

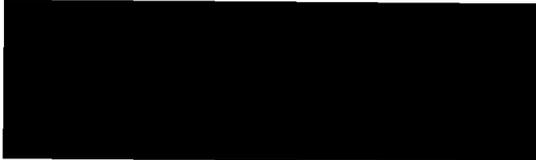
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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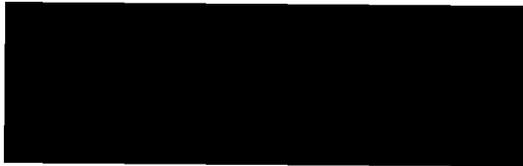


IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On September 3, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on September 23, 2003. However, the Director of the Texas Service Center (“the director”) revoked the approval of the immigrant petition on May 12, 2009, and the petitioner subsequently appealed the director’s decision. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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). As noted above, the petition was initially approved in September 2003, but the approval was revoked in May 2009. The director concluded that the beneficiary did not have the requisite work experience in the job offered in Brazil before the priority date. Further, the director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures and that the application for labor certification involved willful misrepresentation. For these reasons, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal to the AAO, current counsel for the petitioner, ██████████² contends that the director has improperly revoked the approval of the petition and indicates that the petitioner has followed the DOL recruitment procedures in recruiting applicants for the position. Based on the evidence submitted, counsel states that the petitioner placed the advertisements after submitting the labor certification application, consistent with the traditional recruitment process.

Additionally, counsel states that the petitioner has submitted sufficient evidence to demonstrate that the beneficiary worked as a cook in Brazil for at least two years and that she is qualified to perform the duties of the position.

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

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

² Current counsel, ██████████ will be referred to as counsel throughout this decision. Previous counsel, ██████████ will be referred to as previous or former counsel or by name. ██████████ was suspended from practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015. ██████████ representations in this matter will be considered, nonetheless.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Preliminarily, as a procedural matter, the AAO finds 8 C.F.R. § 205.1 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) 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.

1. Good and Sufficient Cause

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

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

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

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

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

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

The Service [USCIS] 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 former attorney of record, ██████████]

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 ██████████ the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since ██████████ filed the petition in this case, the director on 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 the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not 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 also did not specifically state that the petitioner needed to submit, for instance, copies of the in-house postings or other evidence to show that the petitioner complied with the DOL recruitment procedures. 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. However, for reasons discussed below, the revocation of the approval of the petition will be affirmed.

2. Recruitment Procedures

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

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time (Mr. Dvorak) submitted copies of the following evidence in response to the director's Notice of Intent to Revoke (NOIR):

- Copies of the newspapers tear sheets for the position of a cook, published in the *Metrowest Daily News* for three consecutive days on Monday, January 21, 2002; and Wednesday, January 23, 2002;
- A copy of the in-house posting posted from January 10, 2002 through January 25, 2002; and
- A copy of the letter dated December 29, 2001 from the Massachusetts DOL addressed to [REDACTED] forming [REDACTED] that the Application for Employment Certification (Form ETA 750) had been accepted and assigned a priority date of April 25, 2001.⁴

Upon review, the director determined that the petitioner failed to comply with the DOL recruitment requirements, because the petitioner signed the Form ETA 750 on December 10, 2001 claiming that all the recruitment requirements had been completed then, where in fact no recruitment was done until January 2002.

The AAO notes that the Form ETA 750, part A, box 21 indicates that as of the date of signing on December 10, 2001, the petitioner had conducted recruitment through "Job-site postings and advertisement in local newspapers." The record, however, contains no evidence of pre-filing

⁴ The letter further gave [REDACTED] instructions on the recruitment requirements.

recruitment, which is an anomaly in DOL procedures appropriately noted by the director. The record, on the other hand, indicates that the petitioner performed recruitment under supervision of the DOL. The AAO will accept the petitioner's supervised recruitment notwithstanding the noted ambiguities.

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 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (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).

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 authorized [REDACTED] to file the Form ETA 750, and that [REDACTED] filed the Form ETA 750 for processing with the local DOL on April 25, 2001. Further, the letter dated December 29, 2001 from the local DOL to [REDACTED] shows that the local DOL advised the petitioner to begin advertising and accepting resumes. The record shows that the petitioner began recruiting (by placing advertisements in the local newspapers), as instructed by the local DOL, in January 2002. Based on the evidence submitted and the stated facts above, it appears that the petitioner conducted supervised or traditional recruitment. Therefore, the director's conclusion that that the petitioner failed to follow the DOL recruitment procedures is erroneous and must be withdrawn.

3. Willful Misrepresentation

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 director found fraud or willful misrepresentation against the petitioner and revoked the approval of the petition simply because [REDACTED] filed the petition in the instant proceeding.⁵

The AAO disagrees with counsel's contention. If the petitioner or the beneficiary deceived the DOL in the recruitment process, then the labor certification is not valid and should be invalidated.

⁵ In his brief counsel states, "It appears that this case was grouped with many others for Revocation because [REDACTED] name was attached to it at the I-140 stage.

In this case, however, the factual record does not establish that the petitioner failed to follow the DOL's recruitment procedures. Similarly, the record does not indicate that the petitioner and/or the beneficiary engaged in fraud or material misrepresentation.

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.⁶

⁶ 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.

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 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.

In this case, as noted above, the factual record does not disclose that the petitioner engaged in material misrepresentation with respect to the recruitment process. Further, the AAO finds that the proof of the beneficiary's qualifications is inconsistent and not credible. The record does not establish fraud and/or misrepresentation, however. Thus, the director's finding of fraud or misrepresentation is withdrawn.

Nevertheless, the petition is currently not approvable as the record does not establish that (a) the beneficiary is qualified to perform the services of the position and (b) the petitioner has the continuing ability to pay the proffered wage from the priority date. For these reasons, the appeal will be dismissed.

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 (9th 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). Further, 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).

4. Beneficiary's qualification for the job offered

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

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

Here, as noted above the Form ETA 750 was filed and accepted for processing by the DOL on April 25, 2001. Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

The record contains affidavits dated April 18, 2001 and March 6, 2009 from [REDACTED] who stated that the beneficiary worked at his residence as a chef from 1993 to [REDACTED]

1997 and at his company, [REDACTED], as a cook from 1990 to 1993. However, this claimed employment with [REDACTED] was not listed on part B of the Form ETA 750, where the beneficiary was required to list all jobs held during the last three years and all other jobs that were relevant to the position offered.

Furthermore, a review of the copy of the beneficiary's employment and social security booklet shows that the beneficiary worked for [REDACTED] from October 1990 to October 1994 and for [REDACTED] from June 1995 to November 1995.⁷ According to that booklet, the beneficiary also worked as a maid for [REDACTED] in July 1997. The booklet does not state that the beneficiary worked as a cook or chef for [REDACTED].

On November 3, 2011 the AAO sent both the petitioner and the beneficiary a Notice of Derogatory Information and Request for Evidence (NDI/RFE) advising the petitioner and the beneficiary to resolve the inconsistencies in the record as noted above by submitting independent and objective evidence.

In response, the beneficiary submits a sworn statement dated December 1, 2011 stating that she provided that information to [REDACTED] her attorney at the time, that she worked for [REDACTED] at his restaurant as well at his residence as a cook, although she does not know why [REDACTED] did not include that information on the Form ETA 750, part B. The beneficiary reaffirms in her sworn statement that she qualifies for the position because she worked as a cook for [REDACTED] for four years, as shown on her employment and social security booklet.⁸

⁷ The occupation of the beneficiary, according to the booklet, was cook.

⁸ The beneficiary also states in her sworn statement that the signature on the Form G-325 (Biographic Information), which she submitted in connection with her Application to Register Permanent Residence or Adjust Status (Form I-485), was not hers. She further notes that the information about her father and marriage as shown on the Form G-325 was incorrect.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Signature. An applicant or petitioner must sign his or her application or petition. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.

Her failure to apprise herself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve her of responsibility for the content of her petition/application or the materials submitted in support. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for

Since neither [REDACTED] was listed on the approved Form ETA 750, and the official records do not indicate that the beneficiary worked for [REDACTED], the AAO declines to deem the evidence from [REDACTED] (the affidavits) as credible. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

Neither the beneficiary nor the petitioner additionally has submitted independent objective evidence to resolve the inconsistencies in the record as noted above. For these reasons, the petitioner has failed to establish that the beneficiary possessed the requisite work experience in the job offered before the priority date.

5. The 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).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on April 25, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.57 per hour or \$26,145.60 per year (based on a 40-hour work per week).

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

adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents).

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).

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

The petitioner submitted the following evidence:

- A copy of the beneficiary's Form W-2 for 2001; and
- A copy of the petitioner's federal income tax (Form 1120, U.S. Corporation Income Tax Return) for 2001.

Based on the evidence submitted above, the beneficiary received \$22,540 from the petitioner in 2001. Further, the petitioner reported net income and net current assets of \$77,025 and \$77,986, respectively, in 2001. The evidence submitted above, however, is not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until each beneficiary, including the beneficiary in the instant case, received or receives his or her permanent residence, or until the beneficiary ports to work for another employer in a substantially similar position, assuming that 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), applies in this instant proceeding.⁹

⁹ In response to the director's NOIR, counsel for the petitioner at the time [REDACTED] claimed that the beneficiary no longer worked for the petitioner and had ported pursuant to section 204(j) of the Act to work for another restaurant named [REDACTED] as a head cook. The record contains a letter dated March 5, 2009 from [REDACTED] stating that the beneficiary works as a head cook earning weekly salary of \$455. On appeal, [REDACTED] submits a letter dated November 29, 2011 to the AAO stating that [REDACTED] will employ the beneficiary as a cook and pay her at the prevailing wage. Counsel for [REDACTED] indicates that [REDACTED] is the new petitioner, replacing the original petitioner [REDACTED].

On the subject of porting, the AAO finds 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

In adjudicating the instant appeal, we find that the petitioner has filed multiple immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding since 2001. According to USCIS electronic databases, the petitioner has filed six other employment-based immigrant petitions since 2001.¹⁰ Thus, the petitioner, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of the other immigrant visa beneficiaries until each beneficiary receives his or her legal permanent residence (LPR).

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income

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).

_____ is the beneficiary's potential employer. It has not filed an employment-based petition, nor has it filed a labor certification for the beneficiary. Therefore, _____ is not the affected party, and it cannot replace the original petitioner, unless it can establish successor relationship to the original petitioner. The record contains no evidence establishing that relationship. Thus, we cannot accept evidence from _____ or its counsel.

¹⁰ The details of the six petitions filed by the petitioner since 2001 were revealed to the petitioner in the AAO's Notice of Derogatory Information and Request for Evidence (NDI/RFE) dated November 3, 2011.

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.¹¹ 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 after 2001. In addition, no evidence has been submitted to demonstrate that the petitioner has paid or has the ability to pay the other six

¹¹ 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.

beneficiaries. Nor has the petitioner submitted copies of its federal tax returns, audited financial statements, or annual reports for the years 2002 through 2009. On November 3, 2011 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 2002 through 2010. None was submitted. Thus, 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 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.

Here, the record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage of the beneficiary in the instant case and those of the other sponsored workers from their respective priority dates until each may obtain permanent residence. The petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 2001.¹² 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.

¹² A search of the website of the Secretary of Commonwealth, Corporations Division (<http://corp.sec.state.ma.us/corp/corpsearch/corpsearchinput.asp>) shows that Framingham Restaurant was incorporated on January 24, 2001.

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.