

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



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: FEB 12 2014 OFFICE: TEXAS SERVICE CENTER

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:

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 of the Texas Service Center (the director) revoked the approval of the immigrant visa petition on May 8, 2009, and the petitioner subsequently appealed the director's decision to the Administrative Appeals Office (AAO). On January 24, 2013, the AAO withdrew the director's decision and remanded the matter for further action, including the entry of a new decision. The director has now issued that decision and has certified it to the AAO. The AAO will affirm the director's revocation of the approval of the visa petition, but will withdraw his finding of fraud and the invalidation of the Form ETA 750, Application for Alien Employment Certification (labor certification).

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 Act, 8 U.S.C. §1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

In the newly issued decision, dated April 10, 2013, the director found that the record does not establish the beneficiary's qualifications for the offered position or the petitioner's ability to pay the proffered wage. He has also determined that the record does not establish a successor-in-interest to the petitioner, which was dissolved on June 18, 2012, and, therefore, that the approval of the visa petition is subject to automatic revocation pursuant to 8 C.F.R. § 105.1(a)(3)(iii)(D). Further, the director found the record to demonstrate that the petitioner willfully misrepresented a material fact during the labor certification process. Accordingly, he revoked the approval of the visa petition with a finding of willful misrepresentation and invalidated the labor certification.

Basis for Certification to the AAO

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation provides: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

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.

In response to the AAO's remand, the director, on March 7, 2013, issued a Notice of Intent to Revoke (NOIR) to the petitioner, informing it that the record failed to establish the beneficiary's qualifications for the offered position, its ability to pay the proffered wage or that, having been dissolved in 2012, that it had a successor-in-interest in the current proceeding. Further, the director indicated that he found the record to establish that the petitioner had materially misrepresented a material fact during the labor certification process and that he intended to invalidate the labor certification on this basis. The petitioner was given 30 days in which to submit additional evidence in support of the visa petition.

On April 10, 2013, the director issued his decision, affirming his revocation of the approval of the visa petition for the reasons outlined in the NOIR, noting that the petitioner had failed to respond within the 30-day time period.² The director has certified his decision to the AAO based on his determination that the petitioner willfully misrepresented a material fact in the labor certification process, a finding contrary to that reached by the AAO in its January 24, 2013 consideration of the record. The AAO accepts the director's certification of his decision pursuant to the regulation at 8 C.F.R. § 103.4(a)(5) and will review the director's findings, beginning with that of material misrepresentation against the petitioner, on which he based his invalidation of the labor certification.

Invalidation of the Labor Certification

A finding of fraud or material misrepresentation under section 212(a)(6)(C)(i) of the Act may lead to the invalidation of an approved labor certification. In this regard, the regulation at 20 C.F.R. § 656.30(d) states:

Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful

² Although the record indicates that [REDACTED], an attorney claiming to represent the petitioner, did submit a timely response to the NOIR, the AAO does not find it necessary to return the present case for further consideration by the director as [REDACTED] submits no evidence to overcome the director's findings. Instead, his April 5, 2013 letter states that the petitioner will not reply to a NOIR issued by the director until such time as the Motion to Reconsider (MTR) filed in response to the AAO's January 24, 2013 remand has been adjudicated and the AAO's decision reflected in a newly-issued NOIR. Moreover, [REDACTED] does not represent the petitioner or any successor-in-interest, i.e., an entity with legal standing in this matter. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). As the AAO informed the petitioner in its January 24, 2013 decision, [REDACTED] is not recognized as the petitioner's counsel on appeal and the representations he claims to make on behalf of the petitioner will, therefore, not be considered in this proceeding. The AAO's decision dismissing the MTR referenced in [REDACTED] April 5, 2013 letter has been issued as of this date under separate cover.

misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

In his decision, the director indicated that the petitioner's advertisements for the offered position in the *Boston Herald* did not conform to several DOL requirements under the regulation at 20 C.F.R. § 656.21(g). He specifically noted that the advertisements failed to describe the job opportunity, did not state the rate of pay, and did not indicate the minimum job requirements. Based on these deficiencies, the director found the petitioner to have willfully misrepresented the job opportunity in its advertisements, thereby preventing the offered position from being open to all qualified U.S. workers. He invalidated the labor certification accordingly.

The AAO notes that at the time the labor certification in the present matter was filed, two types of recruitment procedures existed – 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 was first required to file a Form ETA 750 with the local DOL office (State Employment Service Office), which then would date stamp the labor certification, make sure it was complete, calculate the prevailing wage for the job opportunity and put its finding into writing, prepare an Employment Service job order and place that order into the regular Employment Service recruitment system for a period of 30 days. See 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the labor certification would then place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade or ethnic publication and provide the local office with required documentation or requested information in a timely manner. See 20 C.F.R. §§ 656.21(g)-(h).

Under the reduction in recruitment process, the employer could, before filing the labor certification with the State Employment Service Office, conduct all of the recruitment requirements, including placing an advertisement in a newspaper of general circulation and posting a job notice in its place of business. See 20 C.F.R. §§ 656.21(i)-(k).

Here, the record reflects that the petitioner's recruitment for the offered position preceded the filing of the labor certification application on May 31, 2001. As a result, it appears that the application was filed under the reduction in recruitment process, a conclusion that is supported by the petitioner's response in Part A.21 of the labor certification, describing its efforts to recruit U.S. workers as follows: "Newspaper advertisements, internal posting, word of mouth and www.jobfind.com."

The AAO, therefore, does not find the record to reflect the inconsistencies or anomalies in the recruitment process that would support a finding of fraud and/or willful misrepresentation of a material fact based on the criteria in *Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the AAO withdraws the director's determination that the petitioner did not comply with DOL requirements, as well as his finding that the petitioner engaged in willful misrepresentation during the recruitment process.

Nevertheless, the approval of the petition may not be reinstated as the record fails to establish that the beneficiary is qualified for the offered position or that the offered position remains a *bona fide* job offer.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.”³ 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).

Beneficiary Qualifications

A beneficiary must meet all of the requirements of the offered position set forth in the labor certification by the priority date of the petition. 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 the present case, the priority date of the petition is May 31, 2001, the date on which the underlying labor certification was accepted for processing by DOL.

In evaluating 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale*

³ Section 204(b) of the Act states, in pertinent part, that:

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

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

Linden Park Company v. Smith, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification.

In the instant case, Part A.14. of the labor certification requires the beneficiary to have two years of experience in the job offered, i.e., as a cook. Part B.15 of the labor certification, which the beneficiary signed on March 13, 2001 as being "true and correct" under penalty of perjury, states that the beneficiary was employed as a cook by the [REDACTED] from May 1995 until July 1997. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains a March 20, 2001 declaration from the [REDACTED] which states that the beneficiary was employed as a cook from May 31, 1995 until July 2, 1997. However, as indicated by the director in his April 10, 2013 decision, this statement fails to satisfy the requirements at 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not include the name and title of the writer, nor a specific description of the duties performed by the beneficiary. As no additional evidence has been submitted in support of the beneficiary's employment experience, the AAO does not find the record to establish that the beneficiary had the experience required by the labor certification as of the May 31, 2001 priority date. Accordingly, the visa petition appears to have been approved in error, which is good and sufficient cause for revoking its approval as of the date of that approval. *Matter of Ho* at 582, 590.

The record also fails to establish that the offered position in this matter remains a *bona fide* job offer.

No Bona Fide Job Offer

A labor certification is valid only for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Therefore, if a labor certification is to remain viable for use by an employer other than the business entity that filed the labor certification, the employer must establish itself as a successor-in-interest to the business for which the labor certification was approved. Here, the employer that filed the labor certification, visa petition and appeal was dissolved on June 18, 2012 and, for the reasons discussed below, the AAO does not find the record to establish that it has a successor-in-interest for the purposes of this proceeding.

Requirements for Establishing Successor-in-Interest

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Such matters are, instead, adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) (*Matter of Dial Auto*) a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the INS Commissioner in 1986.

Matter of Dial Auto involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, *Dial Auto* claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Matter of Dial Auto does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest"). With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.⁴ *Id.* at 1569 (defining

⁴ Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in

“successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true employer identified in the labor certification application.

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, 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 beneficiary's predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as that originally offered on the labor certification. Third, the successor must prove by a preponderance of evidence that it is eligible for the immigrant visa in all respects.

1. Transfer of Ownership

In the present case, the entity that filed the labor certification, visa petition and appeal, [REDACTED] (the petitioner), was involuntarily dissolved on June 18, 2012. In response to an October 3, 2012 Notice of Intent to Dismiss and Derogatory Information (NOID/DI) issued by the AAO after learning of the petitioner's dissolution, the current employer of the beneficiary, [REDACTED] submitted evidence to establish itself as the petitioner's successor, including a statement from its president, [REDACTED] in which [REDACTED] asserts that his business has assumed operation of the petitioner's business “due to the high level of commonality between . . . [them]” and that it acquired “some assets, management, administration and the discharging of the obligations” of the petitioner following the September 2007 death of the petitioner's owner.⁵ However, [REDACTED] also indicates that “technical difficulties” in establishing his business' ability to pay the proffered wage have led him to relinquish sponsorship of the beneficiary and that [REDACTED] is assuming sponsorship for the beneficiary under section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). To establish the

being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

⁵ [REDACTED] also indicates that he is the brother of the petitioner's deceased owner and that in addition to running [REDACTED], his brother also operated another business, [REDACTED], which shares a Federal Employer Identification Number (FEIN), [REDACTED]. However, the fact that the petitioner's owner may have owned and operated [REDACTED], Inc. does not establish [REDACTED] as a successor-in-interest to the petitioner. Copies of the petitioner's 2000 tax return and Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (Forms W-2) it issued to the beneficiary indicate that its [REDACTED], thereby establishing it as a separate and distinct business entity from [REDACTED] and, therefore, [REDACTED].

ability of [REDACTED] to pay the proffered wage, its counsel submits copies of its tax returns for the years 2006 through 2011.

Although [REDACTED] claims regarding [REDACTED] assumption of the petitioner's business are noted, they are not supported by documentation of the transaction(s) through which [REDACTED] acquired ownership of all, or a relevant part of, the petitioner's business. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the record does not establish the transfer of ownership required to demonstrate [REDACTED] as a successor-in-interest to the petitioner. Further, the record fails to demonstrate that the offered position is the same as that indicated on the labor certification.

2. Offered Position

As discussed in the AAO's January 24, 2013 remand, the petitioner's annual reports, dated January 14, 2004 and October 31, 2005, offer information that appears to contradict the petitioner's claim that the offered position is that of "cook" and that it operated as a restaurant. The annual report for 2004 lists the beneficiary as a clerk and that for 2005 indicates that she is the business' Chief Financial Officer. Further, the 2005 report states that the petitioner's business is "marketing, management, and small retail café." As no evidence has been submitted to resolve these inconsistencies, the record does not establish that the [REDACTED] operates the same business as that previously run by the petitioner or that the offered position is that of a cook. It is incumbent upon a petitioner to resolve inconsistencies in the record with independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 591-592. Therefore, the record also fails to demonstrate that the job opportunity with [REDACTED] is the same as that originally offered on the labor certification, the second requirement for establishing a successor-in-interest relationship to the petitioner.

3. Ability to Pay

Finally, to establish its eligibility for the immigrant visa in all respects, [REDACTED] must support its claim with all necessary evidence, including evidence of ability to pay. To meet this requirement, it must demonstrate the petitioner's ability to pay the proffered wage as of the May 31, 2001 priority date until the date on which it acquired the petitioner, and its own ability to pay the proffered wage from the date on which the transfer of ownership took place forward. See 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether a petitioner has paid the beneficiary the full proffered wage each year from the priority date. If a petitioner has not paid the beneficiary the full proffered wage each year, USCIS then examines whether a petitioner had sufficient net income or net current assets to pay the difference between the

wage paid, if any, and the proffered wage.⁶ If neither a petitioner's net income nor its net current assets is sufficient to demonstrate its ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions were withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

In the present case, the proffered wage stated on the labor certification is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour week). The record contains copies of the beneficiary's IRS Forms W-2 for the years 2003 through 2007 issued by [REDACTED] which establish her income from the petitioner as follows:

- 2003 \$10,740.00
- 2004 \$8,890.00
- 2005 \$22,077.00
- 2006 \$20,405.00
- 2007 \$8,195.00

It also provides copies of her Forms W-2 and earnings statements from [REDACTED] that report the following income for the years 2008 through 2012:

- 2008: \$13,635.00
- 2009: \$16,940.00
- 2010: \$9,590.00
- 2011: \$7,868.00

⁶ *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).

- 2012: \$5,306.00

Accordingly, the record does not establish that the petitioner paid the beneficiary the full proffered wage in any year from the priority date until its acquisition by [REDACTED]. [REDACTED] paid the beneficiary the proffered wage following its acquisition of the petitioner. Neither does it demonstrate the petitioner's and [REDACTED] ability to pay the proffered wage based on net income or net current assets.

The petitioner was a C corporation, whose fiscal year ran from November 1st to October 31st. The record contains pages from its annual reports for the years 2004 and 2005, which provide no financial information, and its 2000 tax return that reports \$40,548.00 in net income and \$3,309.00 in net current assets as of October 31, 2001.⁷ No other evidence of the petitioner's financial circumstances has been submitted.

Based on the \$40,548.00 in net income reported on the petitioner's 2000 tax return, the AAO finds that the petitioner had the financial resources to have paid the beneficiary the proffered wage in 2001. However, a review of USCIS databases indicates that, in February and April 2002 respectively, the petitioner filed employment-based immigrant visa petitions ([REDACTED] [REDACTED] for two other individuals, both of which were approved.⁸ Therefore, to establish its ability to pay the proffered wage, the petitioner is required to demonstrate its ability to pay the proffered wage to each of the three individuals for whom it filed Form I-140 petitions from the respective priority dates. The record, however, provides no information on the proffered wages for the two other beneficiaries or on any income they might have earned by working for the petitioner. As a result, it lacks the evidence the AAO requires to determine whether the petitioner's net income in 2002 was sufficient to pay the proffered wage. Accordingly, the AAO finds that the record fails to establish the petitioner's ability to pay the proffered wage from 2002 through 2007.⁹

Even if its ability to pay the proffered wage based on net income or net current assets were established by the petitioner, the record would not demonstrate ability to pay in this proceeding as [REDACTED]

⁷ The priority date of May 31, 2001 is captured in the 2000 tax return of the petitioner and the 2000 return is thus relevant to the determination of the petitioner's ability to pay the proffered wage from the priority date.

⁸ Although the approval of one of these petitions ([REDACTED]) was ultimately revoked, revocation did not occur until May 23, 2011. Accordingly, the petitioner is still required to establish its ability to pay the proffered wage to this individual from the priority date of the Form I-140 filed on behalf of this individual until the date it was acquired by [REDACTED]

⁹ As the record does not establish that at the time of the petition's approval in March 2003 the petitioner had the ability to pay the beneficiary and the other sponsored workers the proffered wage from 2002 forward, the AAO finds the petition to have been approved in error. For this reason alone, there is good and sufficient cause for revoking the approval of the petition as of the date of approval. *Matter of Ho* at 582, 590.

has failed to submit any documentation of its financial circumstances, including the annual reports, tax returns or audited financial statements required by the regulation at 8 C.F.R. § 204.5(g)(2).¹⁰

Moreover, neither the petitioner nor [REDACTED] has submitted the type of evidence that, in *Sonegawa*, established the petitioner's ability to pay the proffered wage, e.g., documentation of their financial history and/or growth, or unusual demands on their financial resources. As a result, the record provides no basis on which the AAO can conclude that the totality of their respective circumstances establishes their ability to pay the proffered wage.

The record does not document [REDACTED] acquisition of the petitioner, establish that the job opportunity with [REDACTED] is the same as that originally offered on the labor certification or demonstrate that [REDACTED] Inc. is eligible for the immigrant visa in all respects. Therefore, the AAO finds that [REDACTED] is not the petitioner's successor-in-interest.

As the petitioner was dissolved on June 18, 2012 and the record fails to establish a successor-in-interest, the AAO finds that the position on the labor certification is no longer a *bona fide* job offer, i.e., that no certified job offer continues to exist. Accordingly, the approval of the petition is subject to revocation on this basis. Moreover, in the absence of a successor-in-interest to the petitioner, the June 18, 2012 dissolution of the petitioner's business resulted in the automatic revocation of the approval of the instant petition pursuant to the regulation at 8 C.F.R. § 205.1(a)(iii)(D).

In the case of the petitioner, the failure of the evidence of record to establish its ability to pay the beneficiary the proffered wage from 2002 forward also demonstrates that the approval of the visa petition on March 25, 2003 was in error. For this reason as well, there is good and sufficient cause for revoking the approval of the petition. *Matter of Ho* at 582, 590.

Validity of the Form I-140 under AC21

In his November 29, 2012 statement, [REDACTED] indicates that a new business entity, [REDACTED], is now the beneficiary's sponsor as it is the employer to whom she will "port" under

¹⁰ The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

section 106(c) of AC21. AC21, however, does not grant any petitioning rights or benefits to the subsequent employers of aliens who port to new jobs under its provisions. Accordingly, the stated intention of [REDACTED] to hire the beneficiary under section 106(c) of AC21 once she has adjusted to lawful permanent resident status does not establish it as the beneficiary's sponsor or the petitioner's successor for the purposes of this proceeding.

Section 106(c) of AC21, now section 204(j) of the Act, allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. As indicated in the AAO's January 24, 2013 decision, the language of AC21 directs that a Form I-140 petition "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid prior to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is the same or similar.

In other words, to be valid for purposes of section 106(c) of AC21, a petition must first be established as valid. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying Form I-140 petition be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant visa petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

This same understanding is reflected in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), where 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 Form 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 a Form I-140 petition could not be revoked." *Id.*

To be considered valid in harmony with related provisions and with the statute as a whole, a Form I-140 petition must have been filed for a beneficiary entitled to the requested classification and must have been approved by a USCIS officer pursuant to his or her authority under the Act. In the present case, the record reflects that the visa petition was approved for a beneficiary whom the record does not establish as eligible for classification as a skilled worker under section 203(b)(3) of the Act.

Accordingly, the petition in the present case was not valid from the start and, therefore, does not “remain valid” for the purposes of porting under section 204(j) of the Act.

The revocation of the petition’s approval will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for 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 revocation of the petition’s approval is affirmed.

FURTHER ORDER: The director’s finding of fraud and/or willful misrepresentation, and the invalidation of the Form ETA 750, case number [REDACTED] are withdrawn.