



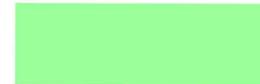
U.S. Citizenship
and Immigration
Services

(b)(6)



Date: Office: TEXAS SERVICE CENTER

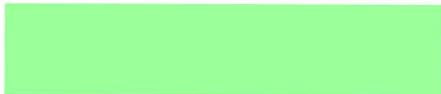
FILE:



NOV 05 2013

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:

SELF-REPRESENTED

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director), revoked the approval of the immigrant petition, invalidated the labor certification, and certified the decision on March 21, 2012, pursuant to 8 C.F.R. § 103.4(a), to the Administrative Appeals Office (AAO). Upon review, the AAO did not find fraud/willful misrepresentation involving the labor certification against the petitioner and withdrew the director's decision to invalidate the labor certification. Nevertheless, in its July 24, 2012 decision, the AAO found that the director had good and sufficient cause to revoke the approval of the petition, in accordance with section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, and affirmed the director's decision to revoke the approval of the petition.

On May 14, 2013, the AAO notified the petitioner that new evidence had come to light to indicate that the petitioning business in this matter may be involved in fraud/willful misrepresentation involving the labor certification. As such, the AAO reopened this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for the purpose of entering a new decision, permitting the petitioner 30 days to file a brief. As of the date of this decision, the petitioner has not responded and the AAO will enter a new decision according to the facts in the record. The AAO will reaffirm the director's revocation of the petition's approval.

The petitioner describes itself as a bakery. It seeks to permanently employ the beneficiary in the United States as a baker. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 12, 2001. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the petition's approval concluded that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date, that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date onward, and that the labor certification was gained through willful misrepresentation of the beneficiary's qualifications. The AAO affirmed the director's decision revoking the petition's approval as the record did not establish that the beneficiary had the required qualifications or that the petitioner had the ability to pay the beneficiary the proffered

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

wage. However, the AAO withdrew the director's finding that the beneficiary's qualifications were misrepresented, as the facts were insufficiently developed to support a finding of fraud.

Upon review, on May 14, 2013, the AAO issued the current Service Motion to Reopen and Notice of Intent to Dismiss and Derogatory Information (NOID/NDI), questioning whether the petitioner misrepresented its identity in the labor certification process and in filing the Form I-140, thereby creating grounds for the invalidation of the labor certification; whether the petitioner demonstrated its ability to pay; and whether the petitioner established that the beneficiary had the required qualifications at the time of the priority date.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See Section 291 of the Act, 8 U.S.C. § 1361; also see *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the entity filing the Form I-140 petition is who it claims to be. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

Petitioner's Identity

The AAO's NOID/NDI notified the petitioner that the record regarding its identity was unclear. Specifically, the petitioner listed its name on the Form ETA 750A labor certification and the Form I-140 petition as [REDACTED]. To demonstrate its ability to pay the proffered wage, the petitioner submitted a copy of a NASDAQ stock quote for the [REDACTED] a press release regarding the [REDACTED] third quarter earnings dated November 7, 2001; and an unaudited financial report for the forty weeks ending October 6, 2001 for [REDACTED] Company. Based on the evidence in the record, the petitioner in this case self-identified as the [REDACTED], and not one of its franchise companies. However, it appears as if the entity filing the Form ETA 750 and the Form I-140 petition is a [REDACTED] franchisee. United States Citizenship and Immigration Services (USCIS) compared the evidence in the record to data within its Validation Instrument for Business Enterprises (VIBE) system.² VIBE uses commercially available data to validate basic information about organizations petitioning to employ alien workers. Specifically, the information the petitioner provided on the Form I-140 petition about its name, [REDACTED] and addresses, [REDACTED] MO [REDACTED], and [REDACTED] (where the beneficiary will work), was insufficient for USCIS to match the petitioner to information in USCIS's VIBE. In its May 14, 2013 NOID/NDI, the AAO notified the petitioner that it was

² For more information about this program, please visit USCIS's website at: www.uscis.gov/VIBE.

responsible for submitting sufficient evidence to establish that it meets all the requirements to qualify for the requested classification and to resolve the inconsistencies in the record regarding its identity.

The AAO's NOID/NDI further noted inconsistencies in the record indicating that the petitioner is not the [REDACTED] but rather a franchisee doing business as [REDACTED]. Specifically, the Form I-140 petition does not state the Internal Revenue Service (IRS) Tax number or the Federal Employer Identification Number (FEIN) of the petitioner as required on the Form I-140. Additionally, the record contains a letter dated May 20, 2002 from [REDACTED] whose title is "Franchise Baker Manager" with [REDACTED] stating that "the beneficiary is presently employed as a full-time baker." Moreover, the Form ETA 750 lists the following address as the address where the beneficiary will work: [REDACTED]. Public records reflect that the [REDACTED] located at [REDACTED] Massachusetts, is owned and operated by [REDACTED] which in turn appears to be owned by [REDACTED] which would have a separate FEIN from the [REDACTED]. Thus, the Form ETA 750 and the Form I-140 petition appear to have been filed by a franchisee of [REDACTED] and not by [REDACTED] itself. Nevertheless, the petitioner represented itself as the [REDACTED] with its address in [REDACTED] and submitted financial information described above relating to the corporate headquarters of the [REDACTED].

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As the identity of the petitioner has not been established, the AAO questions the *bona fides* of the certified job offer. Moreover, only the entity that will be the beneficiary's employer is authorized to file the instant petition supported by a labor certification issued to the petitioning entity by the United States Department of Labor (DOL). It is unclear in this case that the petitioner, the [REDACTED] will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁴ states:

³ Public records indicate that the tax identification number of the [REDACTED] is FEIN [REDACTED]. There is no longer an address associated with [REDACTED]. There is a [REDACTED] owned by [REDACTED]. Its FEIN number is [REDACTED].

⁴ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See*

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish which company would actually employ the beneficiary. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). The labor certification is in the name of the [REDACTED] the petitioning employer, however, appears to be a distinct corporate entity in Massachusetts with a separate FEIN number; and the petition is not accompanied by a valid labor certification.⁵ As such, the petition's approval was properly revoked.

Ability to Pay

Additionally, the AAO finds that the instant petition is not approvable as the petitioner has not established its ability to pay the proffered wage from the priority date until the beneficiary gains permanent residency. 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

69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

⁵ If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Nothing in the record shows, and the petitioner does not assert, any successor relationship.

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 signed the Form ETA 750 on February 5, 2001 and certified that its company, [REDACTED] had enough funds available to pay the wage or salary offered to the beneficiary. However, as noted above, the petitioning employer in the instant case appears to be [REDACTED] owned by [REDACTED] a franchisee of the [REDACTED] as noted above, is a separate and distinct entity with a separate tax identification number, and would file a separate tax return than the [REDACTED] [REDACTED] would not have the same income as the [REDACTED]

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 the U.S. Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d). 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, 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).

Here, the ETA Form 750 was accepted for processing by the DOL on April 12, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.61 per hour or \$22,950.20 per year based on a 35 hour work week.⁶

To show that the petitioner has the continuing ability to pay \$12.61 per hour or \$22,950.20 per year from April 12, 2001, the petitioner submitted copies of the following evidence:

- A copy of a NASDAQ stock quote for [REDACTED] on November 21, 2001,

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).

- A press release regarding [REDACTED] third quarter earnings dated November 7, 2001, and
- An unaudited financial report for the forty weeks ending October 6, 2001 for [REDACTED]

As noted above, the petitioner in the instant case appears to be a franchisee of the [REDACTED] and not the [REDACTED] itself. As such, the financial evidence submitted regarding the [REDACTED] does not constitute evidence of the petitioner's ability to pay the beneficiary the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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. No evidence has been submitted to show that the beneficiary was employed and paid by the petitioner.

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F.Supp.2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at

881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 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 record, however, contains no evidence showing the franchisee's net income or net current assets. No evidence such as copies of the franchise business' federal tax returns, annual reports, or audited financial statements was submitted in response to the AAO's NOID/NDI. The

⁷ 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.

petitioner did not identify the FEIN numbers for the entity that filed the labor certification application and the Form I-140, as well as for the franchisee in [REDACTED] MA. Thus, we cannot determine the entity which must establish the ability to pay. Due to this lack of evidence, the AAO affirms its conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date and until the beneficiary obtains lawful permanent residency.

Even if the petitioner had established that the [REDACTED] were the petitioning entity, the petitioner has not submitted evidence of ability to pay required by the regulation at 8 C.F.R. § 204.5(g)(2), e.g., annual reports, federal tax returns, or audited financial statements. The 2001 unaudited financial statement of the [REDACTED] may not be considered as evidence of the [REDACTED] ability to pay.⁸ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the 2001 statement, the AAO cannot conclude that it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Finally, 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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *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.

⁸ The record does not identify the unaudited financial statement as a portion of the company's annual report.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the petitioner's reputation or historical growth.⁹ Nor has it included any evidence or detailed explanation of the business' milestone achievements. Additionally, as noted above, the record lacks the regulatory prescribed evidence for either entity in the form of tax returns, audited financial statements, or annual reports. In the absence of any regulatory required evidence, the petitioner's burden to submit, *Sonegawa* cannot be positively applied. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

Further, a review of USCIS electronic databases reveals that the petitioner has filed multiple immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding since 1998. The table below shows the details of the other labor certifications that the petitioner has filed since 2001:¹⁰

	<i>Receipt Number</i>	<i>Beneficiary's Last Name</i>	<i>Filing Date</i>	<i>Decision</i>	<i>Date of the Beneficiary's Adjustment to LPR</i>
1.	[REDACTED]	[REDACTED] ¹¹	11/26/01	Revoked ¹²	N/A
2.	[REDACTED]	[REDACTED]	12/10/01	N/A	N/A
3.	[REDACTED]	[REDACTED]	12/14/01	Approved ¹³	N/A

If the instant petition were the only petition filed, the petitioner would only be required to demonstrate the ability to pay the proffered wage to the single beneficiary of the instant petition. However, in this case, the petitioner filed multiple petitions. Unless this fact is disputed (if, for instance, one or more of the petitions above have been withdrawn, or if the information provided above is inaccurate), consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but *for all* of the other immigrant visa beneficiaries beginning on the priority date of each and continuing until either one or more of these circumstances apply:

- a) Each beneficiary receives or received his or her legal permanent residence (LPR);
- b) Unless and until USCIS denies/revokes the petition; or
- c) Unless and until the petitioning organization withdraws the petition.

⁹ The record does not contain such information either for the [REDACTED] or for the franchisee in [REDACTED] Massachusetts.

¹⁰ We only show the petitions filed by [REDACTED] located at [REDACTED]

¹¹ The beneficiary's names are redacted due to privacy concerns.

¹² The petition above was revoked on January 25, 2012.

¹³ The petition above was approved on November 16, 2011.

There is no evidence of record that any of these circumstances occurred from 2001 until January 25, 2012.¹⁴ Thus, the petitioner must show the ability to pay all of the sponsored beneficiaries from 2001 through January 25, 2012. The record does not contain any evidence of the franchisee's ability to pay the instant beneficiary or any of the other sponsored workers.

Moreover, the petitioner in this case did not establish the ability to pay as of the filing date. The petition was initially approved on April 24, 2002 but its approval was later revoked. At the time of the petition's approval, the petitioner's tax return for 2002 was not yet due. Thus, at the time of the petition's approval, the petitioner must have established that it had the ability to pay the proffered wage in 2001. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that, at the time of the petition's approval, it had the continuing ability to pay the proffered wage from the priority date, the petitioner must have demonstrated that it could pay the full proffered wage of \$12.61 per hour or \$22,950.20 and the wages to all other sponsored beneficiaries in 2001. No evidence of the petitioner's ability to pay the proffered wage for 2001 was submitted, as noted above. Thus, the petition was not approvable when filed, and the director had good and sufficient cause to revoke the petition's approval based on the petitioner's failure to establish the ability to pay the proffered wage in 2001.

In its May 14, 2013 NOID/NDI, the AAO notified the petitioner that the evidence in the record was not sufficient to demonstrate that the petitioner has the ability to continuously pay the proffered wage from the priority date until each beneficiary, including the beneficiary in the instant case, received or receives his or her permanent residence.

The petitioner failed to respond to the AAO's NOID/NDI or to provide evidence of its ability to pay. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied." The regulations are clear that failure to respond to a request for evidence *shall* result in the application or petition being considered abandoned and denied.

Because the petitioner failed to respond to the NOID/NDI RFE, the AAO is dismissing the appeal. However, as noted above, the petition's approval was properly revoked by the director as the evidence in the record did not establish the petitioner's ability to pay the beneficiary's proffered wage from the priority date onward.

Therefore, based on the evidence in the record of proceeding, the AAO affirms its previous finding that the petitioner has not established its ability to pay the beneficiary the proffered wage from the priority date onward. Additionally, because the petitioner did not establish that it had

¹⁴ As noted above, the approval of the petition numbered [REDACTED] was revoked on January 25, 2012.

the ability to pay in 2001, the director had good and sufficient cause to revoke the approval of the petition as of the date of the petition's approval.

AC21

In response to the director's Notice of Intent to Revoke dated February 18, 2009 (2009 NOIR), counsel for the petitioner at the time [REDACTED] stated that the beneficiary had ported to work for another employer, pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) found at INA § 204(j). This section permits an employment-based petition to remain valid with respect to the new job when (1) the application for adjustment of status has not been adjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007). The record includes a letter dated March 11, 2008 from [REDACTED] Payroll Benefits Specialist, stating that the beneficiary has been employed full time at [REDACTED] since June 26, 2006.¹⁵

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification "shall remain valid" with respect to a new job if the individual changes jobs or employers. The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition must be "valid" to begin with if it is to "*remain* valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Although section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a

¹⁵ The record also contains a letter from [REDACTED] President of [REDACTED] [REDACTED], dated February 3, 2006 stating that the beneficiary worked for that company as a baker.

new job if the beneficiary's application for adjustment of status has been filed and remained unadjudicated for 180 days, the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job." *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

Where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* As a result, the beneficiary may not port under this petition, whose approval was revoked.

The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for the revocation. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's decision to revoke the previously approved petition is affirmed.