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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

DATE **SEP 11 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On November 1, 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 October 6, 2003. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition on May 14, 2009, and the petitioner subsequently appealed the director's decision to revoke the petition's approval. The director's decision will be withdrawn. The appeal will be remanded to the Texas Service Center director for further action, consideration, and the entry of a new decision.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [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 retail store. It seeks to employ the beneficiary permanently in the United States as a bookkeeper pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on October 6, 2003 by the VSC, but that approval was revoked in May 2009. The director determined that the petitioner failed to follow the U.S. Department of Labor (DOL) recruitment procedures in connection with the approved labor certification application and that the documents submitted in response to the director's Notice of Intent to Revoke (NOIR) were in themselves a willful misrepresentation of material facts, constituting fraud. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner² contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155 to revoke the approval of the petition. Counsel also states that the finding of fraud or material misrepresentation against the petitioner was not supported by any evidence of record. Counsel indicates that the DOL would not have approved the petitioner's Form ETA 750 had the petitioner not followed the DOL recruitment requirements and that the petitioner did comply with the DOL recruitment requirements.

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

² Current counsel of record, [REDACTED] will be referred to as counsel throughout this decision. Previous counsel, [REDACTED] who filed the petition, and [REDACTED], who filed the appeal, will be referred to by name.

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

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

One of the issues raised on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

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

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

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [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,

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).

rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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

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

Here, in the Notice of Intent to Revoke (NOIR) dated February 9, 2009, the director wrote:

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

The director advised the petitioner in the NOIR that the instant case might involve fraud. The director specifically asked the petitioner to submit additional evidence to demonstrate that it had complied with all of the DOL recruiting requirements. The director also asked the petitioner to submit an original letter reaffirming its intent to employ the beneficiary in the proffered job and evidence that the beneficiary met the minimum experience requirements.

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

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

with the DOL recruitment requirements, the petitioner's previous counsel, Mr. [REDACTED] submitted the following evidence:⁴

- Copies of tear sheets from the [REDACTED] advertisement, published in [REDACTED]

On appeal, the petitioner submitted a letter, dated May 27, 2009, indicating that "we have complied with all DOL requirements of our application." Counsel subsequently submitted a notarized affidavit from the petitioner's owner at the time the labor certification was filed, dated December 8, 2011, outlining the recruitment efforts, confirming that the petitioner did not receive any responses, and affirming that the representations on the labor certification application were accurate.

Upon review of the evidence submitted, the director in the revocation noted several deficiencies in the record regarding the recruitment efforts. First, the director indicated that the petitioner failed to submit copies of the in house postings, or alternatively, an affidavit indicating that the petitioner in fact did comply with that internal posting requirement. Second, the director noted that the petitioner failed to submit evidence or a statement indicating that it was in compliance with DOL requirements.

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

Additionally, since there was no requirement to keep such records, the director may not make an adverse finding against the petitioner, if the petitioner no longer has the supporting documentation over five years after the labor certification was approved.⁵ The AAO acknowledges that at the time the petitioner filed the labor certification application with the DOL for processing in August 2001, employers were not required to maintain records documenting the labor certification process once the labor certification had been approved by DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certification, were employers required to maintain records and other supporting documentation, and even then, employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. §656.10(f) (2010).

⁴ This evidence was submitted in response to the director's NOIR.

⁵ However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to out invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)

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

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k). In adjudicating the appeal, the AAO notes that there is an anomaly in the recruitment process which casts doubt on the *bona fides* of the recruitment. Here, the record reflects that the petitioner signed the Form ETA 750 on February 7, 2001. The petitioner advertised the position in March 2001; the additional adverts were placed on [REDACTED]. The Form ETA 750 was filed with the DOL for processing on August 23, 2001 and approved by the DOL on November 6, 2002.

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

The petitioner should have submitted this report to the DOL with its request for reduction in recruitment. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel argues that unless there was good and sufficient cause for revocation specified in the director's NOIR, that USCIS cannot sustain a revocation of approval of a Form I-140 petition. As noted above, 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). In addition, 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).

In summary, although there are questions about the petitioner's recruitment efforts, the AAO disagrees with the director's finding that the recruitment procedures were not followed and withdraws the director's conclusions that the petitioner did not comply with the DOL requirements.

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's finding of fraud or willful misrepresentation against the petitioner was arbitrary and based on a USCIS investigation of other petitioners that had been represented by the same counsel, Mr. [REDACTED]. Counsel further states that the DOL's approval of the labor certification application indicates that there was no fraud or irregularity in the labor certification process.⁶

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

⁶ Counsel adds that in the instant case, the DOL issued a Notice of Finding (NOF) on September 20, 2002 inquiring whether a *bona fide* job offer existed, and thus, the DOL conducted a thorough adjudication of the merits of the labor certification application. The AAO notes that counsel only provided the first page of the NOF, which does not provide information on the DOL's findings or conclusions.

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.⁷

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

⁷ 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.

relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

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

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

Here, as noted above, the evidence of record currently does not support the director's finding that the petitioner failed to follow recruitment procedures. Similarly, there has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the labor certification process. Thus, the director's finding of fraud or misrepresentation is withdrawn. In summary, the AAO withdraws the director's conclusion that the petitioner failed to follow the DOL recruitment requirements. The AAO also withdraws the petitioner's finding of fraud and / or material misrepresentation against the petitioner.

Nonetheless, the petitioner must establish its ability to pay the proffered wage from the priority date, as well as that the beneficiary had the requisite work experience in the job offered before the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (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).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be 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). In determining the petitioner's ability

to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$13.58 per hour or \$24,715.60 per year based on a 35 hour work week, during any relevant timeframe including the period from the priority date in August 2001 onwards. Further, on the ETA 750 B, signed by the beneficiary on February 7, 2001, the beneficiary did not indicate any prior work experience with the petitioner.⁸ In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), 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.

The record contains W-2 forms for the beneficiary's employment with the petitioner, as follows:

- 2001 – evidencing wages of \$11,100 paid;
- 2004 – evidencing wages of \$12,000 paid; and
- 2009 – evidencing wages of \$13,000 paid.

In the instant case, the petitioner has established that it employed and paid the beneficiary less than the full proffered wage of \$24,715.60 from 2001 to 2009. Thus, the petitioner needs to show that it can pay the difference between the amounts already paid and the proffered wage for those years, which in 2001 is \$13,615.60; \$12,715.60 in 2004; and \$11,715.60 in 2009. The petitioner has not submitted the W-2 forms issued to the beneficiary in 2002-2003 and 2005-2008, nor submitted any other evidence to indicate that it employed and paid the beneficiary during these six years. Therefore, the petitioner has not established that it employed and paid the beneficiary the proffered wage of \$24,715.60 from the priority date in 2001 through 2009.

The February 23, 2009 letter from the petitioner in the record indicates that it had been employing the beneficiary since April 2001 at an annual salary of \$26,000. The petitioner also submitted two \$1,636.66 checks issued to the beneficiary in 2005 (totaling \$3,273.32).⁹ The record, however,

⁸ The beneficiary claimed in his Biographic Information (Form G-325) that he worked for the petitioner from April 2001 to the present; the Form was signed on October 27, 2003. The record also contains a February 23, 2009 letter from the petitioner indicating that it had employed the beneficiary since April 2001. Although the ETA 750B was signed by the beneficiary in February 2001, the form was not submitted to the DOL until August 23, 2001 and thus could have been amended by the beneficiary to reflect that he had started working for the petitioner in April 2001. [I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁹ The record does not contain any evidence that these checks were given to the beneficiary or cashed by him.

contains no other evidence that the beneficiary was employed by the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

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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).

Here, the evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner did not provide any information with regards to the current number of employees, its gross annual income or net annual income.

In the present case, the petitioner's tax returns demonstrate its net income for 2003-2008¹⁰, as follows:

- In 2001, the Form 1120S stated net income of \$-1,898;
- In 2002, the Form 1120S stated net income of \$13,678;
- In 2003, the Form 1120S stated net income of \$32,577;
- In 2004, the Form 1120S stated net income of \$35,590;
- In 2005, the Form 1120S stated net income of \$20,194;
- In 2006, the Form 1120S stated net income of \$33,456;
- In 2007, the Form 1120S stated net income of \$32,758; and
- In 2008, the Form 1120S stated net income of \$28,000.

Therefore, for the years 2003-2008, the petitioner had sufficient net income to pay the beneficiary the full proffered wage of \$24,715.60. For 2001, the petitioner did not have sufficient net income to pay the difference between the amounts already paid and the proffered wage. The petitioner has not shown the ability to pay the proffered wage in 2002.

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

¹⁰ Where an S corporation's income is exclusively from a trade or business, 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. 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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and /or other adjustments shown on its Schedule K for 2003-2011, the petitioner's net income is found on Schedule K of its tax returns.

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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.

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.¹² 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 for 2001 and 2002 demonstrate its end-of-year net current assets as follows:

- In 2001, the Form 1120S stated net current assets of \$45,314; and
- In 2002, the Form 1120S stated net current assets of \$82,829.

The petitioner did have sufficient net current assets to pay the proffered wage in 2001 and 2002. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, August 23, 2001, until 2008, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage of \$24,715.60 through an examination of wages paid to the beneficiary, its net income, or net current assets.

With respect to the petitioner's ability to pay the proffered wage in 2009 onwards, on appeal, counsel contends that [REDACTED] is now a successor-in-interest to the petitioner. A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *See Matter of Dial Auto Repair Shop,*

¹¹According 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.

¹²According 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.

Inc., 19 I&N Dec. 481 (Comm'r 1986).

In support, counsel submits the following:

- Asset Purchase and Sale Agreement between the petitioner and [REDACTED], dated October 30, 2008;
- Lease signed by [REDACTED] for business location at [REDACTED] Massachusetts;
- Town Hall meeting and minutes regarding transfer of liquor license from the petitioner to [REDACTED];
- [REDACTED] Application for liquor license first denied on March 9, 2009, then later approved on May 21, 2009;
- Alcoholic Beverages License granted to [REDACTED] on June 9, 2009 and December 20, 2010;
- [REDACTED] Articles of Organization filed June 11, 2008; and
- Letter from [REDACTED]'s owner and president, dated January 19, 2012, outlining its purchase of all of the assets of the petitioner, and the essential rights and obligations to continue the business.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. The AAO concludes that the evidence in the record establishes that [REDACTED] purchased the assets and obligations, such as the lease agreement, from the petitioner. However, the petitioner has not established that [REDACTED] is a successor-in-interest, because there is no evidence in the record that the job opportunity remains the same as originally certified, that [REDACTED] continues to operate the same type of business as the petitioner, in the same metropolitan statistical area and that the essential business functions remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In addition, the records maintained by the Commonwealth of Massachusetts, Corporations Division do not reflect that [REDACTED] is registered to do business in Massachusetts. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Id.* Therefore, the petition is remanded to the director. On remand, the director may request any additional evidence considered pertinent to conclude whether or not [REDACTED] is the successor-in-interest to the petitioner. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership

forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto.* 19 I&N Dec. at 482. The record includes W-2 Forms issued to the beneficiary for wages paid by the petitioner and [REDACTED] in 2009, amounting to \$26,000, which is higher than the proffered wage of \$24,715.60, and a W-2 Form for 2010 wages paid by [REDACTED] totaling \$26,000, more than the proffered wage. The January 19, 2012 letter from [REDACTED] also confirms the successor-in-interest's willingness to continue to employ the beneficiary in the proffered position of bookkeeper and the ability to pay the beneficiary the salary of \$33,600, which is higher than the proffered wage.

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

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

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on August 23, 2001. The name of the job title or the position for which the petitioner seeks to hire is "bookkeeper." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Keep financial records; balance checking accounts, accounts payable, receivables, prepare financial reports." 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.

On the Form ETA 750, part B, signed by the beneficiary on February 7, 2001, he represented that he worked 40 hours a week at [REDACTED] as a bookkeeper from January 1996 to December 1999.¹³ Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment dated December 12, 2002 from the owner of [REDACTED] stating that the beneficiary worked there as a bookkeeper from November 1996 to December 1999 with responsibility for "financial records keeping, consisting of payment of bills, verification of correct receipts, accounting for bills paid out and funds incoming." On appeal, the petitioner submitted a notarized letter from [REDACTED] dated December 12, 2000 (notarized on February 12, 2001) also stating that the beneficiary worked there as a bookkeeper from November 1, 1996 to December 31,

¹³ The AAO notes that the beneficiary neglected to list his prior experience abroad on the Form G 325, Biographic Information.

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1999 and reiterating his duties as “preparing all financial reports; balancing cheque[sic] books, accounts, receivable, payroll, etc.”¹⁴

In response to the NOIR, the petitioner submitted a statement from the beneficiary describing his prior work experience. The director’s revocation concluded that this statement was self-serving and carried little weight. The AAO agrees, however, we conclude that the petitioner has established, through other evidence as outlined above, that the beneficiary did have the requisite two years of experience in the job offered before the petitioner filed the labor certification application.

In conclusion, the director’s decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision.

ORDER: The director’s decision to revoke the previously approved petition is withdrawn. However, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

¹⁴ The record contains a third undated letter from K. Jasminkumar confirming the beneficiary’s prior employment experience, which is consistent with the other two letters in the record.