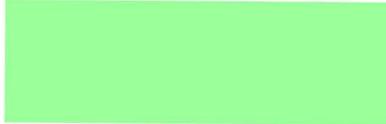
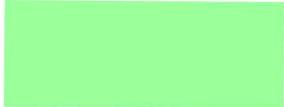


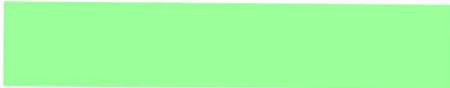
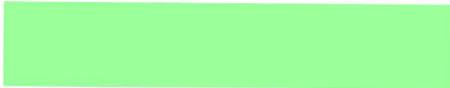


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 27 2013 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:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

[Redacted]

Page 2

cc:

[Redacted]

**DISCUSSION:** This case comes before the Administrative Appeals Office (AAO) on certification for review from the Director, Texas Service Center (the director), pursuant to 8 C.F.R. § 103.4(a).<sup>1</sup> Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

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>2</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The petition was initially approved by the Director, Vermont Service Center on March 28, 2003; however, on February 10, 2009 the director reopened the matter and sent the petitioner a Notice of Intent to Revoke (2009 NOIR), stating:

The Service [referring to U.S. Citizenship and Immigration Services or 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.<sup>3</sup>

The director also requested the petitioner to submit additional evidence to demonstrate that the petitioner conducted good faith recruiting efforts and that the beneficiary had the requisite work experience as a cook before the priority date.

The beneficiary's new employer, Century House Restaurant, represented by [REDACTED] of [REDACTED] responded to the director's NOIR and submitted the following evidence to show that the beneficiary currently works for [REDACTED]

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<sup>1</sup> Under 8 C.F.R. § 103.4(a)(1) allows certifications by district directors to the AAO for review "when a case involves an unusually complex or novel issue of law or fact."

<sup>2</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>3</sup> The AAO notes that the counsel for the petitioner referred to above was [REDACTED] who originally filed the Form I-140 in this case. [REDACTED] has since been suspended from practice of law before the United States Department of Homeland Security for three years from March 1, 2012. He will be referred to throughout this decision by name or as previous counsel.

<sup>4</sup> [REDACTED] or by name throughout this decision.

- A letter dated February 23, 2009 signed by [REDACTED] stating that the beneficiary has been a valuable employee at the [REDACTED] for many years, and that he is employed as a line cook;
- A letter dated February 25, 2009 from [REDACTED], administrator, stating that the beneficiary is a full-time cook at [REDACTED] earning \$15.50 per hour; and
- Copies of the beneficiary's paystubs from [REDACTED] for 2009.

[REDACTED] also submitted additional evidence to demonstrate that the beneficiary possessed the requisite work experience in the job offered prior to the priority date, as will be listed below. She additionally noted that the director's NOIR was not properly issued, because it did not contain specific derogatory information relating to the petition or the petitioner in this case. Further, she asserted that the director's NOIR violated the beneficiary's due process rights.

On March 27, 2009 the director revoked the approval of the petition, finding that "nothing was found in the record directly documenting that all regulations and stipulations in the labor certification process were truthfully and accurately followed." The director also concluded that the beneficiary did not possess the requisite work experience in the job offered as of the priority date. The director mailed the Notice of Revocation (NOR) to the address of counsel for [REDACTED]

Following the director's decision to revoke the approval of the petition, [REDACTED] through its counsel filed a timely appeal with the AAO. Counsel for [REDACTED] contended that the director had inappropriately revoked the approval of the petition, because that decision was not based on good and sufficient cause, as required by section 205 of the Act; 8 U.S.C. § 1155. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), she also asserted 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. She further indicated that the lack of specificities in the director's NOIR was a violation of the beneficiary's constitutional due process rights.<sup>5</sup> To demonstrate that the petitioner followed the DOL recruitment requirements, counsel for [REDACTED] provided copies of advertisements for the position of cook published in the [REDACTED] on Sunday, December 31, 2000; Monday, November 26, 2001; Wednesday, November 28, 2001; and Thursday, November 29, 2001.

The director issued another NOR on May 14, 2009, and mailed it to the address of [REDACTED] who was the petitioner's counsel of record. In this NOR, the director stated that "the totality our records does not establish [that] you have provided a response to the Intent to Revoke from someone legally entitled to represent the petitioner." The director then affirmed the conclusion

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<sup>5</sup> Citing section 239(a)(1) of the Act, counsel for [REDACTED] stated, "Specifically an alien must have reasonable notice of the charges, of the time and place of hearings, and of the opportunity to examine and present evidence and to cross-examine witnesses."

that the petitioner did not comply with the DOL recruitment requirements and that the beneficiary did not have the requisite work experience in the job offered as of the priority date.

Counsel for [REDACTED] filed another timely appeal to the AAO. On appeal, counsel for [REDACTED] renewed her contention that the director's decision to revoke the approval of the petition was not based on good and sufficient cause. She also maintained that the petitioner followed the DOL recruitment requirements and stated that DOL would not have certified the Form ETA 750 if the petitioner had not complied with all advertising and recruiting requirements. Counsel for [REDACTED] also indicated that the director's decision to revoke the approval of the petition violated the petitioner's due process rights.

To demonstrate that the petitioner complied with the DOL recruitment requirements, counsel for [REDACTED] submitted a letter dated May 26, 2009 signed by [REDACTED] stating that he is the general manager of the petitioner; that he has been an employee since 1989; that [REDACTED] began the process of labor certification in 2001 for the beneficiary; and that the company placed advertisements in the newspaper and with the state employment agencies, all of which produced no result. The director rejected the two timely filed appeals by [REDACTED] is not entitled to file the appeal."<sup>7</sup>

Following the director's decision to reject the two appeals, counsel for [REDACTED] sent a letter labeled "Request for Reconsideration," asking the director to forward the case to the AAO. The letter was received and stamped by the AAO on September 15, 2009. In her letter, counsel for [REDACTED] is the affected party as defined at 8 C.F.R. § 103.3(a)(1)(iii)(B), because the beneficiary has legally ported to work in the same or substantially similar position pursuant to section 204(j) of the Act.<sup>8</sup>

<sup>6</sup> The appeal received on April 9, 2009 was rejected on September 14, 2009. The appeal received on June 1, 2009 was rejected on August 27, 2009.

<sup>7</sup> We note that the director's action to adjudicate and reject the appeal in 2009 is erroneous. Procedurally, the AAO, not the director, shall have the jurisdiction over a properly filed appeal, pursuant to 8 C.F.R. § 103.3(a)(2)(iv). That regulation states, "If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC."

<sup>8</sup> The record includes letters and paystubs sent to Vermont and Texas Service Center in 2006 and 2008 – before the director revoked the approval of the petition in 2009 – indicating that the beneficiary has changed employment. One letter, dated January 19, 2006 and signed by I. [REDACTED] stated that the beneficiary is employed by [REDACTED] and that his position is a full-time line cook. Another letter, dated July 13, 2006 and signed by [REDACTED] stated that the beneficiary is employed as a cook at Stromberg's Restaurant and was hired on May 1, 2006. The letter dated November 28, 2008, signed by [REDACTED], indicated that the beneficiary is employed by [REDACTED]

[REDACTED] further states that the beneficiary's current employer is much more interested in the outcome of the case than the original petitioner. Moreover, counsel for [REDACTED] indicates that if the beneficiary's current employer were not allowed to continue the administrative proceedings and to file an appeal in this case, it would effectively foreclose any opportunity for any employer other than the petitioner itself to appeal and correct an erroneous decision made by the director.

On November 19, 2012, the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5), withdrew the decision to revoke the approval of the petition on May 14, 2009 and reinstated the approval of the petition. The director then issued a new NOIR (2012 NOIR) identifying the following deficiencies in the petition:

- a) Insufficient documentation to show that the petitioner followed DOL recruitment requirements;
- b) Insufficient documentation to demonstrate that the beneficiary qualifies for the position offered;
- c) Insufficient documentation to show the petitioner's ability to pay from the priority date until the beneficiary obtains lawful permanent residence; and
- d) No indication that the original petitioner intends to employ the beneficiary.

The petitioner did not respond to this NOIR.

Thus, the director on May 6, 2013 issued a Notice of Certification (NOC) and found that the petitioner failed to demonstrate that it continues to have a job offer for the beneficiary; that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence; and that the beneficiary had the requisite work experience in the job offered before the priority date.

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. The AAO will consider all evidence submitted throughout these administrative proceedings in the adjudication of the matter.

As a threshold issue, the AAO will consider whether the beneficiary's new employer has legal standing to appeal in this proceeding.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states:

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

Further, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states, “An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed.” The language of the cited regulations explicitly states that only the affected party has legal standing and is authorized to file the appeal in this matter. Neither the beneficiary nor his new employer has legal standing in this visa petition proceeding.

On appeal and throughout these administrative proceedings, counsel for the beneficiary’s new employer states that [REDACTED] has legal standing to continue the administrative proceedings because the beneficiary has ported from the petitioner pursuant to section 204(j) of the Act. In essence, counsel for [REDACTED] states that the beneficiary’s new employer should be allowed to take the place of and become the new petitioner of a Form I-140 petition in situations involving the application of section 204(j) of the Act. The AAO disagrees.

To address this issue, we must first analyze section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21) and determine the interpretation of the statute as intended by Congress.<sup>9</sup> Specifically, section 106(c) of AC21 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 adjudicated for 180 days or more shall remain valid with respect to a new job 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).

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after 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 certification was issued.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int’l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987).

<sup>9</sup> On October 17, 2000 Congress passed section 106(c) of AC21, which amended section 204(j) of the Act; 8 U.S.C. § 1154(j).

The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Counsel for [REDACTED] suggests that the beneficiary and his current employer were given the authority by the petitioner of the Form I-140 petition once the petition was approved, the I-485 application had been pending for 180 days, and the beneficiary ported to a new employer and began his new employment in a similar position as the job offered by the petitioner. It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the beneficiary's petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "**remain valid with respect to a new job.**" Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).<sup>10</sup>

However, the statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner. Section 106(c) of AC21 states that the underlying Form I-140 petition "shall remain valid with respect to a new job 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

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<sup>10</sup> Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days. In a case pertaining to the revocation of a Form I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9<sup>th</sup> Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.

was filed." 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). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's Form I-485 application took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.

Moreover, the AAO notes that section 204(j) of the Act does not apply to an immigrant visa petition process (Form I-140), but to an application for adjustment of status (Form I-485). For these reasons, counsel for the beneficiary's current employer has failed to show that section 204(j) of the Act or the passage of AC21 granted any rights or benefits to subsequent employers of the beneficiary. Based on a review of the statute and legislative history, the AAO rejects counsel's assertions that the beneficiary and/or his current employer have now become the petitioner, and an affected party, in these proceedings. Therefore, the AAO agrees with the director's decision to reject the appeal, because [REDACTED] is not the affected party and therefore, has no legal standing to file an appeal and continue the administrative proceedings in this case.

Another threshold issue is whether or not the director adequately advised the petitioner of the basis for revocation of approval of the petition.

On appeal and throughout these administrative proceedings, counsel for the beneficiary's current employer contends that none of the director's NOIRs contains specific adverse information relating to the petition or the petitioner in the instant proceeding, nor does any of them request the petitioner to present specific evidence. Citing *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988), she states that where a notice of intention to revoke is based only on an unsupported statement or an unstated 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. In a response to the NOC, attorney [REDACTED] reasserts these arguments.<sup>11</sup>

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).

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<sup>11</sup> [REDACTED] has submitted a Form G-28 Notice of Entry or Appearance on behalf of the beneficiary. Thus, he will be provided a courtesy copy of this decision.

This means that the director must provide notice before revoking the approval of any petition. Specifically, 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, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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

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

The AAO acknowledges that the 2009 NOIR was deficient in that it did not specifically give the petitioner notice of the derogatory information specific to the current proceeding. In that NOIR, the director generally 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).

However, the AAO finds that the 2012 NOIR contained specific deficiencies and derogatory information relating to the petition and the petitioner in this case. Both *Matter of Arias* and *Matter of Estime*, as noted above, held that a notice of intent 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.

In this case, the director pointed out in the 2012 NOIR that the record contains no evidence establishing that the petitioner is still interested in hiring the beneficiary as a cook, that the petitioner does not have the ability to pay from the priority date and continuing until the beneficiary receives lawful permanent residence, and that the beneficiary's work experience as a cook in Brazil is questionable. Therefore, the AAO finds that the 2012 NOIR contains specific derogatory information relating to the current proceeding and that the director adequately provided the petitioner with specific derogatory information that would warrant a revocation of the approval of the petition if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.<sup>12</sup>

Furthermore, the AAO affirms the director's finding that the approval of the petition may not be reinstated. The director revoked the approval of the petition, because the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date.

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 priority date is the date when the ETA 750 labor certification was accepted for processing by DOL. See 8 C.F.R. § 204.5(d). Here, that date is June 18, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$13.01 per hour or \$23,678.20 per year based on a 35 hour work week.<sup>13</sup> Therefore, the petitioner is required to demonstrate the ability to pay \$13.01 per

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<sup>12</sup> The AAO rejects the argument made by counsel for the beneficiary's new employer regarding a violation of due process rights of the petitioner and/or the beneficiary. There are no due process rights implicated in the adjudication of a benefits application. See *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); see also *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). Thus, we will not address issues relating to due process rights.

<sup>13</sup> The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. § 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more

hour or \$23,678.20 per year from June 18, 2001 and continuing until the beneficiary receives lawful permanent residence, or until the beneficiary ported to another similar employment in 2006.<sup>14</sup>

To demonstrate the ability to pay, the petitioner submitted the following evidence:

- Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation for 2000;<sup>15</sup>
- IRS Form W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for 2001 for \$13,566.01 in wages (\$10,112.19 less than the proffered wage); and
- A letter dated May 24, 2002 from [REDACTED] General Manager, stating that the petitioner is a subsidiary of the [REDACTED], which employs 235 people and has been in existence for 30 years, that the parent company has consistent annual sales of approximately \$8,000,000, and an annual payroll of approximately \$3,600,000, and that the petitioner alone had an annual payroll of \$677,979 in 2000 and \$700,000 is expected in 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) states that in a case where the petitioner employs 100 or more workers, the director “*may*” accept a statement from a financial officer of the petitioning organization. (Emphasis added). The AAO notes that [REDACTED] is not the financial officer of the petitioner, or the parent company of the petitioner. In addition, the record contains no evidence to demonstrate that [REDACTED] is the parent company of 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)).

Further, the record contains no other evidence, i.e. tax returns, annual reports, or financial statements, showing the petitioner’s ability to pay the proffered wage during the relevant period. Given the record as a whole, the AAO does not accept the letter from [REDACTED] as evidence of the petitioner’s ability to pay.

In response to the NOC, [REDACTED] states that USCIS had at one point reviewed the evidence and determined that the job offer was *bona fide*. He indicates that USCIS had considered evidence showing that “the petitioner did in fact employ the beneficiary, evidence of the petitioner’s parent corporation’s overall size, its time in business, and number of employees, and

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per week. See Memo, Farmer, Admin. for Reg’l. Mngm’t., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

<sup>14</sup> As noted earlier, the beneficiary ported to [REDACTED] in January 2006, then to [REDACTED] in 2008.

<sup>15</sup> We will not consider the petitioner’s tax return for the year 2000 as the petitioner is only required to demonstrate the ability to pay from the priority date (June 18, 2001).

the fact that the petitioner had never had a problem making payroll in the past.” [REDACTED] asserts that there was no error in USCIS’ reliance on the evidence noted above, and that it is unfair now, after the beneficiary has ported, to require the petitioner who is no longer interested in the outcome of these administrative proceedings to produce additional evidence demonstrating its ability to pay, which may no longer be available.

As noted earlier, 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. at 590. Moreover, where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden 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).

Here, the petitioner has not submitted any evidence to establish the ability to pay the difference between the proffered wage and actual wages paid in 2001, or the continuing ability to pay from 2002 onwards. In addition, the AAO observes that a review of USCIS electronic databases reveals that the petitioner has previously filed five other Form I-140 immigrant petitions, as shown below:

<i>Receipt Number</i>	<i>Beneficiary’s Last Name</i>	<i>Decision</i>	<i>Date Adjusted to Lawful Permanent Residence (LPR)</i>
[REDACTED]	[REDACTED]	Approved	N/A
[REDACTED]	[REDACTED]	Approved	04/03/2002
[REDACTED]	[REDACTED]	Approved	07/01/2004
[REDACTED]	[REDACTED]	Revoked <sup>16</sup>	N/A
[REDACTED]	[REDACTED]	Revoked <sup>17</sup>	N/A

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wage of the current beneficiary and also of all other beneficiaries from the date of filing each respective labor certification application until the date each beneficiary obtains lawful permanent residence, or until the beneficiary in this case ported, pursuant to section 204(j) of the Act. As noted above, the record contains no evidence, i.e. federal tax returns, annual reports, or financial statements, establishing the petitioner’s continuing ability to pay the proffered wage during the relevant period. In view of the foregoing, the AAO agrees with the director that the petitioner has not established the continuing ability to pay the proffered wage from the priority date onwards.

<sup>16</sup> The approval of the petition was revoked on May 20, 2009.

<sup>17</sup> The approval of the petition was revoked on April 20, 2009.

Furthermore, consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by DOL and submitted with the petition as of the priority date of June 18, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Cook." The job description listed on the Form ETA 750 part A item 13 states, "Prepare all types of dishes."

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. We note that the beneficiary listed on the Form ETA 750B the following relevant work experience under item 15 of the Form ETA 750, part B:

Name and address of employer:	[REDACTED]
Name of Job:	Cook
Date started:	January 1993
Date left:	January 1996
Kind of business:	Restaurant

The record contains the following evidence to demonstrate that the beneficiary had the requisite work experience in the job offered as of the priority date:

- A letter of employment verification dated December 22, 2000 from SPI stating that the beneficiary worked as a cook from February 1, 1993 to November 1, 1996;
- A notarized statement signed by [REDACTED] on February 25, 2009, stating that the beneficiary worked as a cook at SPI doing business as [REDACTED] from February 1, 1993 to November 1, 1996;
- A notarized statement signed by [REDACTED] on February 27, 2009, indicating that she worked with the beneficiary at SPI from February 1, 1993 to November 1, 1996, and that the beneficiary was a cook;
- A notarized statement signed by [REDACTED] on February 27, 2009, stating that he worked with the beneficiary at [REDACTED] from February 1, 1993 to November 1, 1996, and that the beneficiary was a cook;
- A notarized statement signed by [REDACTED] on April 9, 2009 stating that she is a partner with [REDACTED] and that the beneficiary worked as the cook from February 1, 1993 to November 1, 1996;
- A notarized statement dated May 4, 2009 from [REDACTED], stating that she is a partner with [REDACTED] that the company is in the business of trading clothing and accessories, that the company provided food for its employees, which at the time numbered more than 300 people, and that the beneficiary was the cook from February 1, 1993 to November 1, 1996; and

- A copy of the business registration of [REDACTED]

The director, among other things, noted in the 2012 NOIR that, based on the the CNPJ submitted, [REDACTED] is engaged in the retail business of clothing and accessories, whereas the type of business listed by the beneficiary on the Form ETA 750B is restaurant. The director also stated that none of the employment verification letters submitted above complies with the regulations regarding documentation of skilled workers, in that none includes a sufficient description of the experience or training of the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A).<sup>19</sup> For these reasons, the director advised the petitioner to submit another letter of employment verification that complies with the regulations and to resolve the inconsistency noted above by submitting independent objective evidence.

In response to the NOC, [REDACTED] submits the following evidence:

- Affidavit dated May 23, 2013 from the beneficiary stating, among other things, that he worked as a cook at a cafeteria located inside the headquarters of [REDACTED]<sup>20</sup>
- An article from the Brazilian Ministry Labor and Employment regarding worker's rights to meal vouchers and food stamps; and
- A booklet entitled "[REDACTED]" for a company called "[REDACTED]"

[REDACTED] states in his brief that according to the article from the [REDACTED] and Employment, companies with more than 300 employees are required to provide a suitable place for employees to have meals during the day. He also states, "In 2007, [REDACTED]"

<sup>18</sup> CNPJ or Cadastro Nacional da Pessoa Juridica is similar to the federal tax ID or employer ID number in the United States. Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date. The CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/> (last accessed June 4, 2013).

<sup>19</sup> The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide, "Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien."

<sup>20</sup> The beneficiary states that the cafeteria is only accessible to the employees of [REDACTED]; that in Brazil, it is common for employers to provide employees with cafeteria or vouchers to buy food; that he received checks monthly, but he could no longer locate his employment booklet to show that he worked as a cook in Brazil for at least two years.

global professional services and human resources firm, conducted a survey of 300 Brazilian and multi-national companies operating in [REDACTED] and found that 98% provided some form of meal allowance, and that more than 60% provided meals through an in-house restaurant.”

As noted above, the position offered is for a skilled worker, requiring at least two years of specialized training or experience. Upon review of the evidence submitted, the AAO is not persuaded that the beneficiary had the requisite work experience in the job offered before the priority date. The director has stated earlier that that any inconsistencies in the record must be resolved by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-92. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* In this case, no independent objective evidence, such as paystubs, payroll records, the beneficiary’s government-issued identification, or other relevant proofs, has been submitted to show that the beneficiary had the experience in the job offered. 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)).

In summary, the AAO finds that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage from the priority date until the beneficiary ported, and that the beneficiary possessed the minimum experience requirements for the proffered position as of the priority date. The director further had good and sufficient cause to revoke the approval of the petition, consistent with section 205 of the Act, 8 U.S.C § 1155. For these reasons, the director’s decisions to revoke the approval of the petition is upheld.

The petition’s approval will remain revoked for the above stated reasons, with each considered as an independent and alternate basis for revocation. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The director’s decision to revoke the previously approved petition is affirmed.