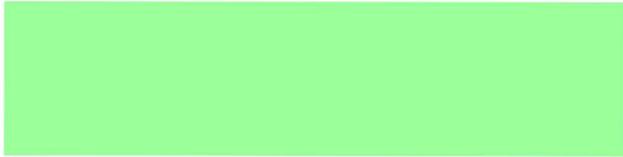


(b)(6)

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



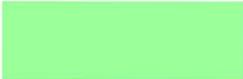
U.S. Citizenship
and Immigration
Services



DATE:

OFFICE: TEXAS SERVICE CENTER

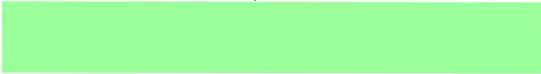
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IN RE:

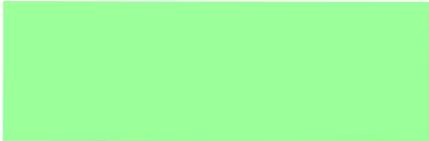
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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

DISCUSSION: On December 30, 2003, 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 Director, VSC (director) on November 16, 2004. The director, however, revoked the approval of the immigrant petition on August 5, 2009 and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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 restaurant. It seeks to employ the beneficiary¹ permanently in the United States as an Indian specialty cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).² 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 November 16, 2004 by the VSC, but that approval was revoked in August 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. The director also questioned whether the beneficiary possessed the minimum experience requirements as stated on the labor certification application prior to the filing of the Form ETA 750 and noted that the petitioner's business had permanently closed on December 31, 2008. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner³ 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

¹ This petition involves the substitution of the labor certification beneficiary which was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

² 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.

³ Current counsel of record, [REDACTED], will be referred to as counsel throughout this

cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. Counsel argues that the petitioner did comply with the DOL recruitment requirements and that the beneficiary possessed the minimum requirements required on the ETA 750 prior to the filing of the labor certification application. On the Form I-290B signed on August 17, 2009, counsel states that “the beneficiary continues to work for the petitioner and the beneficiary had the required work experience as indicated on his application for alien labor certification.”

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.⁴

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.

The threshold issue 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).

decision. Prior counsel, [REDACTED] will be referred to as former counsel or by name. The AAO notes that [REDACTED] was suspended from the practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

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

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

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

Here, in the NOIR dated February 18, 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.

Nonetheless, the approval of the petitioner may not be reinstated, as the record does not establish that the petition was approvable when filed, or that the beneficiary ported off of an approved petition pursuant to section 204(j) of the Act. On November 1, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NODI) with a copy to counsel of record. The AAO noted that:

According to the Commonwealth of Massachusetts, Corporations Division, website <http://corp.sec.state.ma.us/corp/corptest/corptestinput.asp>, (accessed on October 16, 2012), [the petitioner] was dissolved on March 2, 2010...If [the petitioner] is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of [the petitioner's] business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

In the response, dated November 29, 2012, counsel asserts that even though the petitioner's business is closed, "the visa petition at issue in this case is not subject to automatic revocation under 8 C.F.R. § 205.1(a)(iii)(D) because [the beneficiary] currently works in the same occupation for another employer" and is thus "eligible for portability" under Section 204(j) of the Act. In other words, counsel argues that the petition is still approvable due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) and should not be automatically revoked. Counsel states that "[the beneficiary] worked for [the petitioner] as a cook from June, 2004 through November 2008 when the business closed." Counsel also states that the initial response to the director's NOIR included evidence that the beneficiary "did not work for the petitioner and that he worked for another restaurant as a cook."

The record contains a letter, dated January 27, 2009, from [redacted] president of the petitioner, stating that "[the beneficiary] started working for us as of 06/26/2004 and worked until 11/16/2008." [redacted] indicates that "[o]ur business officially closed on 12/31/2008." The record also contains an undated letter from [redacted], manager of [redacted] stating that "[the beneficiary] will be taking the position of Indian Specialties Cook with a starting date of 02/15/09."

The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the letter in the record from [redacted] indicating that its business closed on December 31, 2008 is inconsistent with counsel's assertions in the November 2012 response that the petitioner's business closed in November 2008. Counsel's assertions in the November 2012 response directly contradict his statement on the Form I-290B Notice of Appeal signed by counsel on August 17, 2009, indicating that "the beneficiary continues to work for the petitioner and the beneficiary had the required work experience as indicated on his application for alien labor certification." It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. at 591-592.

On January 10, 2013, the AAO issued a second notice, (Request for Evidence (RFE)) noting that the petitioner submitted evidence to establish that its business closed in November 2008 and that the beneficiary ported to new employment in February 2009. In the RFE, we stated that:

[T]he AAO does not agree that under the terms of AC21, the instant immigrant petition can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid prior to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar.

In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

It is also noted that in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), 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. 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. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked." *Id.*

In the January 2013 RFE, the AAO advised the petitioner that:

The petitioner has the burden of establishing that a *bona fide* job opportunity exists when asked to show that the job opportunity is clearly open to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *see also* 8 U.S.C. § 1361 and 20 C.F.R. § 626.20(c)(8) and §656.3. Doubt cast on any aspect of the petitioner's evidence may 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. at 591-592].

The AAO specifically asked the petitioner to submit evidence to establish that a *bona fide* job offer existed with its organization at the time the petitioner closed in 2008 and when the beneficiary sought to port by obtaining new employment in February 2009 and allowed the petitioner 45 days to respond to the RFE. The AAO noted to the petitioner that:

If you do not respond to this request for evidence, the AAO will dismiss the appeal without further discussion. *See* 8 C.F.R. § 103.2(b)(13)(i). The AAO will also dismiss the appeal if you fail to submit requested evidence which precludes a material line of inquiry. *See* 8 C.F.R. § 103.2(b)(14). The AAO cannot substantively adjudicate the appeal without a meaningful response to each line of inquiry.

The AAO also requested the petitioner to submit evidence that the petition was approvable when filed, as the record does not establish that the petitioner has the ability to pay the proffered wage from the priority date onwards. In the RFE response, counsel submits the Internal Revenue Service (IRS) Forms W-2 issued by the petitioner to the beneficiary for 2004, 2005, 2007 and 2008,⁵ IRS Forms W-2 issued by [REDACTED] to the beneficiary from 2009 to 2012, the beneficiary's IRS Form 1040 for 2006, and the IRS federal tax returns Forms 1120S filed by the petitioner from 2003 through 2008. Counsel states that:

As you can see, the enclosed documents combined with documents previously submitted to your agency confirm that the beneficiary worked for the petitioner and that the petitioner not only paid, but had the ability to pay, the beneficiary the prevailing wage for his job.

⁵ We note that the name of the petitioner as listed on the ETA 750 and Form I-140 petition is [REDACTED]. However, the 2005 IRS Form W-2, and 2005 and 2006 IRS Form 1120S list the employer as "[REDACTED]". The 2007 and 2008 IRS Forms W-2 and 2007 and 2008 IRS Forms 1120S list the employer as [REDACTED]. However, as the Federal Employer Identification Number has remained the same, the AAO will accept the IRS Forms W-2 and Forms 1120S with a different name than that of the petitioner.

⁶ The AAO notes that there is no evidence in the record that [REDACTED] is the same entity as [REDACTED] from which the petitioner submitted the portability letter discussed earlier. The identity or business of [REDACTED] is unclear. Counsel's cover letter accompanying the [REDACTED] Forms W-2 did not address why these forms were submitted in response to the RFE.

The AAO did not question whether the beneficiary worked for the petitioner from 2004 until it closed in 2008. We asked the petitioner to establish that a *bona fide* job offer existed at the time the petitioner closed in November 2008 and when the beneficiary obtained new employment in February 2009. The petitioner failed to do so. Thus, the AAO finds that the approval of the petition was automatically revoked under 8 C.F.R. § 205.1(a)(3)(iii)(D) upon the termination of the petitioner's business in November 2008. We also find that because the approval of the petition was automatically revoked in November 2008 by operation of law, upon the termination of the petitioner's business, the beneficiary's attempt to port from a moot petition is not recognized.

Furthermore, the petition was not valid when the petitioner filed the petition and prior to the director's initial approval in 2004. The petitioner has not established the ability to pay the proffered wage from the priority date in 2003 onwards. 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.

In the instant case, the Form ETA 750 was filed on April 4, 2003, so the petitioner must establish the ability to pay the proffered wage of \$13.01 per hour or \$23,678.20 per year based on the indicated 35 hour work week. At the time of the director's approval in November 2004, the petitioner's 2004 tax return was not yet due. As is shown in the evidence of record discussed below, the petitioner did not establish the ability to pay in 2003 considering the multiple petitions filed by the petitioner. Thus, USCIS had good and sufficient cause to revoke the approval of the petition as of the date of the approval in November 2004.

Moreover, the petitioner has not established the ability to pay the proffered wage from 2003 until 2009 when the beneficiary ported to new employment.⁷ The record contains IRS Forms W-2 evidencing that the petitioner paid the beneficiary the following wages:

- \$9,450 in 2004;
- \$24,050 in 2005;
- \$24,137.94 in 2007; and

⁷ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. § 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

[Redacted]

- \$18,565.27 in 2008.

Thus, the petitioner has not established that it employed and paid the beneficiary the proffered wage in 2003, 2004, 2006,⁸ 2008 or 2009.

In the January 2013 RFE, the AAO advised the petitioner that according to USCIS records, the petitioner has filed several Form I-140 petitions on behalf of other beneficiaries and the petitioner must establish the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition.⁹ See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). Specifically, USCIS records show that the petitioner sponsored the following beneficiaries:

<u>BENEFICIARY</u>	<u>FORM</u>	<u>RECEIPT NUMBER</u>	<u>RECEIPT DATE</u>
[Redacted]	I-140	[Redacted]	11/07/2007
[Redacted]	I-140	[Redacted]	08/13/2004
[Redacted]	I-140	[Redacted]	07/20/2005
[Redacted]	I-140	[Redacted]	04/21/1999
[Redacted]	I-140	[Redacted]	04/23/2002
[Redacted]	I-140	[Redacted]	08/05/1999
[Redacted]	I-140	[Redacted]	04/04/2003
[Redacted]	I-140	[Redacted]	11/14/2001
[Redacted]	I-140	[Redacted]	12/18/2002
[Redacted]	I-140	[Redacted]	09/11/2001
[Redacted]	I-140	[Redacted]	08/25/1999
[Redacted]	I-140	[Redacted]	10/15/2002
[Redacted]	I-140	[Redacted]	03/09/1999
[Redacted]	I-140	[Redacted]	04/07/1998
[Redacted]	I-140	[Redacted]	08/25/1999

The AAO requested that the petitioner submit annual reports, federal tax returns or audited financial statements for 2003 through 2009, as well as any IRS Forms W-2 or 1099 issued to each beneficiary by the petitioner for 2003 through 2009, as well as the position sponsored and the wage owed to each beneficiary from the priority date of each petition. The AAO also noted that:

⁸ The AAO will not accept the beneficiary's IRS Form 1040 for 2006, as it is not accompanied by an IRS Form W-2, so there is no evidence that the wages he received that year were from the petitioner.

⁹ The AAO notes that 13 out of these 15 additional petitions were pending as of the date of the director's initial approval of the instant petition in November 2004, thus further limiting the petitioner's available net income and net current assets to establish its ability to pay the proffered wage for 2003.

[The petitioner] must indicate in [the] response where the wages were deducted on the IRS Form 1120S for 2002 and 2003, neither of which show wages and salaries paid on page one, line eight. Contract labor in 2002 is listed as \$140.00 on the Form 1120S; in 2003, the amount paid in contract labor is \$7,373. The petition lists that the restaurant employs five plus workers in 2003; the tax returns do not reflect wages paid to five workers in either 2002 or 2003. It 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. at 591-592.

As noted above, in the RFE, the AAO specifically advised the petitioner that:

If you do not respond to this request for evidence, the AAO will dismiss the appeal without further discussion. See 8 C.F.R. § 103.2(b)(13)(i). The AAO will also dismiss the appeal if you fail to submit requested evidence which precludes a material line of inquiry. See 8 C.F.R. § 103.2(b)(14). The AAO cannot substantively adjudicate the appeal without a meaningful response to each line of inquiry.

In the RFE response, counsel submitted the petitioner's federal tax returns IRS Forms 1120S reflecting the following:

	<u>NET INCOME</u> ¹⁰	<u>NET CURRENT ASSETS</u> ¹¹
2003	\$31,687	\$-748;
2004	\$36,823	\$-8,882;
2005	\$33,601	\$-28,581;
2006	\$31,268	\$-18,109;

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 March 2013) (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 to 2008, the petitioner's net income is found on Schedule K of its tax returns.

¹¹ 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; the current assets are shown on Schedule L, lines 1 through 6 and current liabilities are shown on lines 16 through 18.

2007	\$29,840	\$27,057; and
2008	\$-18,317	\$0.

While the net income in 2003 was sufficient to pay the proffered wage to the beneficiary that year, it is not sufficient to pay all the sponsored workers, including the 13 for whom Form I-140 petitions were pending in 2003. Thus, the petitioner has not established the ability to pay prior to the director's approval and the director had good and sufficient cause to revoke that approval. Similarly, the petitioner did not have sufficient net current assets from 2003 to 2008 to establish the ability to pay all the sponsored workers. The petition's approval may not be reinstated without the petitioner establishing the ability to pay the proffered wages for each of the sponsored beneficiary from the corresponding priority date until adjustment of status to permanent residence

Moreover, no other evidence was submitted to establish that the petitioner had the ability to pay the beneficiary the proffered wage in 2008 or 2009, or that the petitioner had the ability to pay the proffered wages to the other 15 sponsored beneficiaries for any year from 2003 onwards. Nor did the petitioner submit any independent, objective evidence, as specifically requested in the RFE, to explain or reconcile why its tax returns did not reflect any wages paid to the five employees the petitioner listed on the Form I-140 petition. In the RFE response, counsel argues that:

Although you have requested additional documents, unrelated to this case, those documents will not be provided due to the fact that the petitioner has been out of business for many years and is not required to retain such documentation.

The AAO does not agree that the documents requested are unrelated to the instant case. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As noted above, any petition filed for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective U.S. employer has the ability to pay the proffered wage which shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. *See* 8 C.F.R. § 204.5(g)(2). The documents requested by the AAO to establish that the petitioner has the ability to pay the proffered wage in this case, as well as to the other 15 beneficiaries for whom the petitioner has submitted employment-based petitions, are related to this case. *See Matter of Great Wall*, 16 I&N Dec. at 144-145. Further, even if the petitioner had not retained the IRS Forms W-2 or 1099 for wages paid to the beneficiary in the instant case and the other 15 beneficiaries, the petitioner could have obtained these tax records from the IRS and provided them in response to the RFE.¹² Therefore, the AAO finds that the petitioner has not established the ability to pay from 2003 onwards.

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

¹² According to the IRS website at www.irs.gov (accessed March 6, 2013), the IRS offers several different ways to get tax return information or a copy of your own tax return for prior years; the turnaround time for online and phone orders is typically five to 10 days.

not conduct good faith recruitment and found that the petitioner had engaged in fraud or material misrepresentation with respect to the recruitment process. The AAO disagrees. The record does not show inconsistencies or anomalies in the recruitment process that would justify the issuance of a NOIR based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Therefore, the director's conclusion that the petitioner did not comply with DOL requirements is withdrawn.

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, [REDACTED]

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 DHS 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 DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.¹³

¹³ It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO and USCIS have the authority to enter a fraud finding, if during the course of adjudication, the record of proceedings discloses fraud or a material misrepresentation.

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

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [s]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. at 447. Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

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

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

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 based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. at 447. 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 DOL recruitment requirements. The AAO also withdraws the petitioner's finding of fraud and material misrepresentation against the petitioner.

Beyond the decision of the director, 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.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 4, 2003. The name of the job title or the position for which the petitioner seeks to hire is "Indian Specialty Cooks[sic]." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "Prepare all types of Indian specialty 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 proffered position.

On the Form ETA 750, part B, signed by the beneficiary on February 6, 2003, he represented that he worked 40 hours a week at () in Mumbai, India as a cook from April 1995 to April 1998. The record contains a letter of employment verification on letterhead, dated April 30, 1998, stating that the beneficiary worked there as a cook from April 1995 to April 1998. The record also contains a letter dated March 9, 2009 from (), the general manager of () stating that the beneficiary was employed as a "Tandoori and Curry (Indian Specialities)[sic] cook" from April 1995 to April 1998. However, neither letter meets the requirements in the regulations at 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). The 1998 letter does not list the name or title of the author, nor does it provide a specific description of the duties performed by the beneficiary. The 2009 letter does not provide a specific description of the duties performed by the beneficiary. Therefore, the AAO is not persuaded that the petitioner has established that the beneficiary possessed the minimum two years of experience as an Indian specialty cook as required on the ETA 750 labor certification. For this additional reason, USCIS had good and sufficient cause to revoke the approval of the petition.

The approval of the petition will not be reinstated for the above stated reasons, with each considered as an independent and alternative basis. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Furthermore, even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business prior to the beneficiary's porting to new employment. See 8 C.F.R. § 205.1(a)(iii)(D).

ORDER: The appeal is dismissed.