

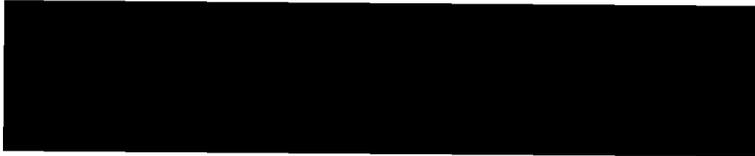
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: **MAY 30 2012**

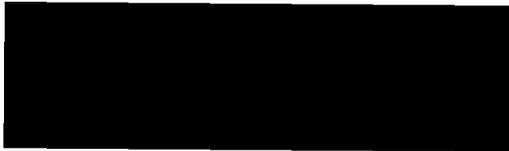
Office: TEXAS SERVICE CENTER FILE: 

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 December 21, 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 30, 2003. However, the Director of the Texas Service Center (the director) revoked the approval of the immigrant petition on May 11, 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.

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

The petitioner is a 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).<sup>1</sup> 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 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. The director left open the issue relating to the beneficiary's qualifications for the position. 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, [REDACTED] contends that the director lacks good and sufficient cause to revoke the approval of the petition. Specifically, counsel states that the director's NOIR did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding, nor did it request the petitioner to present specific evidence. Citing *Matter of Esteime*, 19 I&N Dec. 450, 451 (BIA 1988), counsel contends that where a notice of intention to revoke is based only on an unsupported statement or an unstated

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<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, [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. [REDACTED] 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. [REDACTED] representations in this matter will be considered.

presumption, or where the petitioner is unaware and has not been advised of derogatory evidence and given a reasonable opportunity to respond, the director cannot revoke the approval of the visa petition.

Counsel further claims that the director's finding of fraud or material misrepresentation against the petitioner is not supported by the evidence of record. Counsel states that the director included no specific evidence of fraud or material misrepresentation or information relating to the petitioner, petition, or documents in either the NOIR or the Notice of Revocation (NOR). With respect to the evidence submitted in response to the director's NOIR, counsel indicates that the director wrongly rejected the evidence and should have considered it in determining whether the petitioner followed the DOL recruitment procedures

Further, contends that the petitioner followed the DOL recruitment procedures in recruiting applicants for the position, and that, based on the evidence submitted, the petitioner placed the advertisements prior to submitting the labor certification application, consistent with the reduction in recruitment process which was allowed at the time. Additionally, counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had the petitioner not followed the DOL recruitment requirements.

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 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.

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<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).

## 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).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director 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 20, 2009 issued the NOIR, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that 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 ██████████ 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 *Boston Herald* on the following dates/days: Sunday, November 4, 2001; Sunday, December 9, 2001; Wednesday, December 12, 2001; Thursday, December 13, 2001; Friday, December 14, 2001; and Sunday, December 23, 2001; and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* stating that the job ads would also be posted online on jobfind.com for 30 days.

Upon review, the director stated in the Notice of Revocation (NOR) that the petitioner and his agent failed to submit copies of the in-house postings, or alternatively, a statement indicating that the petitioner complied with the internal posting requirement. Further, the director concluded that [REDACTED] based on the letter from the *Boston Herald* dated February 14, 2001, paid for and created the job advertisement.

On appeal, [REDACTED] – the owner of the original petitioning company – who signed the Form ETA 750A and Form I-140 petition, submitted an affidavit, declaring that he followed every step that the DOL required of him and/or his company to secure the approval of the labor certification for the beneficiary, including posting the job internally at the place of business and paying for the newspaper advertisement. More specifically, [REDACTED] states:

I do have some specific memory of hiring [REDACTED] [the beneficiary], however. I know that we sponsored [REDACTED] through all of the necessary and proper steps. We ran a series of classified advertisements for his position. I don't specifically recall an in-house posting as it pertained to [REDACTED] case, but this was many years ago and in house posting was our protocol.

The AAO finds that the director erred in faulting the petitioner for failing to submit the in-house posting notice. As stated earlier, the director in the NOIR did not specifically notify the petitioner to submit copies of the in-house postings to show that it complied with the DOL recruitment procedures. 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, USCIS may not make an adverse finding against the petitioner, if, as in this case, the petitioner claims it no longer has the documentation.<sup>4</sup> The AAO acknowledges that before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until

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<sup>4</sup> 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.

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 (5) 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 AAO also disagrees with the director that [REDACTED] paid for and created the job advertisements. The record contains no evidence showing that the beneficiary or [REDACTED] either paid for or created the job advertisement or interviewed or considered candidates for the position. The letter dated February 14, 2001 from the *Boston Sunday Herald* merely shows that [REDACTED] placed an order to post the advertisement in the *Boston Herald* newspapers and online at [www.jobfind.com](http://www.jobfind.com) for 30 days and provided the cost involved.<sup>5</sup>

Even though the regulation at 20 C.F.R. §§ 656.20(b)(3)(i)-(ii) specifically prohibited agents or legal representatives of the beneficiaries and the petitioners from participating in interviewing or considering applicants for the job offered,<sup>6</sup> the AAO notes that the regulation in place at the time of the recruitment, 20 C.F.R. § 656.20(b)(1), allowed beneficiaries and petitioners to have agents

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<sup>5</sup> No DOL regulations specifically prohibit agents and/or legal representative of petitioners from placing advertisements for their clients with local newspapers.

<sup>6</sup> This regulation is currently found at 20 C.F.R. § 656.10(b)(2) (2010).

The regulation at 20 C.F.R. § 656.20(b)(3)(i) at the time of recruitment stated:

It is contrary to the best interests of U.S. workers to have the alien and/or agents or attorneys for the alien participate in interviewing or considering U.S. workers for the job offered the alien. As the beneficiary of a labor certification application, the alien cannot represent the best interests of U.S. workers in the job opportunity. The alien's agent and/or attorney cannot represent the alien effectively and at the same time truly be seeking U.S. workers for the job opportunity. Therefore, the alien and/or the alien's agent and/or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent and/or attorney is the employer's representative as described in paragraph (b)(3)(ii) of this section.

The regulation at 20 C.F.R. § 656.20(b)(3)(ii) at the time of recruitment stated:

The employer's representative who interviews or considers U.S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

and/or attorneys (legal representatives) represent them throughout the labor certification process,<sup>7</sup>

Finally, 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 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 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).

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 conducted the recruitment (by placing an advertisement in the local newspapers in November and December 2001) and certified that the recruitment was complete on February 14, 2002, when it signed the Form ETA 750. The petitioner further, according to the record, filed the Form ETA 750 for processing with the DOL on March 1, 2002. Based on the evidence submitted and the stated facts above, it appears that the petitioner appropriately requested a reduction in recruitment. Therefore, the AAO withdraws the director's findings that the petitioner did not comply with recruitment procedures by failing to submit the internal posting notice and by allowing the beneficiary or [REDACTED] to be impermissibly involved in recruitment.

### **3. Willful Misrepresentation**

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation.

If the petitioner or the beneficiary 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's recruitment procedures. Similarly, the record does not indicate that the petitioner and/or the beneficiary engaged in fraud or material misrepresentation.

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<sup>7</sup> This regulation is currently found at 20 C.F.R. § 656.10(b)(1) (2010).

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>8</sup>

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

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<sup>8</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.

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. 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 the petitioner has the continuing ability to pay the proffered wage from the priority date. For this reason, 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 (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). 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. 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).

Here, the record shows that the ETA Form 750 was accepted for processing by the DOL on March 1, 2002. The rate of pay or the proffered wage specified on the Form ETA 750 is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week).

On September 29, 2010 and October 18, 2011 the AAO issued Requests for Evidence (RFE) to the petitioner indicating that the evidence submitted is not sufficient to establish the ability to pay the proffered wage from the priority date. Specifically, the AAO found, when adjudicating the appeal, that the petitioner has filed multiple employment-based petitions for other alien beneficiaries since 2001. The AAO gave the petitioner notice of the deficiency and the opportunity to respond.

The record contains the following evidence to demonstrate that the petitioner has the continuing ability to pay \$13.01 per hour or \$23,678.20 per year from March 1, 2002:

- The Forms 1120S, U.S. Tax returns for an S Corporation, for the years 2002 through 2009.

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).

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. No evidence has been submitted to show that the beneficiary worked for the petitioner at any time after the petitioner filed the Form ETA 750 with the DOL for processing.<sup>9</sup>

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<sup>9</sup> The beneficiary states in his affidavit dated June 26, 2009 that he worked for the petitioner from February 2002 to May 2002, that the job at the petitioner's place was his second job, and that he was let go in May 2002 because he did not have a "green card" and because "the business died down a little bit." The beneficiary also indicates that upon the issuance of his green card he will return to work for the petitioner. When he left the petitioner to work for [REDACTED] the beneficiary claims that he "ported." The record also contains a statement from the beneficiary's former attorney, [REDACTED], stating that the beneficiary is no longer employed by the petitioner and that he has ported pursuant to section 204(j) of the Act.

Section 106(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313) added the following to section 204(j) of the Act:

*Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence*  
– A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job

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). 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

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if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

AC21, Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

The portability provisions of section 204(j) of the Act; 8 U.S.C. § 1154(j) as amended by section 106(c) of AC21 do not apply in this case for a couple of reasons. First, the petition in this case was not yet approved by the director in May 2002, and thus, it could not have remained valid for porting purposes. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010) (To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act; an adjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days.)

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

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

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

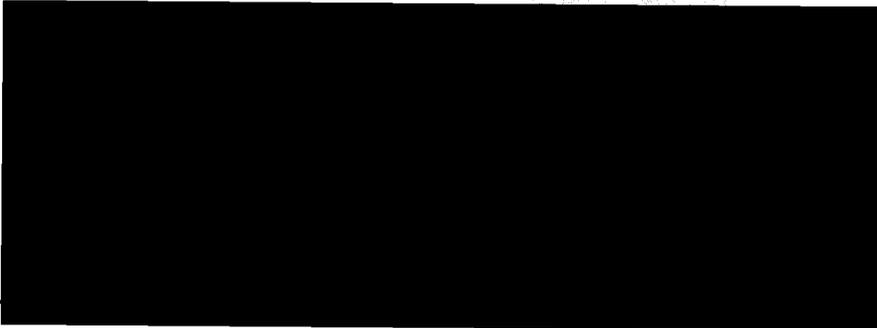
The petitioner’s tax returns demonstrate its net income (loss) for the years 2002 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)<sup>10</sup> – in \$</i>	<i>The Proffered Wage – in \$</i>
		

<sup>10</sup> For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S if the S corporation’s income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2009) of Schedule K. See Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-prior/i1120s--2009.pdf> (last accessed May 7, 2012) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income is found on line 21 of page one of the Form 1120S.

Therefore, the petitioner had the ability to pay the proffered wage in 2002, 2003, 2006, 2007, 2008, and 2009, but not in 2004 and 2005.

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>11</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. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2002 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>The Proffered Wage – in \$</i>
		

Based on the table above, the petitioner did not have sufficient net current assets to pay the full proffered wage in 2004 and 2005.

Further, if the instant petition were the only petition the petitioner filed, the petitioner would have only been required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, that is not the case here. In this case, the petitioner has filed multiple employment-based petitions in the past. We find in adjudicating the instant appeal that the petitioner has filed seven other employment-based immigrant petitions since

<sup>11</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.

<sup>12</sup> No Schedule L is attached for the 2002 and 2003 tax returns.

2001.<sup>13</sup> 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 either one or more of these circumstances apply:

- a) Each beneficiary receives his or her legal permanent residence (LPR),
- b) Unless and until we revoke the petition, or
- c) Unless and until your organization withdraws the petition.

On October 18, 2011 the AAO issued a Request for Evidence (RFE) specifically advising the petitioner to submit the following evidence:

- Copies of the labor certifications that the petitioner filed on behalf of those other beneficiaries; and
- Copies of the W-2s, 1099-MISCs, paystubs, or other documents that the petitioner issued to all of the beneficiaries.

Only two out of the seven requested labor certifications are submitted. The petitioner did not submit any W-2s, 1099-MISCs, or paystubs issued to the other beneficiaries. Responding to the AAO's RFE, counsel states that the petitioner no longer has other documentation to produce.

The AAO specifically alerted the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Without additional evidence as requested the AAO cannot find that the petitioner has the continuing ability to pay the proffered wage of the beneficiary and the other sponsored beneficiary in any of the relevant years in this case.

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

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<sup>13</sup> The details of the seven petitions filed by the petitioner since 2001 were revealed to the petitioner in the AAO's Request for Evidence (RFE) dated October 18, 2011.

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.

On appeal, the petitioner states that the petitioner experienced unusual losses due to an internal embezzlement scheme and had to pay substantial fees in legal costs to resolve the problems in 2004 and 2005. In a signed statement dated July 15, 2011, [REDACTED] the owner of the petitioning company states, in pertinent part, the following:

In all years except 2004 and 2005, I showed ordinary business income and overall profit. Unfortunately, in 2004 and 2005, my business showed losses in income due to an internal embezzlement scheme.

Over the period of 2004 to 2005, several of my employees had embezzled hundreds of thousands of dollars from my company. The case was investigated by police and FBI and was brought before a federal court judge. The embezzlement scheme resulted in costs beyond the theft, including attorney and other fees needed to resolve the matter. I suffered financially during these two years but I was still able to maintain my business.

The petitioner's statement that it suffered extraordinary losses during the two years it could not pay the beneficiary is noted. Nevertheless, the petitioner has not established that it can pay the proffered wages of the beneficiary of the instant petition and the other sponsored beneficiaries in any of the years. Further, the petitioner did not submit corroborating evidence of the embezzlement or other documentation, such as the statements to its 2004 and 2005 tax returns that might indicate the theft loss. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception. 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.

In summary, the AAO finds that the director had good and sufficient cause to reopen the matter and to revoke the approval of the petition. The petitioner has failed to establish that the petitioner has the continuing ability to pay the proffered wage of the beneficiary and of the other beneficiaries as previously indicated from their respective priority dates.

As noted above, the Secretary, Department of Homeland Security (DHS) may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the DHS obligation to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The approval of the petition remains revoked.