



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: SEP 06 2013

OFFICE: TEXAS 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:
[REDACTED]

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: On December 3, 2012 the Administrative Appeals Office (AAO) issued a decision withdrawing the director's decision to revoke the approval of the employment based immigrant visa petition and remanding the matter to the Director, Texas Service Center (the director), for further action and review in accordance with the AAO's decision. On March 18, 2013, the director, after sending the petitioner a Notice of Intent to Revoke (NOIR) and receiving a response, revoked the approval of the petition, invalidated the labor certification, entered a finding of willful misrepresentation, and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision to revoke the approval of the petition.

The petitioner states on the Form I-140 that it is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The petition was initially approved on September 28, 2001, but the approval of the petition was eventually revoked and the labor certification invalidated on May 26, 2009. The director found willful misrepresentation involving the labor certification process. Specifically, the director determined that the petitioner failed to demonstrate that it conducted good faith recruitment in accordance with the U.S. Department of Labor (DOL) recruitment procedures set forth in 20 C.F.R. § 656.21(g) (2001). Additionally, the director found that the petitioner failed to demonstrate the continuing ability to pay the proffered wage from the priority date and to show that the beneficiary met the minimum job requirements for the position offered prior to the priority date.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

We will discuss each of the director's findings as follows.

a) **Whether there was willful misrepresentation involving the labor certification process.**

As noted above, the director found willful misrepresentation involving the labor certification application and invalidated the labor certification for the following reasons:

1. The director stated that the attorney who filed the Form ETA 750 and the Form I-140 petition, [REDACTED] had been suspended from practicing law before the Board of Immigration Appeals (BIA), the Immigration Courts, and the Department of Homeland Security (DHS) for three years from March 1, 2012 under 8 C.F.R. § 292.3(b); and

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

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

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

Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961).

In response to the director's NOIR dated February 10, 2009 and to demonstrate that the petitioner fully complied with the DOL recruitment requirements, counsel for the petitioner at the time [REDACTED] submitted the following evidence:

- Copies of newspaper tear sheets evidencing that the petitioner placed advertisements for the position of maintenance repairs/cooks in the [REDACTED] for three consecutive Sundays on January 7, 2001, January 14, 2001, January 21, 2001 and again on March 25, 2001, April 1, 2001; and
- A copy of a letter dated February 14, 2001 addressed to [REDACTED] from the [REDACTED] [REDACTED] stating that the advertisements he ordered would be run on [REDACTED]

At the time the Form ETA 750 labor certification was filed on February 26, 2001, DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. See 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. See 20 C.F.R. §§ 656.21(d)-(f) (2003). The employer filing the Form ETA 750, in conjunction with the

recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2003).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k). Here, based on the evidence submitted and the stated facts above, the AAO notes that the petitioner appears to have conducted reduction in recruitment, which was allowed at that time.

The director in the Notice of Certification (NOC) also stated that the job advertisements did not contain and include, among other things, the description of the job, the rate of pay, and the minimum job requirements, as required by the regulation at 20 C.F.R. § 656.21(g) (2001).

We acknowledge the extensive requirements prescribed by the regulation above to advertise the position; however, the record shows that DOL certified the Form ETA 750 on May 31, 2001, after the petitioner apparently satisfied the recruitment requirements. No inconsistencies or anomalies in the recruitment process.²

Further, we note that at the time the petitioner filed the Form ETA 750 labor certification application with DOL for processing in February 2001, employers were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991.³ For these reasons, the AAO does not find fraud or willful misrepresentation involving the labor certification.

Regarding [REDACTED] representation of the petitioner, the AAO acknowledges [REDACTED] suspension from practicing law before the BIA, immigration courts, and DHS for three years from March 1, 2012. However, the record contains no evidence implicating [REDACTED] involvement in the recruitment process or his participation in interviewing or considering the job applicants in this case. Thus, the director's finding of willful misrepresentation is not substantiated by evidence of record and will be withdrawn. Further, the director's decision to

² The AAO notes that the newspaper tear sheets submitted in response to the director's NOIR direct applicants to forward resumes to "Owner, [REDACTED], Natick, MA 01760." (emphasis added) Nothing in the record ties this address to the petitioner in the instant case.

³ Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

invalidate the certified Form ETA 750 will also be withdrawn, and the certification of the Form ETA 750 will be reinstated.

Nevertheless, the approval of the petition cannot be reinstated because the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, that the beneficiary had the requisite work experience in the job offered prior to the priority date, and that the job offer is *bona fide*.

b) The Petitioner's Ability to Pay the Proffered Wage.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, as indicated above the Form ETA 750 was accepted by DOL for processing on February 26, 2001. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on the indicated 35-hour work per week).⁴

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial

⁴ 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).

resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

The record contains Internal Revenue Service (IRS) Forms W-2 evidencing that the petitioner paid the beneficiary \$19,179.55 in 2003. The petitioner also submitted paystubs demonstrating that the petitioner paid the beneficiary \$18,722.13 in 2004.⁵ However, despite the AAO's specific request for Forms W-2 from 2001 onwards in the August 1, 2013 Notice of Intent to Dismiss/ Notice of Derogatory Information/ Request for Evidence (NOID/NDI/RFE) and the petitioner's representation in multiple letters that it has employed the beneficiary continuously from 1998 onwards, no additional evidence of salary or wages paid to the beneficiary was submitted. 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). The 2003 Form W-2 and the 2004 paystubs demonstrate wages paid at a rate less than the proffered wage for those years.

If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Again, despite the NOID/NDI/RFE's specific request to submit its annual reports, federal tax returns, or audited financial statements from 2001 onwards, the petitioner submitted no evidence of its financial circumstances.

With its original submission, the petitioner submitted a letter from [REDACTED] General Manager, stating that the petitioner employs approximately 150 people, has an annual payroll upwards of \$1 million and gross income upwards of \$3 million. The regulation at 8 C.F.R. § 204.5(g)(2) states: "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." (emphasis added). The regulation allows the director to accept such a statement, but does not mandate the acceptance of such a statement. In the instant case, because doubt was cast on other evidence in

⁵ The record also contains Forms W-2 for 1999 and 2000, however, as that time precedes the priority date, the Forms can be considered only generally.

the record, USCIS requested additional evidence to demonstrate the petitioner's ability to pay the proffered wage.

In response to the director's first NOIR, counsel stated that the letter submitted demonstrated the ability to pay the proffered wage and no evidence suggests that the petitioner misrepresented its financial position. The evidence need not suggest that the petitioner misrepresented its financial position in order for USCIS to request additional financial evidence concerning the ability to pay the proffered wage. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). As stated above, 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).

If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In the instant case, the petitioner did not submit evidence of its ability to pay the proffered wage in any year from the priority date onwards nor any evidence of its net income, net current assets, or other financial standing despite a specific request to do so.

The evidence in the record does not establish that the petitioner has the ability to pay the proffered wage in any year from 2001 onwards. 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 2001 onwards in spite of a specific request for those documents. In view of the foregoing, the AAO agrees with the director that the petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date.

c) The Beneficiary's Qualifications for the Job Offered.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted earlier, the priority date here is February 26, 2001. The name of the job title or the position for which the petitioner sought to hire is "cook." Under the job description, section 13 of the Form ETA 750, the petitioner wrote, "Prepare all types of dishes." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, the director must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 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).

As set forth by the petitioner, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on December 29, 2000, she represented that she worked 35 hours per week at [REDACTED] in Belo Horizonte, Brazil as a cook from January 1994 to April 1997. The record contains a letter of employment dated January 2, 2001 from [REDACTED] stating that the beneficiary worked there as a cook, preparing cold dishes from January 29, 1994 until April 10, 1997. The petitioner submitted a second letter from [REDACTED] dated February 23, 2009 stating that the beneficiary worked eight hours per day from 1994 to 1997. The letter further states that the restaurant is currently operating under the name [REDACTED], with one of the same owners still in charge. However, these letters do not meet the requirements in the regulations as they do not list a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

In addition to the deficiencies with the employment verification letters, we note that the beneficiary stated on her Form G-325 that accompanied the Form I-485 Application to Register Permanent Residency or Adjust Status, that she resided in Dom Cavati, Brazil from 1986 to 1997. We note that Dom Cavati is over 70 kilometers from Coronel Fabriciano and that it would take upwards of an hour to drive between the two locations. As a result, a discrepancy exists as to whether the beneficiary was employed in Coronel Fabriciano from 1994 to 1997. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

No other evidence has been submitted to show that the beneficiary had at least two years of work experience in the job offered prior to the priority date. The AAO's NOID/NDI/RFE specifically cited the director's finding that the letters submitted regarding the beneficiary's prior work experience did not meet the regulation requirements that the letter contain a specific description of the duties performed by the beneficiary and requested additional evidence to demonstrate that the beneficiary has the prior experience claimed. The petitioner did not submit additional evidence concerning this issue in response to the NOID/NDI/RFE.

We note that the position offered in this case is for a skilled worker, requiring at least two years of specialized training or experience gained *before* the priority date. The petitioner has failed to establish that the beneficiary had at least two years of specialized training or experience in the job offered before the priority date. Therefore, we find that the beneficiary is not qualified for the position offered.

d) **The Bona Fide Nature of the Job Offered**

As set forth in the AAO's NOID/NDI/RFE, evidence in the record states that the petitioner has not employed the beneficiary as a cook at any time. Instead, the evidence in the record indicates that the beneficiary has been employed as a member of the maintenance department, in charge of keeping the women's locker room clean and assisting members with towels. In addition, although the Form I-140 states that the petitioner is a restaurant, the website for the business indicates that it is a fitness center and contains no indication that the premises also includes a restaurant or café. As a result, the NOID/NDI/RFE requested evidence to explain or reconcile these inconsistencies.

In response, the petitioner submitted a letter dated August 5, 2013 from its general manager, stating that the petitioner does have an operational café and that the beneficiary was originally considered for a position as cook in the café. However, the anticipated opening as a cook did not arise, so the beneficiary was employed with the maintenance department keeping the women's locker room clean. The letter further states that the petitioner does not anticipate a cook position becoming available and intends to continue employing the beneficiary in her current role with the maintenance department. The letter refers to and reiterates the information contained in a letter dated March 25, 2013 from its general manager.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). In addition, the job opportunity must be "bona fide . . . and not merely exist on paper." *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). The AAO's NOID/NDI/RFE specifically requested evidence to demonstrate that a restaurant or café is associated with the petitioner's business. The petitioner submitted no independent, objective evidence to demonstrate that it had such a restaurant or café. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

No evidence in the record establishes that the petitioner has a restaurant or café as part of its operations. In addition, the letters in the record indicate that a cook position was not available at the time the petition was filed and is not available now. As a result, the evidence in the record does not establish that the job offer was *bona fide* at the time the labor certification was filed and may be denied on this basis as well.

Furthermore, a willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). A finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will

be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The petitioner stated on the Form I-140 and the Form ETA 750 that its type of business was a "restaurant." No evidence has been submitted to establish that the petitioner has or ever had a restaurant as a part of its operations. Furthermore, in signing the Form ETA 750, the petitioner certified that the job opportunity has been and continues to be open to any qualified U.S. worker. The petitioner, however, stated in its letters dated August 5, 2013 and March 25, 2013 that the job opportunity was never open at all. As a result, the petitioner has made a willful misrepresentation of material fact that shut off a material line of inquiry before the DOL and the labor certification is, hereby, invalidated.⁶

In summary, the director's finding that there was willful misrepresentation involving the labor certification based on recruitment anomalies will be withdrawn. Similarly, the director's decision to invalidate the labor certification on this basis will be withdrawn. As stated above, however, the petitioner's misrepresentations concerning the nature of its business and the *bona fides* of the job offer amount to willful misrepresentations involving the labor certification, leading to the invalidation of the labor certification on this basis. In addition, the AAO finds that the director had good and sufficient cause to revoke the approval of the petition per section 205 of the Act, 8 U.S.C. § 1155, which states, "The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Here, the petitioner has failed to establish by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the priority date, and that the beneficiary had the requisite work experience in the job offered before the priority date. Where the petitioner of an approved visa petition is not eligible for the classification sought, the director

⁶ We additionally note that the petitioner submitted letters concerning the beneficiary's job and job duties at different stages of the proceedings. A letter dated October 17, 2001 from the petitioner's manager, submitted as part of the beneficiary's Form I-485 application for permanent residence, states that the beneficiary works as a cook in the café. A second letter also submitted with the beneficiary's Form I-485 from the general manager stated that the beneficiary worked as a full-time cook for the petitioner. Similarly, the petitioner submitted a letter dated February 18, 2009 from the general manager in response to the director's first NOIR stating that the beneficiary is employed as a cook at the beneficiary's café. The letters cited above from the same general manager as in 2013 state that the beneficiary was never employed as a cook for the petitioner and that a cook position was not available either in 1998 or thereafter and that the beneficiary has always been employed in the maintenance department. These letters directly contradict each other and also bear on the question of whether the job offer was *bona fide* and whether the petitioner willfully misrepresented material fact.

may seek to revoke the approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought.

The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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

FURTHER ORDER: The director's finding of willful misrepresentation involving the labor certification process is affirmed.

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