

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: NOV 01 2013 OFFICE: VERMONT SERVICE CENTER

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), initially approved the preference visa petition. Subsequently, the director issued a Notice of Intent to Revoke (NOIR) the approval of the petition. In his Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140 petition. The AAO affirmed the director's decision to revoke the petition's approval. The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the approval of the petition will remain revoked.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as a banquet captain under Section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

On August 4, 2009, the director revoked the petition's approval pursuant to Section 204(c) of the Act, 8 U.S.C. § 1154(c) based upon the determination that the beneficiary is ineligible for the classification sought based on the beneficiary's fraudulent marriage to a United States citizen.

The February 7, 2013 AAO decision affirmed the revocation based on the previous marriage fraud and also held that the petitioner did not submit evidence to demonstrate that the beneficiary had the experience required by the terms of the labor certification or that it had the ability to pay the proffered wage from the priority date onwards. The petitioner then filed a motion to reopen and reconsider the AAO decision. We will accept the motion to reopen the matter based on the new information submitted and the motion to reconsider based on arguments made by counsel. Thus, the instant motion is granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under Section 205 of the Act, the BIA has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)¹ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The regulation 8 C.F.R. § 204.2(a)(1)(ii) states in pertinent part:

Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

Section 212(a)(6)(c)(i) the Act states:

[Misrepresentation] 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 stated in the prior AAO decision, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130 petition was filed on the beneficiary's behalf on January 12, 1995. Concurrent with the filing of Form I-130 petition, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a United States citizen. The file contains the completed forms, signed by

¹ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

the beneficiary, copies of documentation in support of the beneficiary's claim of a *bona fide* marriage, and a copy of a marriage certificate between the beneficiary and R-E-²

In the AAO's February 7, 2013 decision, we specifically reviewed the beneficiary's and his spouse's testimony during their February 28, 1997 USCIS Stokes interview; affidavits from R-E- and her mother attesting to the validity of the marriage, both original and second affidavits submitted on appeal; the beneficiary's and his wife's marriage certificate from 1994; the beneficiary's United States Internal Revenue Service (IRS) Individual Income Tax Form 1040 for 1994 indicating that he was married, filing separately; a letter from Central Fidelity Bank indicating that the bank is unable to add R-E- to the beneficiary's checking account due to negative information on R-E-; various bills, such as energy, car insurance and phone bills, from 1995 listing both the beneficiary and his wife's names; a copy of a life insurance policy adding R-E- to the beneficiary's plan as a rider³; a copy of R-E-'s driver's license with the same address as that of the beneficiary issued November 21, 1996; a document from a Circuit Court in Fairfax, Virginia evidencing the separation of the beneficiary and R-E- on February 7, 1996 and dissolution of the marriage on March 21, 1997; a letter from beneficiary's counsel requesting the withdrawal of the petition; a legacy INS letter to R-E- dated March 5, 1997 stating that it intended to deny her Form I-130 petition for her husband; and a legacy INS letter to R-E- dated April 4, 1997 stating that her Form I-130 petition for her husband had been denied.

The previous decision noted that the first two affidavits submitted by R-E- and her mother were nearly identical to one another in their content, paragraph structure, and information relayed and were submitted only in response to the director's NOID following a second Form I-130 filed on behalf of the beneficiary.⁴ The AAO noted that the new affidavit relays very little new information in regard to the actual *bona fides* of the marriage, providing a review of the circumstances surrounding the interview of R-E- and statements that R-E- is not easily fooled and that the beneficiary did not marry her for immigration purposes. The AAO further noted that these documents were not contemporaneous with the events; coupled with the similarity of the testimony in the affidavits, the AAO thus lessened the probative weight of this evidence.

The previous AAO decision also stated that all of the evidence submitted regarding the beneficiary's and his wife's commingling of lives and residence appears to be general in nature. Though R-E-'s mailing address appears to be the same as that of the petitioner, there is no concrete evidence showing that she actually lived there or that they had a *bona fide* relationship. For example, during the Stokes interview, the petitioner and the beneficiary gave differing accounts of how they met and recent activities together. Counsel contends that the discrepancies in the testimony at the Stokes interview resulted from the separation of the couple in 1996 and that the marriage was valid at its

² Name withheld to protect the identity of the individual.

³ The record contains a copy of the beneficiary's employment application for the petitioning entity on the Form I-140 which reflects that the beneficiary designated only his cousin as a beneficiary of his life insurance.

⁴ On April 10, 1999, the beneficiary's second wife filed a Form I-130 petition for alien marriage based on their marriage dated March 21, 1997: the same date as the beneficiary's divorce from R-E-.

inception. He outlines the documentary evidence submitted in support of the initial validity of the marriage. However, at no point during the interview did the beneficiary or the petitioner indicate that they were no longer residing together. Moreover, the separation of the couple does not account for the discrepancies in their testimony describing how they initially met. Furthermore, the petitioning first wife's explanation for the discrepancies conflicts with the documentary evidence. In her affidavits submitted with the Form I-130 petition, R-E- indicates that she and the beneficiary separated and she went to live with her parents in February 1996; however, the record contains a driver's license for R-E- issued on November 21, 1996 indicating that the petitioner resided with the beneficiary.

On motion, counsel states that although the circumstances noted above concerning the general nature of the evidence submitted and the similarities between the affidavits "might justify a decrease in the probative weight of this evidence, they do not justify the total exclusion of any consideration of this evidence." As stated above, the AAO considered all of the evidence, but determined that it did not outweigh the substantial and probative evidence disproving the validity of the marriage.

The previous AAO decision notes that the adjudications officer who conducted the Stokes' interviews of the beneficiary and his wife on January 28, 1997 documented the discrepancies and inconsistencies between their testimonies, which were given under oath, e.g., how the couple had met, information regarding their respective families, basic information regarding their household schedule and activities. With respect to these personal matters, the beneficiary and his wife consistently provided contradictory information to the officer.⁵ Additionally, the testimony provided by the petitioner and the beneficiary belies the petitioner's explanation in the current case that the couple had separated in February 1996. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho* also states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Id.* at 591-592. Neither the petitioner nor counsel has provided sufficient explanation for those discrepancies and inconsistencies.

In addition, counsel stated that the Stokes interview was improperly conducted because notice was not given beforehand to allow the parties to prepare or to bring their attorney.⁶ As stated in the

⁵ For example, R-E- stated that she and the beneficiary had visited her family for a week in Harrisonburg approximately 3 to 4 weeks after Christmas. The beneficiary stated that he last visited the petitioner's family six months ago (July/August). R-E- stated that she and the beneficiary drove down together to visit her family in Harrisonburg on Christmas Eve and returned Christmas night. The beneficiary stated that he worked Christmas Day until 4 pm and returned home to find the petitioner at a friend's house who lives nearby.

⁶ Previous counsel, [REDACTED] objected to the Stokes' interview without her presence on a motion of counsel. The petitioner in the Form I-130 petition, R-E-, did not sign a Form G-28

previous decision, spouses are separated during a Stokes interview. *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975). A USCIS officer will question each individual in order to elicit information about the other. The questions posed elicit information about their relationship, home life, and daily interactions. R-E- and the beneficiary were given ample time to provide evidence to rebut the findings in the NOID and instead the beneficiary chose to withdraw the petition.⁷ Nothing in the regulations requires notice to be given to the parties prior to the Stokes interview being conducted; instead, the purpose of a Stokes interview is to determine whether the parties have knowledge of each other that is gained through daily and usual interactions as a married couple. The INS Officer's decision to conduct the Stokes interview on a day when the couple appeared to inquire about their case as opposed to a date set by the INS does not amount to an error that would discount or excuse the inconsistencies and discrepancies present during the interview.

On motion, counsel states that the finding that the beneficiary never resided with his wife was without basis.⁸ Although the previous AAO decision noted that public databases indicated that the couple never resided together, this finding was not a part of the director's Notice of Revocation nor did it affect the outcome of the previous AAO decision. The decision to affirm the director's revocation is sound.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that there was an attempt to enter into a sham or fraudulent marriage. We find that R-E- and the alien beneficiary, by fraud or by willfully misrepresenting a material fact, are in violation of Section 212(a)(6)(c)(i) of the Act first mentioned above.

Counsel also asserts that the reliance on *Matter of Phillis*, 15 I. & N. Dec. 385 (BIA 1975), is misplaced because the beneficiary in that case admitted that he had not resided with his spouse or otherwise represented that he had a spouse in other official proceedings. The BIA in *Phillis* found that a reasonable inference could be made that the marriage was not *bona fide* because there were inconsistencies in testimony given including whether the parties ever lived together as husband and wife. In that case, as was presented here, the inconsistencies in evidence and testimony formed the basis for the finding that no valid marriage existed. The petitioner submitted no evidence on motion

authorizing Ms. [REDACTED] to represent her. The regulation at 8 C.F.R. § 103.2(a)(6), in pertinent part, states, "An applicant or petitioner may withdraw an benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." See also 8 C.F.R. § 103.2(3) ("Representation An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.2 of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. **A beneficiary of a petition is not a recognized party in such a proceeding.**") (emphasis added.) The director's failure to obtain a waiver of counsel from the petitioner is not erroneous as the petitioner did not sign the Form G-28 authorizing Ms. [REDACTED] representation.

⁷ The Form I-130 petitioner did not submit a withdrawal of the petition.

⁸ A statement to this effect is found in the January 20, 2009 Notice of Intent to Revoke (NOIR).

to overcome the inconsistencies.

Counsel also cites *Chan v. Bell*, 464 F.Supp. 125 (D.D.C. 1978), *Matter of Mackee*, 17 I&N Dec. 332 (BIA 1980), *Matter of Boromand*, 17 I&N Dec. 450 (1980), and *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975), as examples of marriages where the parties separated but the marriage was held to be valid under immigration law. In these cases, the BIA addressed whether separation alone was enough to demonstrate that the marriage was not valid for immigration purposes and concluded that separation alone could not form the basis for a denial. As stated above, in this case, the decision was made not based on the parties' separation, but instead, based on inconsistencies in the record going to the validity of the marriage from its inception.

Counsel also asserts that the above stated cases stand for the proposition that the reasons for the couple's entering a sham marriage must be clearly stated in the record in order for USCIS to find that the marriage was not *bona fide* at the time it was entered into. The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. See also *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). Neither the governing statute or regulations or any case law require that a statement appear in the record regarding the reason for the marriage. Instead, *Tawfik* requires evidence that the marriage was entered into for the purpose of evading immigration laws. In this case, the weight of the evidence, consisting of the inconsistencies in the spouses' testimony noted above, leads us to conclude that the marriage was not valid from its inception.

The record includes substantial and probative evidence of an attempt or conspiracy by the alien and other individuals who have attempted or conspired to enter into a marriage in violation of the regulation 8 C.F.R. § 204.2(a)(1)(ii) for the purpose of evading the immigration laws. The beneficiary, by submitting fraudulent documents or by conspiring with others to submit fraudulent documents that on their face presented evidence of a valid marriage where none existed as a basis of that petition, committed fraud. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

The withdrawal was not valid as it was filed by the beneficiary instead of the petitioner of the Form I-130. The regulation at 8 C.F.R. § 103.2(a)(6), in pertinent part, states, "An applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." The regulations do not allow for the withdrawal of the petition by the beneficiary. In addition, the request for withdrawal was made after a decision on the merits. The withdrawal would not change the fact that the petitioner attempted to procure a visa through misrepresentation or fraud.

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other “appropriate action.” DHS Delegation Number 0150.1 at para. (2)(I).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.⁹

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. See section 212(a)(6)(C) of the Act.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

The previous AAO decision also stated that, beyond the decision of the director, the petitioner did not establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16

⁹ It is important to note that while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. See *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. See sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a).

I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the proffered position. On the labor certification, the beneficiary claims to qualify for the proffered position based on his experience as a banquet captain at the [REDACTED] Virginia from September 1988 until October 1990. The previous AAO decision considered a letter on [REDACTED] letterhead, dated March 13, 2000, from [REDACTED] Banquet Manager, indicating that the beneficiary worked for him as a headwaiter (banquet captain) at the [REDACTED] from September 1988 until October 1990 and describes the beneficiary's job duties. The previous decision noted that the letter is not written on [REDACTED] letterhead, but on [REDACTED] letterhead. The previous decision stated that the letter cannot be considered as evidence of the beneficiary's employment at the [REDACTED]. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The letter indicates that the beneficiary was employed by [REDACTED] an employer other than that listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

On motion, the petitioner submitted a letter from [REDACTED] Human Resources Coordinator of [REDACTED] dated March 5, 2013 stating that she was unable to verify whether the beneficiary worked for that company because of a management change in 2001. The petitioner also submitted a copy of the beneficiary's FICA earnings for 1988, 1989, and 1990 and IRS Forms 1040 with corresponding IRS Forms W-2 for the same years. The FICA statement demonstrates that the beneficiary worked for three different businesses in 1988 and earned \$2,106.35 from [REDACTED] in that year. This evidence does not suggest that the beneficiary worked for this company in a full-time capacity during this time. Similarly, a summary of the beneficiary's FICA earnings in 1990 demonstrates that the beneficiary received wage payments from seven different companies and earned \$12,700 from [REDACTED] in that year. This amount also does not establish that the beneficiary worked for the company in a full-time capacity in that year. As a result, this evidence is insufficient to demonstrate that the beneficiary has two years of experience as a banquet captain with [REDACTED] prior to the priority date. The evidence submitted concerning the beneficiary's 1989 work experience suggests that the beneficiary was employed in a full-time capacity by [REDACTED] but he states on his IRS Form 1040 for 1989 that his occupation was "Banquet Server" instead of the required profession of banquet captain. This evidence does not demonstrate that the beneficiary has the required two years of experience as a banquet captain; the labor certification did not specify alternate experience that would qualify an applicant for the position. As a result, the petition will remain denied on this basis as well.

The previous decision also found that the petitioner failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* However, the record does not contain annual reports, federal tax returns, or audited financial statements for the petitioner.

As stated in the prior decision, the petitioner’s failure to provide annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to revoke the approval of the petition. The record contains a 2001 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement for the beneficiary and copies of various paychecks issued to the beneficiary in 2002 and 2007. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Moreover, the evidence submitted would only be *prima facie* evidence of payment of the proffered wage in 2001. The record does not establish any payment of wages or ability to pay in 2000, the priority date.¹⁰

With its initial submissions, the petitioner submitted a letter from its Director of Human Resources stating that the petitioner employs over 100 workers and is financially capable of paying the proffered wage. On motion, the petitioner submitted a letter from its Director of Human Resources stating that the petitioner was unable to release financial documents due to its confidential and proprietary nature and reiterating the petitioner’s 262 employees and ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) states that “In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” A Director of Human Resources is not a financial officer of the petitioner’s organization and is thus not qualified under the regulations to attest to the company’s ability to pay the proffered wage.

In addition, as stated in the prior AAO decision, according to USCIS records, the petitioner has filed other I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977). On motion, the petitioner did not submit any evidence to document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary or to the other sponsored workers.

¹⁰ At the time that the petition was initially approved, the petitioner had not established its ability to pay the proffered wage in 2000 and 2001. Thus, USCIS would have had good and sufficient cause to revoke the petition’s approval in 2001.

The petitioner also claims that its due process rights were violated. The petitioner, however has not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is the Stokes' interview was conducted without notice, without the presence of counsel and despite a purported withdrawal of the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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 motions to reopen and reconsider are granted, the previous AAO decision is affirmed, and the petition's approval remains revoked.