In the NOIR dated June 1, 2011 and the Notice of Certification dated February 21, 2012, the director specifically requested the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date. No response or additional evidence as requested has been provided or submitted. The AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date.

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

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

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

For the above stated reasons, we determine that the revocation of the previously approved petition is based on good and sufficient cause as required by section 205 of the Act, 8 U.S.C. § 1155. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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