



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: OFFICE: TEXAS SERVICE CENTER  
MAY 30 2013

[Redacted]

IN RE:

[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 March 7, 2007, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center (NSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the NSC director on May 20, 2008. The director of the Texas Service Center (the director), however, revoked the approval of the immigrant petition and invalidated the labor certification on January 7, 2013, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's finding of fraud and/or willful misrepresentation regarding the beneficiary's relationships with the owners of the petitioner and decision to invalidate the labor certification will be withdrawn, but the appeal will be dismissed, and the director's decision to revoke the approval of the petition will be affirmed.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 an operator of the [REDACTED] convenience store and gas station in [REDACTED] New Hampshire. It seeks to employ the beneficiary permanently in the United States as an electric appliance repairer pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).<sup>1</sup> As required by statute, the petition is submitted along with a certified ETA Form 9089 (Application for Permanent Employment Certification). As noted above, the petition was initially approved on May 20, 2008, but that approval was revoked in January 2013 by the director of the Texas Service Center (the director).

The director determined that the job offer was not *bona fide* and that the petitioner had submitted misleading information in order to obtain a benefit under the Act through fraud and misrepresentation of a material fact. The director also stated that the position offered in this case was specifically created for the beneficiary, and accordingly, the director revoked the approval of the petition and invalidated the labor certification. The director further concluded that the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date.

On appeal, counsel for the petitioner contends that the evidence of record does not show that the petitioner had any intent to deceive U.S. Citizenship and Immigration Services (USCIS) or to materially misrepresent any facts regarding the relationship between the owner of the petitioner and the beneficiary. Counsel further states that the job offered was *bona fide* and that the position offered to the beneficiary was legitimate and not created specifically for the beneficiary.

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.<sup>2</sup> Before we adjudicate the merits of the appeal – whether the

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

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-

job offer is *bona fide* and whether or not the petitioner has the continuing ability to pay the proffered wage from the priority date – the threshold issues here are whether the director adequately advised the petitioner of the basis for revocation of approval of the petition, and whether or not the director had good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act, 8 U.S.C. § 1155.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

This means that the director must provide notice before revoking the approval of any petition. Specifically, 8 C.F.R. § 205.2 reads:

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

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

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

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

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

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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).

Both *Matter of Arias* and *Matter of Estime* held that a notice of intent to revoke 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.

Here, the director raised the issues involving the *bona fide* of the job offer, because the beneficiary is the relative of the owners of the petitioner. The director also indicated in the Notice of Intent to Revoke (NOIR) dated April 26, 2011 that the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date and specifically requested the petitioner to submit copies of its federal tax returns, annual reports, and/or audited financial statements for the years 2008 through 2010 as well as any wages the petitioner might have paid the beneficiary from 2007 onwards. Based on the information provided in the NOIR, the AAO finds that the director has adequately provided the petitioner with specific derogatory information to revoke the approval of the petition.

We also determine that the appeal cannot be sustained, the approval of the petition reinstated, and the petition approved, as the director had good and sufficient cause to revoke the approval of the petition, as required by section 205 of the Act, 8 U.S.C. § 1155. In response to the director’s NOIR, the petitioner submitted copies of checks that the petitioner issued to the beneficiary between January and August of 2009.<sup>3</sup> The director noted in the NOR that none of the checks submitted above was cashed by the beneficiary. The petitioner did not submit any evidence specifically requested by the director, i.e. copies of its federal tax returns, annual reports, and/or audited financial statements for 2008-2010. For these reasons, the AAO finds that that the director’s decision to revoke the approval of the petition is based on good and sufficient cause.

Concerning the *bona fide* of the job offer, a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship. *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary’s true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor (DOL) advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that the Department of Homeland Security (DHS), the Department of State, or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

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<sup>3</sup> All checks were for the same amount, \$2,416.65.

Here, the petitioner answered “No” to question 9 of part C of the ETA Form 9089, which reads, in pertinent part: “Is there a familial relationship between the owners, stockholders and the alien?” The record reflects, however, that the beneficiary is indeed related to the owners of the petitioner by blood and/or by marriage. In reviewing the evidence submitted, the director found that the beneficiary is the brother or the brother-in-law of the owners of the petitioner, [REDACTED] and his [REDACTED]

A material issue in this case is whether or not the owners of the petitioner [REDACTED] deliberately misrepresented their familial relationships with the beneficiary, and whether the job offer was open and available to all qualified U.S. workers. In short, the issue is whether the job offer was *bona fide*. A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant’s eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). We note that 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).

In addition, the fact that the beneficiary is related to the owners of the petitioner by blood or by marriage in and of itself is not sufficient to automatically disqualify the beneficiary to have a legitimate interest in the job offered and to conclude that the job offer was not *bona fide*. See *Matter of Silver Dragon Chinese Restaurant, id.* Nor should the labor certification be invalidated simply because the beneficiary has family ties with the owners of the petitioner.

As noted by the director in the April 26, 2011 NOIR and the Notice of Revocation (NOR) dated January 7, 2013, the petitioning business in this case is owned by a married couple – [REDACTED] and her husband, [REDACTED] each owns 50% of the business. The director noted in the NOIR and the NOR that the beneficiary is the brother of [REDACTED] (and the brother-in-law of [REDACTED]).

On appeal and throughout these administrative proceedings, counsel does not dispute the familial relationships between the beneficiary and the owners of the petitioner; but rather, she contends that the job offer was *bona fide* despite the existing relationship between them. Counsel argues that no evidence of record indicates that the petitioner had any intent to deceive USCIS or to materially misrepresent any facts regarding the relationship between the owner of the petitioner and the beneficiary.

The AAO agrees with counsel in that no evidence of record shows that either the petitioner or the beneficiary deliberately concealed and willfully misrepresented the facts about their familial

relationship. In response to the director's NOIR, counsel for the petitioner submitted the following evidence to demonstrate that the job offered was *bona fide*:

- Original copies of the newspaper advertisements for the position of electrical appliance repairer published by the [REDACTED] and [REDACTED]
- A copy of the online advertisement placed by the petitioner in the [REDACTED] [REDACTED] for the position of electrical appliance repairer;
- A copy of the in-house job posting for the position offered; and
- A statement dated June 12, 2011 from [REDACTED] stating, among other things, that when she filed the labor certification application (ETA Form 9089), her attorney at the time, [REDACTED] never asked if the beneficiary was related to her by blood or by marriage.

On appeal counsel states in her appellate brief that had [REDACTED] asked [REDACTED] about her relationship to the beneficiary at the time, she would have considered the beneficiary her relative. Counsel further indicates that the fact that [REDACTED] and the beneficiary are brothers was never concealed or hidden from the beginning. Counsel states that the petitioner listed [REDACTED] under the employer contact information on the ETA Form 9089, part D; and that the petitioner provided documents that identified [REDACTED] interest in the petitioning business when asked by the director.<sup>5</sup>

The AAO acknowledges the director's concerns that the petitioner was not accurate or candid about the identity of its owners. When responding to the director's NOIR, counsel claimed that that [REDACTED] alone was the 100% stockholder of the petitioner at the time the ETA Form 9089

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<sup>4</sup> [REDACTED] was under USCIS investigation at the time he filed the Form I-140 in 2007. USCIS suspected that [REDACTED] submitted fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012.

<sup>5</sup> The director sent a Request for Evidence (RFE) on April 3, 2008 asking the petitioner to submit additional evidence to demonstrate that [REDACTED] is the successor-in-interest to the original petitioning business [REDACTED]). The AAO notes that the name of the business listed on the Form I-140 petition and the ETA Form 9089 was [REDACTED] with Federal Employer Identification Number [REDACTED] but evidence submitted to show the petitioner's ability to pay came from a company called [REDACTED]. Responding to the director's RFE, the petitioner submitted various documentation establishing that [REDACTED] is doing business as [REDACTED], and that [REDACTED] [REDACTED] are one and the same business entity. The evidence submitted also shows that [REDACTED], are the owners of the petitioner.

was filed in December 2005.<sup>6</sup> However, that claim is not accurate; the AAO notes, as the director in his NOR also stated, that the evidence of record shows that at the time of filing of the ETA Form 9089 (in 2005) and Form I-140 petition (in 2007), [REDACTED] and her husband both owned the petitioner.

Nevertheless, based on the evidence submitted above, the AAO is persuaded that neither [REDACTED] nor her husband, [REDACTED] intentionally or deliberately concealed their family relationships with the beneficiary at the time the ETA Form 9089 was filed with DOL. Moreover, we are persuaded that the recruitment efforts were conducted in accordance with the DOL regulations. The record does not contain any inconsistencies or anomalies in the recruitment process. Accordingly, the director's finding of fraud or willful misrepresentation regarding the beneficiary's relationships to the owners of the petitioner is not substantiated by evidence of record and will be withdrawn. Further, the director's decision to invalidate the certified ETA Form 9089 will also be withdrawn, and the certification of the ETA Form 9089 will be reinstated.

Nonetheless, the AAO agrees with the director that the proffered job in this case was not *bona fide*, and that it appears to have been created specifically for the beneficiary. Here, the job title listed on the section H.3 of the ETA Form 9089 is electric appliance repairer. The job duties of an electric appliance repairer, as described in the ETA Form 9089, section H.11, are as follows:

Repair and maintain machinery in store, including coffee makers, drink makers, refrigeration, freezer unit, air conditioners.

[REDACTED] also stated in her June 12, 2011 statement that the business has gas pumps, cash registers, refrigeration, hot dog machines, slush, soda machines, ice cream machines, and freezers, all of which need constant repair and maintenance, and that the beneficiary was hired to repair and maintain all of those equipment.

On the ETA Form 9089, section H.10, the petitioner required all job applicants to have at least 24 months (two years) of work experience as an electrician for the position offered. To demonstrate that the beneficiary possessed the minimum work experience prior to the priority date, the petitioner submitted the following evidence:

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<sup>6</sup> Counsel also stated that the petitioner belonged to [REDACTED] and was created only to provide income to her, as her husband, [REDACTED] had his own business and was operating it in Boston, Massachusetts, full time. It is not clear how counsel came up with that conclusion, as evidence of record shows that both [REDACTED] and her husband purchased the business together and both appeared to have been involved in the business activities together. We note, however, that [REDACTED] stated in her June 12, 2011 statement that she operated the [REDACTED] store and gas station alone at first until she realized she could not do all the work by herself and that her husband later helped her to watch the store at night.

- A copy of the beneficiary's professional training certificate showing that the beneficiary passed the exam for the professional training in basic electricity from [REDACTED] in July 1976;
- A letter of employment certification dated July 19, 1995 stating that the beneficiary worked as an electrician at [REDACTED] from February 21, 1994; and
- A letter of employment certification dated November 28, 2006 stating that the beneficiary worked as a tech electrician and in the maintenance department from March 18, 1985 to August 2, 1990 and from January 18, 1992 to July 27, 1993 for [REDACTED]

Based on the evidence submitted above, even though the beneficiary may have possessed the minimum work experience as an electrician prior to the priority date, we do not find the position offered in this case is *bona fide*. In reviewing the franchise agreements submitted in response to the director's RFE, we find that the petitioner agreed to have [REDACTED] or other providers designated by [REDACTED] (the franchisor) service and maintain all of the petitioner's equipment and machines. The agreement specifically prohibits the petitioner from using other service/maintenance providers not designated by the franchisor [REDACTED]. No evidence of record shows that the franchisor [REDACTED] has designated or agreed to designate the beneficiary to provide repair and maintenance service of the equipment for the petitioner. For this reason, we conclude that the position offered in this case was not *bona fide*, and that it was created specifically for the beneficiary.

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

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<sup>7</sup> The agreement, in relevant part, specifically stated:

[REDACTED] has entered into an agreement with [REDACTED] with an effective date of April 1, 1998 (the "[REDACTED] Agreement") whereby [REDACTED] will provide the repair and maintenance services (the "Services") of the 7450/7453 POS Registers, in-store processors ("ISP") and peripherals (collectively, the "Equipment") described in Exhibit A in [REDACTED] corporate and franchised stores. Franchisees are required to use and pay for maintenance and repair services for the Equipment from a provider designated by [REDACTED] from time to time. [REDACTED] is currently the designated provider for maintenance and repair of the Equipment.

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 December 15, 2005. The offered wage specified on ETA Form 9089 is \$17.55 per hour or \$36,504 per year based on a 40 hour work week.<sup>8</sup>

To demonstrate the ability to pay \$17.55 per hour or \$36,504 per year from December 15, 2005, the petitioner submitted the following evidence:

- Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 2004 through 2007;<sup>9</sup> and
- IRS Forms W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 2005 and 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ eight 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).

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<sup>8</sup> The director noted in the NOIR and NOR that the petitioner listed \$615 per week as the proposed employment's wages per week on the Form I-140 petition. Therefore, the director concluded that the beneficiary's proffered wage is \$31,980 per year. We note that the petitioner's in-house job posting stated the rate of pay of \$17.55 per hour, 35 hours per week. The ETA Form 9089 does not specify the number of hours per week, and therefore, we use 40 hours per week.

<sup>9</sup> The AAO will not consider the petitioner's 2004 federal tax return, as the petitioner is not required to establish the ability to pay prior to the priority date (December 15, 2005).

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 above, the beneficiary received the following compensation from the petitioner in 2005 and 2006:

<i>Tax Year</i>	<i>Actual wage (AW) (Box I, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2005	\$32,030	\$36,504	(\$4,474)
2006	\$12,150	\$36,504	(\$24,354)

Therefore the petitioner has not established the ability to pay in either 2005 or 2006. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the difference between the proffered wage and the actual wage, which is \$4,474 in 2005; \$24,354 in 2006; and the full proffered wage of \$36,504 from 2007 onwards.

The petitioner can pay those amounts – \$4,474 in 2005; \$43,566.60 in 2003; and \$22,916.40 in 2004 – through either its net income or net current assets. 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 (1<sup>st</sup> 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) for the years 2005-2007, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)<sup>10</sup></i>	<i>Remainder of the PW</i>
2005	\$34,658	\$4,474
2006	\$37,255	\$24,354
2007	\$42,172	\$36,504

Therefore, the petitioner has established the ability to pay the proffered wage in 2005, 2006, and 2007, but not from 2008 onwards until the beneficiary receives his lawful permanent residence. The record does not contain any other evidence of the petitioner’s ability to pay (i.e. federal tax returns, annual reports, and/or audited financial statements) for 2008 onwards. As noted above, we cannot use the checks issued by the petitioner to the beneficiary in 2009 as evidence of the petitioner’s ability to pay, as none of them was cashed by the beneficiary. In view of the foregoing, the AAO agrees with the director that the petitioner has not established by a

<sup>10</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

Beyond the decision of the director, we find that that the approval of the petition may also be revoked in accordance with 8 C.F.R. § 205.1. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if one of the following circumstances occurs: (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) the petitioner is no longer in business.

In reviewing the case, evidence has come to light that the petitioning corporation in this matter has been dissolved and is no longer in business as of September 1, 2006.<sup>11</sup> Where the petitioning company is no longer an active business, the petition is subject to automatic revocation, pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

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 finding of fraud or willful misrepresentation regarding the relationship between the owners of the petitioner and the beneficiary is withdrawn.

**FURTHER ORDER:** The director's decision to invalidate the alien employment certification, ETA Form 9089, ETA case number A-05349-64562, is withdrawn.

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<sup>11</sup> Based on the website of the New Hampshire Secretary of State, Corporations Division (<https://www.sos.nh.gov/corporate/soskb/csearch.asp>), we find that (the petitioner) was administratively dissolved on September 1, 2006.