

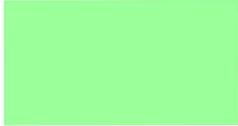
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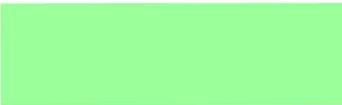
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

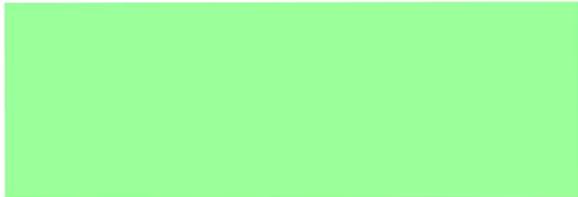


Date: **MAY 24 2013** Office: TEXAS SERVICE CENTER FILE: 

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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On January 11, 2013 the Administrative Appeals Office (AAO) issued a decision withdrawing the director's decision to revoke the approval of the employment-based immigrant visa petition and remanding the matter to the Director, Texas Service Center (the director), for further action and review in accordance with the AAO's decision. On March 18, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving no response,¹ revoked the approval of the petition, invalidated the labor certification, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner is an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as an Indian specialty 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).² As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved on December 30, 2002, but the approval of the petition was eventually revoked and the labor certification invalidated on March 18, 2013. The director found fraud or willful misrepresentation involving the labor certification process. Specifically, the director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures. Additionally, the director found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from 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).

As noted above, the director found fraud or willful misrepresentation involving the labor certification application and invalidated the labor certification because the attorney who filed the Form ETA 750 and the Form I-140 petition, [REDACTED] had been suspended from practicing law before the Board of Immigration Appeals (BIA), the Immigration Courts, and the Department of Homeland Security (DHS) for three years from March 1, 2012 under 8 C.F.R. § 292.3(b). The director also indicated that the person who signed the Form ETA 750 and Form I-140 petition, [REDACTED] was not authorized to file the applications, as he was not the officer of the petitioning organization.³ In addition, the director found that the advertisements

¹ The record shows that counsel for the petitioner sent a timely response to the director's NOIR, but the director did not wait 30 days (or 33 days, if the notice was sent by mail) before issuing the Notice of Certification (NOR). The AAO will consider the response provided by counsel in reviewing the petition in this case.

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 The director noted that only [REDACTED] as the officer of the petitioning organization was

from the [REDACTED] intended to demonstrate that the petitioner complied with DOL's recruitment regulations did not conform to several of DOL'S requirements under 20 C.F.R. § 656.21(g) (2001), i.e. the advertisements did not describe the job opportunity, did not state the rate of pay, nor did they state the minimum job requirements.

In accordance with 20 C.F.R. § 656.30(d), U.S. Citizenship and Immigration Service (USCIS) may invalidate the labor certification based on fraud or willful misrepresentation. The term "willfully" in the statute has been interpreted to mean "knowingly 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) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. 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 documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

In response to the director's NOIR dated February 18, 2009 and to demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time [REDACTED] submitted the following evidence:

- Copies of the [REDACTED] tear sheets evidencing that the petitioner placed advertisements for the position of Indian specialty cook in the local newspaper, first on January 7, 2001 and February 11, 2001; and then for eight consecutive days from November 24, 2001 through December 1, 2001;
- A copy of the letter dated February 14, 2001 addressed to [REDACTED] from the [REDACTED] stating that the advertisements he ordered would be run on jobfind.com;
- A printout showing that the job offered was posted on [REDACTED] from November 15, 2001 to December 15, 2001;
- A sworn statement dated March 17, 2009 from [REDACTED] the owner of the petitioner, stating, among other things, that he advertised and posted the position in the local newspaper and in his business place per [REDACTED] advice, that he complied with the

authorized to sign and file the labor certification application and the employment-based petition on behalf of the beneficiary. [REDACTED] is the owner of the petitioner according to the record of the Secretary of the Commonwealth of Massachusetts, Corporations Division. The record of the Secretary of the Commonwealth of Massachusetts, Corporations Division, can be accessed online at: [REDACTED] (last accessed May 2, 2013).

DOL's recruitment regulations, and that he no longer has any other recruitment documentation to produce at this time;

- A letter dated March 13, 2009 addressed to Commonwealth of Massachusetts Department of Employment and Training from [REDACTED] stating that he had placed advertisement in the local newspaper and posted the position in his business premises and that no application had been received in response to the advertisement or the posting;
- A copy of a letter dated October 12, 2001 from the U.S. DOL Employment and Training Administration denying the petitioner's request to waive the traditional recruitment process (the supervised recruitment); and
- A copy of a letter dated December 29, 2001 from [REDACTED] to U.S. DOL Employment and Training Administration requesting to continue to process the labor certification under the "normal" DOL regulations.

At the time the Form ETA 750 labor certification was filed on April 10, 2001, DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2003). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k). Here, based on the evidence submitted above, we can determine that the petitioner conducted the supervised recruitment, after the request for reduction in recruitment process was denied. The director in the Notice of Certification (NOC) stated that the job advertisements did not contain and include, among other things, the description of the job, the rate of pay, and the minimum job requirements, as required by the regulation at 20 C.F.R. § 656.21(g) (2001).

The AAO acknowledges the extensive requirements prescribed by the regulation above to advertise the position; however, the record shows that DOL certified the Form ETA 750 on April 26, 2002, after the petitioner apparently conducted supervised (traditional) recruitment in November and December 2001.

We also note that at the time the petitioner filed the Form ETA 750 labor certification application with DOL for processing in April 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the

DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991.⁴ We also acknowledge [REDACTED] suspension from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012. However, the record contains no evidence implicating [REDACTED] involvement in the recruitment process or participation in interviewing or considering the job applicants in this case. In conclusion, the AAO does not find any inconsistencies or anomalies in the petitioner's recruitment process.

Finally, even though the director checked the record of the Secretary of the Commonwealth of Massachusetts and found that only [REDACTED] was the only officer of the petitioner, we find that [REDACTED] was also authorized to sign and file the labor certification and the petition in this case, since he was given the authority to do so by [REDACTED]. In his affidavit dated submitted in response to the director's NOIR dated February 14, 2013, [REDACTED] stated:

I employed [REDACTED] as a manager at the restaurant from 1999 to May of 2001. [REDACTED] was authorized to sign paperwork on behalf of the restaurant.⁵

Thus, the director's finding of fraud or willful misrepresentation is not substantiated by evidence of record and will be withdrawn. Further, the director's decision to invalidate the certified Form ETA 750 will also be withdrawn. Nevertheless, the approval of the petition cannot be reinstated.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment

⁴ Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

⁵ We note that the record contains evidence that [REDACTED] was an employee of the petitioner in 2000 and 2001.

Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as indicated above the Form ETA 750 was accepted by DOL for processing on April 10, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on a 35-hour work per week).⁶

The petitioner submitted the following evidence to show that it has the continuing ability to pay the proffered wage from the priority date:

- Copies of Internal Revenue Service (IRS) Forms 1120S U.S. Income Tax Return for an S Corporation for the years 2001 through 2011; and
- Copies of the beneficiary's IRS Forms W-2 Wage and Tax Statement for the years 2003 through 2012.

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 1988 and to currently employ five 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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'l Comm'r 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.

Based on the evidence submitted, the beneficiary received the following compensation from the petitioner from 2001 to 2012:

⁶ 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).

<i>Tax Year</i>	<i>Actual Wage (AW) (Box 1, W-2)</i>	<i>Tips⁷ (Box 7, W-2)</i>	<i>AW less Tips = Net Wage (NW)</i>	<i>Annual Proffered Wage (PW)</i>	<i>NW minus PW</i>
2001	N/A	-	N/A	\$22,877.40	\$22,877.40
2002	N/A	-	N/A	\$22,877.40	\$22,877.40
2003	\$10,200.00	-	\$10,200.00	\$22,877.40	(\$12,677.40)
2004	\$22,454.17	-	\$22,454.17	\$22,877.40	(\$423.23)
2005	\$21,412.50	-	\$21,412.50	\$22,877.40	(\$1,464.90)
2006	\$23,250.00	-	\$23,250.00	\$22,877.40	Exceeds the PW
2007	\$20,550.00	\$100.00	\$20,450.00	\$22,877.40	(\$2,427.40)
2008	\$15,950.00	\$300.00	\$15,650.00	\$22,877.40	(\$7,227.40)
2009	\$14,850.00	-	\$14,850.00	\$22,877.40	(\$8,027.40)
2010	\$11,900.00	\$2,200	\$9,700.00	\$22,877.40	(\$13,177.40)
2011	\$10,200.00	-	\$10,200.00	\$22,877.40	(\$12,677.40)
2012	\$9,200.00	-	\$9,200.00	\$22,877.40	(\$13,677.40)

Based on the table above, the petitioner has established the ability to pay only in 2006. In order for the petitioner 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, it must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage from 2001 to 2012, which is:

- \$22,877.40 in 2001;
- \$22,877.40 in 2002;
- \$12,677.40 in 2003;
- \$423.23 in 2004;
- \$1,464.90 in 2005;
- \$0 in 2006;
- \$2,427.40 in 2007;
- \$7,227.40 in 2008;
- \$8,027.40 in 2009;
- \$13,177.40 in 2010;
- \$12,677.40 in 2011; and
- \$13,677.40 in 2012.

When the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517

⁷ Tips are not wages paid by the petitioner and must be subtracted out of the beneficiary's box 1 wages.

(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)⁸ for the years 2001-2012, as shown in the table below:

<i>Tax Year</i>	<i>Net Income (Loss)</i>	<i>Remainder of PW</i>
2001	\$20,415.00	\$22,877.40
2002	\$20,006.00	\$22,877.40
2003	\$10,087.00	\$12,677.40
2004	\$10,439.00	\$423.23
2005	\$11,065.00	\$1,464.90
2006	\$5,270.00	\$0
2007	\$5,286.00	\$2,427.40
2008	\$33,210.00	\$7,227.40
2009	(\$4,240.00)	\$8,027.40
2010	(\$11,423.00)	\$13,177.40
2011	(\$51,127.00)	\$12,677.40
2012	N/A	\$13,677.40

Therefore, the petitioner had sufficient net income to pay the remainder of the beneficiary's proffered wage from 2004 to 2008, but not in 2001-2003 and from 2009 onward.

Alternatively, USCIS may review the petitioner's net current assets in determining the petitioner's ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to

⁸ 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 (2001-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, 2011, at <http://www.irs.gov/pub/irs-prior/i1120s--2011.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 is found on line 23 (2001-2003), line 17e (2004-2005), and line 18 (2006-2011) of schedule K.

⁹ 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.

the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2001-2003 and 2009 -2011, as shown below:

<i>Tax Year</i>	<i>Net Current Assets</i>	<i>Remainder of PW</i>
2001	\$7,672.00	\$22,877.40
2002	N/A ¹⁰	\$22,877.40
2003	\$34,544.00	\$12,677.40
2009	(\$3,593.00)	\$8,027.40
2010	(\$13,532.00)	\$13,177.40
2011	\$8,539.00	\$12,677.40
2012	N/A	\$13,677.40

Therefore, the petitioner had sufficient net current assets to pay the remainder of the beneficiary's proffered wage in 2003, but not in 2001 and 2002 and from 2009 onward.

Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence, particularly in 2001-2002 and from 2009 onward.

In response to the director's NOC, counsel for the petitioner states that the petitioner is a successful restaurant which has been in operation since 1988. [REDACTED] stated in his affidavit that he had to close the business temporarily from September 5, 2011 to February 24, 2012 for renovations. This temporary closing, according to counsel, negatively impacted the business for that period. To show further that his restaurant business is successful, [REDACTED] stated in his affidavit that over the years he had employed on average 9-11 employees and had been able to pay their wages/salaries.

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

¹⁰ The petitioner's federal tax return for the year 2002 is missing schedule L.

petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence 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 field since 1988. However, unlike *Sonegawa*, 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. Even if we were to consider the six-month closing of the business in 2011-2012 as special circumstances in which the petitioner experienced uncharacteristic losses, the petitioner would not have been able to establish the ability to pay the proffered wage in 2001-2002 and 2009-2010. In addition, the petitioner in this case, as acknowledged by [REDACTED] in his affidavit, has filed 13 other employment-based immigrant visa petitions in the past.¹¹ Considering all of the above, 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 lawful permanent residence.

In summary, the director's finding that there was fraud or willful misrepresentation involving the labor certification will be withdrawn. Similarly, the director's decision to invalidate the labor certification will be withdrawn. Nevertheless, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition per section 205 of the Act, 8 U.S.C. § 1155, which states, "The Secretary 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. Such revocation shall be effective as of the date of approval of any such petition."

¹¹ In his affidavit, [REDACTED] stated, "I can also state that thirteen individuals for whom I have filed employment petitions worked at the restaurant and got their green cards while working at the restaurant." We do not have specific information with regards to these 13 beneficiaries which the petitioner sponsored, i.e. we do not know the proffered wages and proffered job positions. Regardless, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner should have been required to establish the ability to pay the proffered wages *not only* for the current beneficiary but also for the other sponsored beneficiaries until each beneficiary receive his or her lawful permanent residence (LPR), or until each petition is withdrawn, denied, or revoked. For future proceedings, the petitioner is required to establish the ability to pay the proffered wages of all of the beneficiaries it sponsored from each of the petition's respective priority date.

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).

Here, the petitioner has failed to establish by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Where the petitioner of an approved visa petition is not eligible for the classification sought, the director may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the 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). The revocation of the previously approved petition is affirmed for the above stated reason. 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.

FURTHER ORDER: The director's decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.