



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: OFFICE: TEXAS SERVICE CENTER
MAR 28 2013

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On April 6, 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 9, 2002. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition and invalidated the labor certification on November 15, 2010, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision to invalidate the labor certification will be withdrawn, but the appeal will be dismissed, and the director's decision to revoke the approval of the petition will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook 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 employment-based petition was approved on October 9, 2002, but that approval was revoked in November 2010. The director determined that the petitioner failed to establish the ability to pay the proffered wage from the priority date and that the beneficiary did not have the requisite work experience in the job offered as of the priority date. The director further concluded that the petitioner tried to circumvent immigration laws by submitting fraudulent documentation to U.S. Citizenship and Immigration Services (USCIS) in order to qualify the beneficiary for immigration benefit that he was not eligible for, thus committing fraud in violation of 18 U.S.C. §§ 1001 and 1546. Accordingly, the director invalidated the labor certification.

On appeal, counsel for the petitioner contends that the petitioner has submitted sufficient evidence to establish that the beneficiary possessed the requisite work experience in the job offered. Counsel also indicates that the petitioner has the ability to pay the proffered wage from the priority date based on the totality of the business' circumstances.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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 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).

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

Section 205 of the 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).

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 un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director indicated in the Notice of Intent to Revoke (NOIR) dated August 31, 2010 that the beneficiary could not have worked as a cook at [REDACTED] in Brazil from 1991, since the

company was not registered with the Brazilian government until July 26, 1995.³ This, according to the director, meant that the petitioner had submitted false documentation to verify the required work experience of the beneficiary. In addition, the director identified that the beneficiary failed to include his employment abroad on the Form G-325 (Biographic Information).⁴

The director also noted that the petitioner had failed to establish the ability to pay and specifically requested additional proof to show that the beneficiary worked as a cook in Brazil, such as pay stubs or receipts for wages issued to the beneficiary while working in Brazil, and evidence demonstrating the petitioner's ability to pay from the priority date until the beneficiary receives lawful permanent residence.

For these reasons stated above, the AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR to the petitioner, and that the director provided specific derogatory information relating the current proceeding. The AAO finds that the director's NOIR warrants a revocation of the approval of the petition if the derogatory information remains unexplained and un rebutted by the petitioner. *See, Matter of Arias*, 19 I&N Dec. 568; *Matter of Estime*, 19 I&N Dec. 450.

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 the U.S. Department of Labor (DOL) and submitted with the petition as of the priority date. Here, the priority date is March 23, 2001, which was the date when the Form ETA 750 was filed and accepted for processing by DOL.

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.

The beneficiary listed the following relevant work experience under item 15 of the Form ETA 750, part B:

Name and address of employer: [REDACTED] Cuiaba, Brazil.

³ The director found the information above by searching the CNPJ database (the CNPJ database can be accessed online at <http://www.receita.fazenda.gov.br/>). CNPJ or Cadastro Nacional da Pessoa Juridica is a unique number given to every business registered with the Brazilian authority. In Brazil, a company can hire employees, open bank accounts, buy and sell goods only if it has a CNPJ. The director indicated that the Department of State had 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.

⁴ We note that the beneficiary filed the Form G-325 in conjunction with his Application to Register for Permanent Residence or Adjust Status (Form I-485).

Name of Job:	Cook.
Date started:	1991.
Date left:	January 1997.

Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment verification dated January 15, 1997 from [REDACTED] stating that the beneficiary worked as a cook from 1991 to January of 1997.

In response to the NOIR, the petitioner submitted the following evidence to show that the beneficiary possessed the minimum requirements for the position offered:

- A letter of employment verification dated January 3, 1998 from [REDACTED] stating that the beneficiary “worked in our firm from 1994 to 1997;”
- Simplified certificate of [REDACTED], CNPJ number 00.721.801/0001-46;
- Simplified certificate of [REDACTED] CNPJ number 26.784.785/0001-24;
- A statement dated September 28, 2010 from [REDACTED] stating he was the accountant and the attorney for [REDACTED], the owner of [REDACTED] and [REDACTED] that [REDACTED] was established in 1991; that [REDACTED] was established in 1994 by [REDACTED]; and that both companies were in the business of bottling and selling cleaning chemicals; and
- An affidavit dated September 17, 2010 from the beneficiary stating that he worked as a cook at the cafeteria of a business that made “[REDACTED]” brand cleaning products.

We acknowledge that the letters of employment verification dated January 15, 1997 and January 3, 1998 both state that the beneficiary worked as a cook, but one letter states that he worked as a cook from 1991 to January 1997, and the other indicates that he worked as a cook from 1994 to 1997. The beneficiary states in his affidavit that the attorney who prepared his labor certification application at the time made a minor clerical mistake when stating that the beneficiary worked at [REDACTED] from 1991 to January 1997. The beneficiary indicates, “In actuality, I began working in the cafeteria of the [REDACTED] facility in 1994.” Further, the beneficiary states in his affidavit that he was paid in cash, and thus, he did not have paystubs to show that he worked at [REDACTED] from 1994.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The record contains no independent objective evidence, i.e. the beneficiary’s booklet of employment and social security, tax records, payroll/paystub records, etc., to confirm or verify the beneficiary’s statement that he worked as a cook in Brazil from 1994 to 1997. The inconsistency in the time period of the beneficiary’s employment in Brazil is material in this case. The beneficiary’s statement alone does not cure this type of inconsistency in the record. 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)). Moreover, [REDACTED] and [REDACTED] were both in the business of producing and selling cleaning products. No evidence has been submitted to demonstrate that either businesses owned a cafeteria.

Further, we note that none of the employment verification letters from [REDACTED] meets the minimum requirements in the regulations, in that none includes the name and title of the author and a specific description of the training received or duties performed by the beneficiary. See 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A). Considering all of the above, we agree with the director's conclusion that the beneficiary did not have the requisite work experience in the job offered as of the priority date.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation involving the labor certification, which then led to the invalidation of the labor certification.

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."

As outlined by the Board of Immigration Appeals, a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 289-90. The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "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 Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded. *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be

addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

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

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

In this case, the beneficiary claimed on part B of the Form ETA 750 that he worked as a cook at [REDACTED] in Brazil from 1991 to January 1997. That claim is consistent with the signed statement dated January 15, 1997 from [REDACTED] stating that the beneficiary "worked for our company from 1991 to January of 1997 as a cook."⁵

As indicated above, the fact that [REDACTED] was not registered with the Brazilian government in 1991 is not sufficient for the director to conclude that the petitioner willfully misrepresented the beneficiary's qualifications. In fact, in response to the director's NOIR, the petitioner submits various documents which reflect that [REDACTED], which was connected to [REDACTED], existed in 1991.⁶

In summary, we find that 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 beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Thus, the director's decision to invalidate the certified Form ETA 750 must be withdrawn. *See* 20 C.F.R. § 656.31(d).

As noted earlier in the NOIR, the director noted that the record did not contain evidence of the petitioner's ability to pay. The director specifically asked the petitioner to submit ability to pay evidence from 2001 to 2009 and any evidence of wages paid to the beneficiary in 2010. In response the petitioner submitted the following evidence:

⁵ Counsel claims on appeal that neither the petitioner nor the beneficiary has a copy of the letter of employment verification letter dated January 15, 1997, and thus, neither can make representations about the said letter.

⁶ We note based on the evidence submitted that both [REDACTED] and [REDACTED] were partly owned by [REDACTED]

- Copies of Internal Revenue Service (IRS) Form 1120S, U.S. Corporation Income Tax Return for an S Corporation, for the years 2002 through 2009;
- Copies of IRS Forms W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 1999 through 2009;⁷
- Printouts of the payroll records showing the names of the employees who were no longer employed as of the end of 2001;
- Copies of IRS Forms W-2 issued by the petitioner to those employees whose employment was terminated as of the end of 2001;
- Bank statements issued in 2001;
- A letter dated September 29, 2010 from [REDACTED] Partner, stating that the business has been a permanent fixture in Cambridge, Massachusetts, for many years, and that it is a popular venue that is noted for its ambiance; and
- Copies of various magazine articles clippings and advertisements promoting the petitioner's business.

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 DOL. See 8 C.F.R. § 204.5(d). Here as noted earlier, the ETA 750 labor certification was accepted for processing on March 23, 2001. The rate of pay or the proffered wage specified on the ETA 750 is \$12.57 per hour or \$22,877.40 per year based on a 35 hour work week.⁸

⁷ The AAO notes that the petitioner submitted copies of the beneficiary's Forms W-2 for the years 1999 and 2000. We note that these W-2s are for years prior to the priority date of the visa petition; and, therefore, they have little probative value when determining the petitioner's continuing ability to pay the proffered wage from the priority date of March 23, 2001. Thus, we will not consider the beneficiary's 1999 and 2000 W-2 when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

⁸ 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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in August 1998⁹ and to currently employ 18 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

In the instant case, although the petitioner has established that the petitioner employed the beneficiary continuously from the priority date, it has not established that the beneficiary received the full proffered wage during any relevant time frame including the period from the priority date in 2001 or subsequently.

In addition, a review of the Internal Revenue Service (IRS) Forms W-2 in the record reveals that the beneficiary earned a significant amount as "tips" from 2001 to 2009. We note that the beneficiary's position was cook. Thus, payment of tips casts doubt on his employment with the petitioner, and we will not consider any of the Forms W-2 submitted as evidence of the petitioner's ability to pay.¹⁰

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).

⁹ A search of the website of the Secretary of the Commonwealth, Corporations Division (<http://corp.sec.state.ma.us/corp/corptest/corpsearchinput.asp>) confirms that [redacted] or the petitioner was incorporated on June 29, 1998.

¹⁰ We note that even if we considered the Forms W-2 for 2001 to 2009 as evidence of the petitioner's ability to pay, the wages paid to the beneficiary minus tips from 2001 to 2009 would not exceed the proffered wage.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *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 tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner’s tax returns demonstrate its net income (loss)¹¹ for the years 2001-2009, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)</i>
2001	N/A ¹²
2002	(\$92,897)
2003	\$69,184
2004	(\$59,614)
2005	(\$74,831)
2006	(\$22,392)
2007	(\$78,721)
2008	(\$51,365)
2009	(\$4,923)

Therefore, the petitioner did not have sufficient net income to establish the ability to pay from 2001 to 2009.

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.¹³ 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

¹¹ For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S if the S corporation’s income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2002-2003) line 17e (2004-2005) line 18 (2006-2009) of Schedule K. See Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-prior/i1120s--2009.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income in 2002 is found on line 23 (2002-2003), line 17e (2004-2005), and line 18 (2006-2009) of schedule K.

¹² The petitioner failed to submit the copy of its federal tax return for 2001.

¹³ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets</i>
2001	N/A
2002	(\$178,049)
2003	(\$155,829)
2004	(\$210,594)
2005	(\$322,487)
2006	(\$431,284)
2007	(\$566,775)
2008	(\$631,846)
2009	(\$729,311)

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's proffered wage in any of the relevant years from the priority date, as shown above.

In response to the Request for Evidence (RFE) dated June 21, 2002, counsel for the petitioner at the time contended that the petitioner could use the money paid to other employees to pay the beneficiary's wage. Counsel submitted printouts of the payroll records showing the names of the employees who were no longer employed as of the end of 2001 and copies of their IRS Forms W-2.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence in the record showing that those employees performed the beneficiary's proposed duties as a cook. If these employees performed other kinds of work, such as a bookkeeping, cashier, or server, for instance, then those workers would not qualify to temporarily work for the beneficiary. In addition, we note that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. Even though this consideration does not form the basis of the decision on the instant appeal, we decline to accept counsel's contention as persuasive.

In addition, in response to the RFE dated June 21, 2002, counsel submitted copies of the business' bank statements issued in 2001 and asked the director of Vermont Service Center to consider the balances available in the bank statements as evidence of the petitioner's ability to pay.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit

additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for the years 2002 through 2009. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Further, the bank statements only show balances in the petitioner's bank account in a particular time period. They do not explain how those balances can help the petitioner pay the proffered wage during the qualifying period from the priority date. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

On appeal, counsel maintains that the petitioner has the continuing ability to pay based on the totality of the business' circumstances. The beneficiary, according to counsel, has been employed continuously by the petitioner since 1999, and the petitioner has not had any difficulties in paying its employees throughout the years. In a letter dated September 29, 2010, [REDACTED] Partner, stated that the business has been a permanent fixture and a popular venue in Cambridge, Massachusetts, for many years.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO acknowledges that the petitioner has been in a competitive business since 1998. However, unlike *Sonogawa*, the petitioner in this case has not provided any evidence reflecting

the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. The various magazine articles and advertisements about the petitioner in the record appear to have been written or published to promote the business. The petitioner's business does not appear to be well-recognized locally and/or nationally. The record does not show that the petitioner's products and services are subjects of discussion in various business journals and newspapers. The record does not establish that the petitioner is a viable business with a good reputation. With the exception of 2003, the business has reported net loss in its tax return since 2002. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his permanent residence.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number P2001-MA-01311346, is withdrawn.