



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER

APR 08 2014

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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 employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. Thereafter, we withdrew the decision and *sua sponte* reopened the matter. After further consideration, we again dismissed the appeal. The matter is now before us as a motion to reopen. The motion will be granted. Our prior decision will be affirmed. The petition's approval will remain revoked.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently 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). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is April 27, 2001, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on motion.¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ, supra*.

This decision will address whether the record on motion establishes the beneficiary's qualifications for the offered position and the petitioner's ability to pay the proffered wage. The petitioner maintains that it has provided sufficient evidence of both. We do not agree. Accordingly, as discussed below, the prior decision of the AAO will be affirmed and the approval of the petition will remain revoked.

Procedural History

On February 28, 2002, the Director, Vermont Service Center, approved the Form I-140, Immigrant Petition for Alien Worker. However, on October 3, 2008, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner,² indicating that inconsistencies in the record cast doubt on the

¹ The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

² The petitioner in this matter is [REDACTED] which claims to be the successor-in-interest to [REDACTED], the business that originally filed the labor certification and visa petition on behalf of the beneficiary. We previously concluded that the record established a successor relationship between [REDACTED]. The Form I-140 petition lists a tax identification number of [REDACTED]'s tax returns for 2001 and 2002; a 2003 Form W-2 for the beneficiary reflects payment from [REDACTED] with a tax identification number of [REDACTED]. Additionally, upon review, records maintained by the

beneficiary's employment experience. On November 5, 2008, the petitioner responded to the NOIR, providing statements from the beneficiary, his prior employer and copies of material from the Cadastro Nacional da Pessoa Juridica (CNPJ) of Brazil. Finding that the petitioner's evidence did not resolve the identified discrepancies in the record, the director revoked the petition's approval on February 18, 2009.

The petitioner appealed the director's revocation on March 5, 2009. On July 31, 2012, we dismissed the appeal, concluding that the record established good and sufficient cause for the director's revocation of the petition's approval. On May 28, 2013, we withdrew the previous decision; reopened the matter *sua sponte*; and issued a Request for Evidence (RFE) asking for proof of the petitioner's ability to pay the proffered wage and for evidence of the beneficiary's employment experience. Upon review, we again dismissed the appeal. The July 17, 2013 decision found that the record did not establish either the beneficiary's qualifications for the offered position or the petitioner's ability to pay the proffered wage. Accordingly, United States Citizenship and Immigration Services (USCIS) erred in approving the petition on February 28, 2002 and the director revoked the petition's approval for good and sufficient cause pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On August 19, 2013, the petitioner filed a motion to reopen, submitting new evidence in support of the visa petition.

Motion to Reopen

The requirements for a motion to reopen are found at 8 C.F.R. § 103.5(a)(2):

Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

Corporations Division, Secretary of the Commonwealth of Massachusetts reflect that [REDACTED] [REDACTED], previously held a different Employer Identification Number ([REDACTED]) than that reflected on its tax returns for 2007 through 2012 [REDACTED]. See <http://corp.sec.state.ma.us>. No evidence in the record establishes that the business entities identified by either tax identification number [REDACTED] are interim successors-in-interest to [REDACTED]. If a petitioner is not the business entity that filed the labor certification or the visa petition, 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). Therefore, in any future proceedings, the petitioner should address and establish the full chain of successorship from the priority date onward. In the absence of such evidence, the petitioner cannot establish itself as a successor-in-interest to [REDACTED]. However, for the purposes of this decision, [REDACTED] will be referred to as the petitioner or the current petitioner, and [REDACTED] will be identified as the original petitioner.

On motion, the petitioner has submitted a brief and additional evidence to establish the beneficiary's qualifying experience and its ability to pay the proffered wage. The petitioner's motion is granted.

Beneficiary Qualifications

The petitioner is seeking classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). 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.

To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition, which, as previously noted, is April 27, 2001. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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).

Part A.13. of the Form ETA 750 states the duties of the offered position of cook as follows: "Prepares all types of dishes." To perform these duties, Part A.14. requires the beneficiary to have two years of experience in the offered position.

Part B.15. of the labor certification, signed by the beneficiary on January 23, 2002 as being true and correct under penalty of perjury, indicates that from February 25, 1997 until August 15, 2000, he was employed 35 hours a week as a cook at the [REDACTED] and was responsible for "[making] all different kinds of dishes." The beneficiary lists no other employment experience on the Form ETA-750B.

In support of the beneficiary's claimed experience, the petitioner submitted a declaration, dated January 10, 2002, signed by [REDACTED] which stated that the beneficiary worked "in the Restaurant e [REDACTED], in the period from 25th of February of 1997 to 15th of August of 2000 . . . [in] the function of cook." The director notes in his NOIR that the CNPJ number stated on the letter belonged to another business, which was formed in November 1999; this inconsistency casts doubt on the beneficiary's claimed experience. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

employment with [REDACTED] casting further doubt on their statements. See *Matter of Ho*, at 591-592.

The record also contained no independent objective evidence that established any business relationship between [REDACTED]. The fact that the two businesses had owners with a family relationship and operated with the same business address was found insufficient to demonstrate either a successor relationship or that the beneficiary was employed as claimed. The beneficiary did not claim employment with [REDACTED] on the labor certification or list either [REDACTED] as his last employer abroad on the Form G-325, Biographic Information, filed with his Form I-485, Application to Register Permanent Residence or Adjust Status.⁴ The AAO found no independent, objective evidence in the record to resolve these inconsistencies and, therefore, concluded that the petitioner had failed to establish that the beneficiary had the experience required by the terms of the certified labor certification. *Matter of Ho*, at 591-92.

Present Motion

Counsel asserts on motion that the record establishes that the beneficiary began working as a cook for the [REDACTED], and that in 1998 [REDACTED] took over the business upon the death of his father. Counsel submits additional evidence of the beneficiary's work experience in the form of affidavits from three individuals. The affidavits are each dated August 13, 2013.

In the first of the three statements, [REDACTED] attests that the beneficiary worked at the [REDACTED] beginning in 1997, under the supervision of "the business owner, [REDACTED]. [REDACTED] states that he owns a bakery that supplies bakery goods to the [REDACTED] Restaurant and that the beneficiary signed for deliveries on several occasions. [REDACTED] asserts that he and his family have for many years been patrons of the [REDACTED] which has existed for approximately 20 years.

In the second statement, [REDACTED] attests that he has known the beneficiary since birth. He states that the beneficiary worked at the [REDACTED] as a cook during the period 1997 to 2000, "under the supervision of the business owner, [REDACTED]. [REDACTED] also reports that he delivered milk to the [REDACTED] for many years and that the beneficiary signed for deliveries on many occasions. [REDACTED] states that he continues to deliver milk to the establishment. He states that the [REDACTED] has been in business for approximately 20 years.

The third statement is provided by [REDACTED] who asserts that the beneficiary worked at the [REDACTED] as a cook, beginning in 1997, "under the supervision of the business

⁴ Dicta in *Matter of Leung*, 16 I&N Dec. 12 (BIA 1976), states that when employment experience is not certified by DOL on the labor certification, the credibility of the evidence and the facts asserted is lessened.

owner, [REDACTED]. He attests that from 1998 to 1999, he worked for two furniture delivery services and that while working for these companies he ate lunch at the [REDACTED] on a daily basis and met the beneficiary. He states that the beneficiary continued to work at the [REDACTED] until August 2000. [REDACTED] attests that the [REDACTED] has been in business for approximately 20 years.

These statements do not resolve the identified inconsistencies in the claims made regarding the beneficiary's employment from 1997 to 2000. None of the affiants state that they delivered to, or witnessed the beneficiary cooking at, [REDACTED] was the predecessor of the [REDACTED] as claimed by the petitioner. No evidence addresses the menu available at [REDACTED] or demonstrates that [REDACTED] required the bakery items or milk deliveries mentioned by [REDACTED] respectively. In the absence of such evidence, the deliveries described in the [REDACTED] statements appear inconsistent with the "scope" of [REDACTED], as stated in the 1993 partnership agreement between [REDACTED] "Entertainment services, nightclubs and dancehalls. Bar (retail [l]iquors sales)." Further, as [REDACTED] has indicated that the [REDACTED] did not begin operations until 1999, it is unclear how [REDACTED] could have eaten lunch at the [REDACTED] in 1998. Accordingly, the submitted affidavits do not establish the beneficiary's experience. Instead, they offer further reason to question the employment experience claimed by the beneficiary. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, at 591-92.

Upon review, the record contains the following evidence in support of the petitioner's assertion that the beneficiary has two years of experience as a cook:

- The January 10, 2002 declaration of [REDACTED] which states that the beneficiary was employed as a cook at the [REDACTED] from February 25, 1997 until August 15, 2000. The CNPJ number on [REDACTED] letter, [REDACTED], but the petitioner has submitted evidence that indicates the [REDACTED] did not open until November 8, 1999.
- The October 29, 2008 statement from [REDACTED] which states that the beneficiary's employment experience as a cook began with [REDACTED] from February 25, 1997 to November 7, 1999, and, thereafter, that the beneficiary worked at [REDACTED] Restaurant⁵ until August 15, 2000. [REDACTED] states that he worked as the manager of the [REDACTED] nightclub beginning in 1995. His statement fails to explain why he initially stated that the beneficiary was employed by the [REDACTED] at a time when it did not exist. The beneficiary signed the labor certification under penalty of perjury, on January 3, 2002, identifying his employer as the [REDACTED]. He

⁵ The beneficiary and the "Statement of Individual Mercantile Company" signed by [REDACTED] on July 18, 2001, refer to the business as a hotel/restaurant.

did not indicate that he was initially employed by a nightclub or that he was employed by a nightclub that became a restaurant.

- The partnership agreement in the record between [REDACTED] (DOB June 7, 1934) and [REDACTED] (DOB 3/26/65) lists [REDACTED], as the managing partner of [REDACTED]. This same agreement lists the scope of the business as “entertainment services, nightclubs, and dancehalls. Bar (retail liquor sales).” The agreement does not mention a restaurant that would clearly require the services of a cook.

The record reflects that [REDACTED] were owned by individuals in the same family and were operated sequentially at the same address. It does not, however, establish that [REDACTED] served food or required a cook. Neither does the record establish that the business, [REDACTED] became the [REDACTED]

The record also fails to demonstrate that [REDACTED] in 1997 or the owner/operator of [REDACTED] following his father’s death in 1998.⁶ Therefore, Mr. [REDACTED] statements do not satisfy the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), which requires employment claims to be supported by letters from “trainers or employers.” Although [REDACTED] declarations identify him as the manager of [REDACTED] in 1997 and the owner/operator of [REDACTED] after the death of his father in 1998, evidence in the record is not consistent with regard to his relationship with [REDACTED]. Accordingly, the record does not establish the authority of [REDACTED] to attest to the beneficiary’s employment as required by 8 C.F.R. § 204.5(l)(3)(ii)(A).

Further, the record does not establish that the beneficiary was employed sequentially as a cook first at [REDACTED] to establish the claimed and required two years of experience as a cook. [REDACTED] initial statement failed to address [REDACTED] as did the beneficiary’s description of his qualifying experience on the labor certification, and, for the reasons previously discussed, subsequently submitted evidence has not resolved this inconsistency. Although requested to do so, the petitioner has failed to submit pay stubs, the beneficiary’s workbook, tax records, payroll records or other contemporaneous evidence of the beneficiary’s two

⁶ The evidence of record establishes that the [REDACTED] continued to operate until October 2, 2004.

⁷ The record contains the death certificate of [REDACTED], who died on October 8, 1998. The certificate indicates that the decedent is survived by a wife and a minor child and left property to be probated. The certificate does not mention that he was also survived by two adult sons. The record indicates that [REDACTED] would have been approximately 33 in 1998; and [REDACTED] Jr., approximately 25 years old.

years of employment as a cook in Brazil, objective, independent evidence that might verify the beneficiary's claimed experience and changes in the name of his employer.⁸

The statements submitted on motion do not resolve the discrepancies in the beneficiary's employment history or the other evidentiary deficits just described. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(2)(i), affidavits may be submitted as evidence in immigration proceedings only in cases where primary and secondary evidence does not exist and must be accompanied by proof that primary and secondary evidence does not exist or is unavailable. The petitioner has not submitted independent, objective evidence of the beneficiary's employment with [REDACTED], or the [REDACTED], such as the beneficiary's payroll stubs, his social security records or workbook, and has not submitted any reason why sworn statements should be accepted in lieu of such evidence. Further, as already discussed, the statements do not establish that any of the affiants had personal knowledge of the beneficiary prior to his claimed employment with the [REDACTED] Restaurant, which, the petitioner indicates, began operations in 1999.

For the reasons discussed, the affidavits submitted on motion do not establish by a preponderance of the evidence that the beneficiary has the experience required by the labor certification as of the priority date. Therefore, USCIS erred in approving the instant visa petition on February 28, 2002.

Section 205 of the Act provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], 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." The Board of Immigration Appeals (BIA) has held that the realization that a petition was approved in error may "in and of itself" be good and sufficient cause for revoking the approval of that petition, "provided the . . . revised opinion is supported by the record." *Matter of Ho*, at 590. In that the evidence of record in the

⁸ The RFE issued on May 28, 2013 requested that the petitioner submit independent objective evidence of the beneficiary's employment to resolve the discrepancy between the beneficiary's claim on the labor certification to have worked for the [REDACTED] from February 25, 1997 until August 15, 2000 and [REDACTED] was not operating in 1997 and not established until November 1999. The RFE indicated that such independent objective evidence could include the beneficiary's pay stubs, payroll records or tax documents issued to the beneficiary, his work contract/agreement, his [REDACTED] e [REDACTED]

In response to the RFE, the petitioner submitted copies of the "Advanced Notice of Employment Termination [REDACTED]" and "Terms of Employment Contract Termination," which together appear to reflect that the beneficiary's employment with the [REDACTED] Restaurant began on February 25, 1997 and terminated on August 15, 2000. However, as discussed, this document conflicts with other evidence of record that indicates the [REDACTED] did not open until 1999 and, therefore, fails to resolve the identified inconsistency in the beneficiary's experience. The record lacks the independent, objective evidence required to overcome the inconsistency

present matter establishes that the approval of the instant petition was in error, the petition's approval was revoked for good and sufficient cause.

Petitioner's Ability to Pay the Proffered Wage

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.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any subsequently filed immigrant visa petition, a petitioner must establish that the job offer is realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A 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).

To determine a petitioner's ability to pay the proffered wage, USCIS first considers whether the petitioner has employed and paid the beneficiary during the required period. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the absence of such evidence, USCIS examines the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation of 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).⁹ If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude

⁹ 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).

of a petitioner's business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In assessing the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), only the petitioner's ability to pay the proffered wage from the priority date until February 28, 2002, the date that USCIS approved the petition will be considered. However, in considering whether the totality of the petitioner's circumstances establish its ability to pay the proffered wage to the beneficiary, all of the petitioner's financial evidence, including that submitted for the years 2007 through 2012, will be reviewed.

Where a petitioner has filed multiple petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. *See Matter of Great Wall*, at 144-145; *see also* 8 C.F.R. § 204.5(g)(2). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS adds together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyzes the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates any beneficiary obtained lawful permanent residence, or after the dates any Form I-140 petition was withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not require a petitioner to establish the ability to pay additional beneficiaries for any year that the beneficiary of the instant petition was paid the full proffered wage.

In the present matter, the petitioner must establish that on February 28, 2002, the date of the petition's approval, it had the continuing ability to pay the beneficiary the proffered wage of \$12.57 an hour or \$22,877.40 a year (based on a 35-hour work week) as of the April 27, 2001 priority date. On February 28, 2002, the record contained only the original petitioner's 2000 tax return, the most recent tax return available.

Ability to Pay – Net Income/Net Current Assets

The RFE issued on May 28, 2013 requested that the petitioner submit Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (Forms W-2) issued to the beneficiary from 2001 onward; the petitioner's federal tax returns, audited financial statements or annual reports for the years 2003 onward; and the original petitioner's tax returns, audited financial statements or annual reports for the years 2001 through 2003.

In response, the petitioner provided a copy of the beneficiary's 2003 Form W-2 (Wage and Income

Transcript) issued by I [REDACTED]¹⁰ and an IRS Account Transcript indicating that no Form W-2 for the beneficiary was found for 2001. It also provided copies of its federal income returns for 2007 through 2012, and indicated that it could not obtain tax documentation for prior years. A June 25, 2013 letter from [REDACTED] one of the petitioner's owners, accompanied this information. In her letter, Ms. [REDACTED] indicates that she does not have tax returns for any years prior to 2007 and that her accountant, [REDACTED], has informed her that he is not in possession of any earlier tax returns. A June 24, 2013 letter from [REDACTED] states that when he took over the practice of the petitioner's prior accountant he retained only five years of his predecessor's prior tax return data, as required by the IRS.

The July 17, 2013 decision found that the record did not demonstrate the petitioner's ability to pay the proffered wage in the years 2001-2006 and 2009-2010. The petitioner's failure to establish its ability to pay from the April 27, 2001 priority date onward provided an additional reason for determining that USCIS had erred in approving the visa petition on February 28, 2002.

On motion, the petitioner submits tax returns filed by the original petitioner for the years 2000 through 2003, although, as noted above, it previously stated that it had no tax returns prior to 2007.¹¹ The petitioner further asserts that, like the petitioner in *Sonegawa*, its ability to pay the proffered wage during the periods 2004-2006 and 2009-2010 is established by the overall magnitude of its business activities.

The original petitioner's tax return for 2001 reflects net income of \$25,396.00 and net current assets of \$84,681.00, while its tax return for 2002 reports net income of \$33,658.00 and net current assets of \$213,997.00. Accordingly, the record would demonstrate the original petitioner's ability to pay the beneficiary the proffered wage of \$22,877.40 as of the 2001 priority date through the date of the petition's approval on February 28, 2002 if the beneficiary were the petitioner's only sponsored worker.

However, a petitioner that has filed petitions for multiple beneficiaries must demonstrate its ability to pay the proffered wages for all of its sponsored workers. Following the receipt of the original petitioner's tax returns on motion, a review of relevant USCIS databases sought to determine whether the original petitioner had filed visa petitions for any other workers.¹² This review

¹⁰ As previously indicated, the record also contains a 2003 Form W-2 issued to the beneficiary by [REDACTED]. The record does not establish the relationship between [REDACTED] the original petitioner, or [REDACTED] the current petitioner.

¹¹ The petitioner's accountant previously indicated that he had retained only five years of the petitioner's tax records and the petitioner offers no explanation as to why it is now able to submit this evidence. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to the deficiency, the AAO need not accept the evidence if it is offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Nevertheless, the original petitioner's tax records will be considered.

¹² The petitioner stated that the 2001-2002 tax returns were unavailable in response to the May 28,

identified ten additional Form I-140 petitions that were either pending or approved on the date of the petitioner's approval in 2002. Accordingly, the record must establish not only that the original petitioner had the ability to pay the beneficiary the proffered wage in 2001 and 2002, but also the ability to pay the proffered wages of its ten other sponsored workers. See *Matter of Great Wall*, at 144-145; see also 8 C.F.R. § 204.5(g)(2).

The evidence of record contains no information regarding the proffered wages of the sponsored workers or their actual wages, if any. A review of other USCIS records relating to these workers indicates that their combined proffered wages would have totaled approximately \$228,774.00 a year in 2001 and 2002,¹³ exceeding the original petitioner's net income and net current assets in those years. The records contain no evidence of the wages that the original petitioner may have paid these individuals in 2001 and 2002. Without such evidence, it is not possible to determine whether the original petitioner's net income or net current assets in 2001 and 2002 would have covered its financial obligations with regard to its sponsored workers.¹⁴ Accordingly, the evidence of record does not establish that the petitioner, on the date of the petition's approval, had the ability to pay the proffered wage from the priority date forward.¹⁵

Ability to Pay – Totality of Circumstances

The July 17, 2013 decision found that the petitioner had failed to demonstrate that the totality of its circumstances established its ability to pay or to establish the type of exceptional circumstances present in *Sonegawa*, e.g., evidence of growth from its inception and its reputation within the industry.

On motion, counsel asserts that in those years where the petitioner's tax returns do not demonstrate its ability to pay the proffered wage, i.e., in 2004-2006 and 2009-2010, that ability is established by the totality of its circumstances. Counsel contends that the petitioner's gross income and/or total assets in 2009 and 2010, "lean years for the American economy as a whole," establish the "overall magnitude of [its] business activities." *Matter of Sonegawa*, at 612. Counsel further maintains that even though the petitioner is unable to submit its tax returns for the years 2004 through 2006, its ability to pay in these years is established by the evidence of its ability to pay in the years preceding

2013 RFE.

¹³ Information available on eight of the ten workers for whom the original petitioner filed Form I-140 petitions establishes that the proffered position in each case was that of a cook and that the proffered wage was at least \$12.57/hour or \$22,877.40 a year (based on a 35-hour work week), the proffered wage in the present case.

¹⁴ As discussed in the AAO's July 17, 2013 decision, a petitioner may establish its ability to pay the proffered wage if the actual wages it has paid a beneficiary, when combined with its net income or net current assets, equal or exceed the proffered wage. Without information establishing the wages the original petitioner may have paid its sponsored workers, this calculation cannot be made.

¹⁵ USCIS did not previously notify the petitioner of the requirement to establish its ability to pay the proffered wage to all sponsored workers as this issue only became relevant with its submission of the original petitioner's tax returns for 2000 through 2003.

and following this period.¹⁶ Counsel claims that the original and current petitioners have provided extensive evidence of their respective abilities to pay the proffered wage over the 13 years since the priority date. Finally, counsel asserts that, in the absence of affirmative evidence casting doubt on the petitioner's ability to pay the proffered wage, the petitioner has met its burden of proof in this matter. Counsel's assertions are not persuasive.

The record does not provide extensive evidence of the original and current petitioners' ability to pay. The original petitioner's tax returns do not establish its ability to pay the proffered wage as of the priority date through 2003. As previously discussed, USCIS databases reflect that at the time of the petition's approval, the petitioner had filed ten other Form I-140 petitions that were either approved or pending. These same databases also indicate that in May and July 2002, the original petitioner filed an additional three Form I-140 petitions and that of these 13 petitions, ten remained approved or pending during 2003. The absence of any evidence establishing the actual wages the original petitioner may have paid these sponsored workers prevents any calculation of the original petitioner's total financial obligation to all sponsored workers in any of these years. Additionally, the petitioner failed to state the number of its employees in Part 5. of the Form I-140 petition, which prevents an assessment of the petitioner's gross receipts or wages paid in relation to the size of the petitioner's operations. Accordingly, the original petitioner's tax returns do not establish its ability to pay the proffered wage from the April 27, 2001 priority date through 2003.

Counsel's assertion that the gross income and total assets reported in the petitioner's 2009 and 2010 tax returns demonstrate that the totality of its circumstances establish its ability to pay the proffered wage in these years is also unpersuasive.¹⁷ Although a petitioner's gross receipts and assets over its history are appropriately considered in determining whether the totality of its circumstances establish its ability to pay the proffered wage, the petitioner in the present matter has not established that the totality of its circumstances, e.g., the occurrence of extraordinary events in the deficient years, its reputation, historical growth or other factors outlined in *Matter of Sonogawa*, establish its ability to pay the proffered wages of the beneficiary of the current petition and all of its sponsored workers.

Counsel also contends that the petitioner's ability to pay the proffered wage in the years 2004 through 2006 may be inferred from its demonstrated ability to pay in other years and that in the absence of affirmative evidence casting doubt on its ability to pay, the petitioner has met its burden of proof in this proceeding. 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). The petitioner must establish its eligibility in this matter by a preponderance of the evidence. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

¹⁶ Additionally, without tax returns for the years 2004 through 2006, the AAO is unable to assess whether there is an intervening successor(s) in the chain of successorship. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

¹⁷ As discussed in the July 17, 2013 decision, the record does not establish that the petitioner's net income or net current assets were sufficient to pay the beneficiary the proffered wage in 2009 and 2010.

For the reasons previously discussed, the submission of the original petitioner's tax records on motion, without an explanation as to why they could not have been submitted previously, does not, when considered with the other evidence of record, establish that the totality of the petitioner's circumstances demonstrate its ability to pay the beneficiary the proffered wage from the 2001 priority date through the date of the petition's approval.

The record does not demonstrate the petitioner's ability to pay the proffered wages of the instant beneficiary and the other beneficiaries for whom the original petitioner had filed Form I-140 petitions that were pending or approved on the date of the petition's approval in 2002. Accordingly, USCIS erred in approving the visa petition. For this additional reason, the petition's approval is revoked for good and sufficient cause under section 205 of the Act. *See Matter of Ho*, at 590.

The prior decision of the AAO is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the visa petition's approval will remain revoked.

ORDER: The prior decision of the AAO is affirmed. The approval of the petition remains revoked.