

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: OFFICE: NEBRASKA SERVICE CENTER FILE:

JAN 03 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. § 11523(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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director) revoked the approval of the immigrant visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely filed, returning the case to the director for possible consideration as a motion. The director reconsidered the matter but affirmed his prior decision. The petitioner has again appealed the director's decision to the AAO. The appeal will be dismissed. The director's revocation of the approval of the petition will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian Specialty 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 accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. 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 will be considered, including new evidence properly submitted upon appeal.²

Procedural History

On May 8, 2012, the director revoked the approval of the visa petition, finding the beneficiary did not have the experience required by the labor certification. He also invalidated the underlying labor certification. The director based his decision on Department of Homeland Security (DHS) investigations that had found the qualifying employment experience claimed by the beneficiary on the labor certification to be fraudulent.³ On June 4, 2012, the petitioner appealed the revocation to the AAO.

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The director indicates that the petition was automatically revoked based on the fraudulent nature of the beneficiary's claimed employment. However, automatic revocation of the approval of an employment-based visa petition occurs only upon the invalidation of the underlying labor certification, the death of the petitioner or beneficiary, written notice of the withdrawal of the petition by the petitioner or the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). Instead, the director's decision, which followed notification to the petitioner, was for cause, pursuant to the regulation at 8 C.F.R. § 205.2(a), which allows for the revocation of a petition's approval when "the necessity for revocation comes to the attention of [USCIS]."

On February 1, 2013, the AAO rejected the appeal as untimely filed, but returned the matter to the director for possible consideration as a Motion to Reopen or Motion to Reconsider. On April 8, 2013, the director granted the Motion to Reconsider. He concluded, however, that although the petitioner had submitted sufficient evidence to establish the beneficiary's employment with the [REDACTED] "doubt and problems" still existed with respect to the petition as the petitioner had submitted no evidence to demonstrate the beneficiary's employment with the [REDACTED]. Therefore, the director found that the petitioner had not overcome the reasons for revocation and affirmed his prior decision.

On April 26, 2013, the petitioner appealed the director's decision to the AAO, asserting that the director had erred in affirming his revocation of the approval of the petition based on the beneficiary's fraudulent claim of having been employed by the [REDACTED]. On appeal, counsel contends that as the beneficiary's two years of employment with the [REDACTED] satisfy the experience requirements of the labor certification, her claim of employment at the [REDACTED] is "immaterial to meeting the requirements of the ETA 750 and . . . the previously approved I-140." As a result, counsel asserts, the director should not have revoked the petition's approval.

On August 29, 2013, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to the petitioner, notifying it that the records of the Secretary of the Commonwealth, Corporations Division, Commonwealth of Massachusetts indicated that its owner had voluntarily dissolved the business on March 2, 2010. The NOID/RFE informed the petitioner that if it was no longer in business then no *bona fide* job offer existed and the appeal would be moot. It further indicated that even if the appeal could be otherwise sustained, the dissolution of the petitioner's business would subject the approval of the petition to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D). Additionally, the NOID/RFE notified the petitioner that, unlike the director, the AAO did not find the evidence submitted with the Motion to Reconsider to establish the beneficiary's employment experience with the [REDACTED]. The NOID/RFE further indicated that the record did not contain sufficient evidence to demonstrate the petitioner's ability to pay the beneficiary the proffered wage.

On September 27, 2013, counsel for the petitioner responded to the NOID/RFE, acknowledging the dissolution of the petitioner's business in March 2010. He asserted, however, that the closure of the petitioner's business did not subject the visa petition's approval to revocation as the beneficiary had "ported" to new employment under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Counsel stated that the beneficiary had accepted her new job subsequent to the October 3, 2008 approval of the Form I-140 petition and after the Form I-485, Application to Register Permanent Resident or Adjust Status, she had filed had been pending more than 180 days. To establish the petitioner's ability to pay, counsel submitted the petitioner's federal tax returns for the years 2005 through 2008.

On November 14, 2013, the AAO issued a second NOID, which notified the petitioner that having reviewed the additional evidence submitted in the September 27, 2013 response, the AAO continued to find the evidence of record insufficient to establish the beneficiary's qualifications or its ability to pay the proffered wage, and that it found the record to indicate that the beneficiary and/or the

petitioner might have attempted to procure a benefit under the Act through fraud or the willful misrepresentation of a material fact, which, if established, could render the beneficiary inadmissible to the United States under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C). On December 13, 2013, the petitioner submitted additional evidence to demonstrate the beneficiary's qualifications for the offered position and its ability to pay the proffered wage. This evidence, as well as that previously provided by the petitioner, is addressed in the following discussion of the record.

The AAO turns first to the question of whether the petitioner has established that the beneficiary is qualified to perform the duties of the offered position.

Beneficiary's Experience

To establish that a beneficiary is qualified for the offered position, a petitioner must demonstrate that, as of the priority date, a beneficiary had the qualifications stated on the labor certification application, as certified by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the priority date is March 25, 2005, the date on which the labor certification was accepted for processing by DOL.

Part A.14. of the labor certification requires the beneficiary to have two years of experience as an Specialty Cook or in a related occupation. Part B.15. of the labor certification, which the beneficiary signed under penalty of perjury on March 1, 2005 as being "true and correct," shows that she claimed the following employment experience:

- 12/01 to 12/04 – Cashier/Manager, [REDACTED]
- 01/99 to 02/99 – Indian cook, [REDACTED]
and
- 10/95 to 10/97 – Indian Special Cook, [REDACTED]

In its August 29, 2013 NOID/RFE, the AAO notified the petitioner that it did not find the record to establish the beneficiary's employment with the [REDACTED] despite the director's finding that the petitioner had submitted sufficient evidence of that employment.⁵ Specifically, the AAO informed the petitioner that it would not accept the experience letter signed by [REDACTED] the manager of the [REDACTED] which had been submitted by the petitioner pursuant to the regulation at 8 C.F.R. § 204.5(l)(3), which states:

⁴ The beneficiary's résumé, submitted with the Form I-140 petition, reflects that her employment with the [REDACTED] began January 1998, not January 1999. The experience letter submitted in support of her employment with the [REDACTED] also indicates a January 1998 start date.

⁵ The AAO is never bound by a decision of a service center or district director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

(ii) *Other documentation –*

(A) *General.* 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 AAO questioned the reliability of the letter, which, although written on [REDACTED] letterhead, had been signed on February 27, 2005, a date by which the [REDACTED] had been out of business for more than five years. It also informed the petitioner that the statements submitted by the beneficiary's former co-workers concerning her employment did not satisfy the regulation's requirement that claims of experience be supported by letters from a beneficiary's prior employers.

The petitioner subsequently submitted a September 6, 2013 sworn statement from [REDACTED] who identifies himself as the former partner of Mr. [REDACTED] who died in 2006. In his affidavit, Mr. [REDACTED] attests to the beneficiary's dates of employment and describes her duties. However, the AAO in its November 14, 2003 NOID also questioned the reliability of Mr. [REDACTED] statement, noting that, in a June 19, 2012 affidavit, Mr. [REDACTED] had appeared to indicate that, while a business partner of Mr. [REDACTED] he was not involved in the operations of the [REDACTED] which was "wholly operated" by Mr. [REDACTED]

In a December 13, 2013 response to the November 14, 2013 NOID, counsel for the petitioner asserts that the AAO has drawn an erroneous conclusion from Mr. [REDACTED] 2012 affidavit and that he, as a partner in the [REDACTED] served in a supervisory capacity over the beneficiary and, therefore, is in a position to confirm her experience. As further evidence of Mr. [REDACTED] authority, counsel has submitted a third affidavit from Mr. [REDACTED] dated December 5, 2013, in which Mr. [REDACTED] states that he was a partner in the [REDACTED] until 1999, when the partnership ended and the restaurant closed. Mr. [REDACTED] also states that he "had full knowledge of all the employees that worked in [the [REDACTED]] from October 1993 to December 1999 and that he had "full knowledge about [the beneficiary] and her [duties] and responsibilities," as indicated in his prior affidavit.

While Mr. [REDACTED] most recent affidavit is noted, the AAO does not find it to establish him as the beneficiary's employer for the purposes of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). His statement does not explain his business partnership with Mr. [REDACTED], describe his involvement in [REDACTED] operations or indicate that the AAO has misinterpreted his 2012 statement that Mr. [REDACTED] "wholly operated" the [REDACTED]. Neither does he state that his knowledge of the beneficiary's duties and responsibilities was gained as a result of any actual involvement in restaurant operations. Further, the record contains no documentary evidence that would establish Mr. [REDACTED] involvement in the [REDACTED]. Instead, the lease agreement for the land on which the [REDACTED] was located identifies only Mr. [REDACTED] as the lessee, while a November 5, 2011 affidavit signed by the individual who leased the land to Mr. [REDACTED] identifies Mr. [REDACTED] as the owner of the [REDACTED]. Documentation of the amount of rent to be collected from the [REDACTED] for use of the property, issued by the [REDACTED] also identifies only Mr. [REDACTED]. Further, Mr. [REDACTED] name is the only name reflected on the business registration

certificate issued October 30, 1993 by the Magistrate of [REDACTED] District. An October 15, 2011 certificate issued by [REDACTED] reflects that on December 1, 1999, the [REDACTED] was closed by its owner, [REDACTED].

Therefore, while Mr. [REDACTED] may have had a financial partnership with Mr. [REDACTED] the record fails to demonstrate that this partnership resulted in any actual involvement with or knowledge of the operations of the [REDACTED] and, therefore, that he is knowledgeable about any aspect of the beneficiary's employment.

Although the petitioner has indicated that no documentary evidence is available to establish the beneficiary's employment by the [REDACTED] it has failed to support this assertion with any documentary evidence or to establish that secondary evidence may be accepted under the provisions of 8 C.F.R. § 103.2(b)(2). 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)). The record contains no documentation of its attempts to obtain records retained by [REDACTED] government authorities that could serve to identify the beneficiary as an employee of the [REDACTED] during the period 1995-1997. Neither has it submitted evidence to demonstrate that such records are unavailable.⁶ Accordingly, the record does not establish that the beneficiary had the two years of experience required by the labor certification as of the March 25, 2005 priority date.

Moreover, as indicated by the AAO in its November 14, 2013 NOID, the beneficiary's claim of employment at the [REDACTED] in [REDACTED] in 1999, which the director found to be fraudulent and which the petitioner has not rebutted, also supports a finding that the petitioner has not demonstrated the beneficiary's qualifications for the offered employment. 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). On appeal, counsel for the petitioner asserts that "the existence or lack thereof of the [REDACTED] is completely immaterial to the fact that the material issue in this case, the required two years of experience under the INA, [has] been met." However, the AAO finds the beneficiary's false claim of having been employed at the [REDACTED] and the fraudulent letter submitted in support of that experience to cast serious doubt on her claim of having been employed by the [REDACTED] employment that, as just noted, is not established by the record. For this reason, as well, the AAO does not find the petitioner to have demonstrated that the beneficiary is qualified for the offered position.

On appeal, counsel has asserted that *Matter of Ho* does not apply in the instant case as it relates to family-based petitions and, further, that, unlike the beneficiary in *Matter of Ho*, the eligibility of the

⁶ The petitioner has provided a statement from an accountant at [REDACTED] who states that the beneficiary has no tax records that would establish her employment at the [REDACTED] from 1995 to 1997 as she did not earn sufficient income to pay taxes. This statement, however, does not, in the absence of supporting documentary evidence, establish the absence of tax records for the beneficiary. *Matter of Soffici* at 165.

present beneficiary is not in question. However, counsel offers no legal basis for his assertion that *Matter of Ho* may be applied only in family-based immigration cases and his assertion alone is not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as just discussed, the beneficiary's eligibility in this matter, i.e., her two years of employment with the [REDACTED] has not been established by the record. Accordingly, counsel's assertions regarding the AAO's inappropriate reliance on *Matter of Ho* are not persuasive.

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."⁷ 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, for the reasons just discussed, the record fails to establish that the beneficiary had the two years of experience required by the labor certification as of the March 25, 2005 priority date. As a result, the AAO finds the instant petition to have been approved in error. Accordingly, it will affirm the director's May 8, 2012 revocation of the petition's approval under section 205 of the Act.

The AAO does not, however, find the record to contain sufficient evidence to support a finding that the beneficiary and/or petitioner attempted to procure a benefit under the Act through the willful misrepresentation of a material fact pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

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). A misrepresentation is material where the application involving the misrepresentation should be denied

⁷ 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.

on the true facts, or where the misrepresentation tends to shut off a line of inquiry that is relevant to eligibility and which might well have resulted in a proper determination that the petition be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Attempting to procure a benefit under the Act through fraud or the willful misrepresentation of a material fact may render a beneficiary inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). If it is determined that fraud or a willful misrepresentation of a material fact occurred in the labor certification application, a labor certification is subject to invalidation by USCIS pursuant to 20 C.F.R. § 656.30(d), which states:

After issuance, a labor certification is subject to invalidation by [USCIS] 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”

Here, the record contains insufficient evidence on which to determine that the beneficiary's fraudulent claim to having been employed by the [REDACTED] constitutes the willful misrepresentation of a material fact discussed in *Matter of S-- and B--C--*, *supra*. It is not clear from a review of the record that the labor certification would have been denied based on the “true facts” of this case or that the beneficiary's fraudulent employment claim shut off a line of inquiry that was relevant to her eligibility that would likely have resulted in the denial of the labor certification. Accordingly, the director's invalidation of the labor certification will be withdrawn.

Ability to Pay

Beyond the decision of the director, the AAO finds that the petitioner has failed to establish its ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2).

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS then examines 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.⁸ If neither the petitioner's net income nor its net

⁸ *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

current assets is 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).

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.

To establish its ability to pay the proffered wage of \$13.39 per hour or \$27,851.20 per year (based on a 40-hour week), the petitioner has submitted its federal tax returns for the years 2005 through 2008, asserting that as the beneficiary ported to new employment under the provisions of AC21 in late 2008, it is not required to establish its ability to pay beyond 2008. Although, the AAO does not find the beneficiary's eligibility to port to a new employer under section 106(c) of AC21, now section 204(j) of the Act, to be established, it has, nevertheless, reviewed the record to determine the extent to which the submitted tax returns demonstrate the petitioner's ability to pay the proffered wage during the period 2005 through 2008.

The petitioner has not employed the beneficiary and, therefore, cannot establish its ability to pay the proffered wage based on wages paid to the beneficiary. Moreover, the AAO does not find the record to establish the petitioner's ability to pay the proffered wage based on its net income or net current assets, as the petitioner's 2008 tax return reports negative net income of \$18,317.00 and no net current assets.

To overcome the AAO's finding that it has not established its ability to pay the proffered wage in 2008, the petitioner has submitted a December 4, 2013 statement from the spouse and legal guardian of its owner. In her statement, the spouse of the petitioner's owner states that, in 2008, the petitioner had a gross profit of \$77,056.00 and with \$38,452.00 in outdated inventory written off, it had the ability to pay wages in the amount of \$61,860.00. She further indicates that if the value of the inventory is not written off, the petitioner had a net profit of \$20,135.00 for the year.

The AAO, however, does not consider depreciation in determining a petitioner's ability to pay. As noted by the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009):

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).

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

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

River Street Donuts at 118.

Further, the AAO does not find the claim that the petitioner had net income of \$20,135.00 in 2008 to be supported by the record. Instead, as previously indicated, the petitioner's 2008 tax return reports negative net income of \$18,317.00. However, even if \$20,135.00 figure cited by the owner's spouse were accurate, it would not establish the petitioner's ability to pay as it falls \$7,716.20 short of the proffered wage of \$27,851.20. Therefore, the petitioner's December 4, 2013 statement does not overcome the finding that neither its net income nor its net current assets establish its ability to pay the beneficiary the proffered wage in 2008. Moreover, the petitioner has provided no evidence of its ability to pay the proffered wage to a second beneficiary for whom it filed a Form I-140 petition in 2002.

The AAO's November 14, 2013 NOID informed the petitioner that to establish its ability to pay in this matter, it was required to demonstrate its ability to pay the proffered wage to this second individual, as well as to the beneficiary. At that time, the AAO provided the petitioner with the receipt number for the Form I-140 petition it had filed in 2002. In response, counsel for the petitioner contends that "it is unjust and completely nonsensical to request information on someone who has absolutely nothing to do with the case at hand" and that the case receipt number provided by the AAO is insufficient to identify the second beneficiary, now that the petitioner's owner is incapacitated. Counsel also states that if the petitioner were required to gather information on all of its employees who have applied for benefits under the INA, the result would be nothing more than a wild goose chase, which would ultimately lead to an obscure end result."

Although the petitioner contends that its ability to pay the second beneficiary the proffered wage is not relevant in this proceeding, USCIS requires that a petitioner establish a continuing ability to pay the combined proffered wages of all beneficiaries for whom it has filed employment-based visa petitions from the relevant priority date onward. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting

Reg'l Comm'r 1977). Moreover, counsel's assertion that the AAO provided insufficient information to identify the second Form I-140 beneficiary is unpersuasive. USCIS records indicate that the petitioner has filed an employment-based immigrant visa petition for only one individual (Receipt Number, [REDACTED], not the multiple petitions asserted by the petitioner's counsel. Accordingly, the AAO does not find its request to the petitioner for evidence of its ability to pay this single individual the proffered wage for the employment offered him or her to be overly burdensome.

The director approved the petition on October 1, 2008. At that time, the record did not reflect that the petitioner had the ability to pay both the instant beneficiary and the beneficiary of the visa petition filed in 2002. As such, the director's decision approving the petition was in error and USCIS finds good and sufficient cause for revoking the approval of the petition as of the date of its approval.

The record also fails to establish that factors similar to those in *Sonegawa* exist in the instant case and, therefore, does not permit a conclusion that the petitioner has the ability to pay the proffered wage despite its inability to demonstrate that its net income or net current assets are sufficient to do so. Accordingly, the petitioner has failed to establish a continuing ability to pay the proffered wage to the beneficiary since the priority date.

As the record does not establish the petitioner's ability to pay the proffered wage from the priority date onward, the AAO finds that the approval of the petition must be revoked for this reason as well.

Automatic Revocation

Additionally, the AAO finds even if the approval of the instant petition were not revocable under section 205 of the Act, it would be subject to automatic revocation under 8 C.F.R. § 205.1(a)(3)(iii)(D).

In the NOID/RFE it issued on August 29, 2013, the AAO informed the petitioner that the online records of the Secretary of the Commonwealth, Corporations Division, Commonwealth of Massachusetts indicated that the petitioner had been voluntarily dissolved as of March 2, 2010. The NOID/RFE notified the petitioner that if this information was accurate, its dissolution would result in the automatic revocation of the approval of the petition pursuant to the regulation at 8 C.F.R. § 205.1(a)(3)(iii)(D), which states that the approval of a petition under section 204 of the Act is revoked "[u]pon termination of the employer's business in an employment-based preference case under section 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

In the petitioner's response to the NOID/RFE, dated September 25, 2013, counsel acknowledged that the petitioner is no longer in business, but asserted that its dissolution is not relevant in the present case because the beneficiary is eligible to "port" to new employment under section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), now section 204(j) of the Act.

The AAO acknowledges that AC21 allows an application for adjustment of status to be approved despite the fact that an initial job offer is no longer valid. The language of AC21 states that the I-

140 “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, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petition has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. 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).

It is also noted that in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the 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 an alien who is entitled to the requested classification and must have been approved by a USCIS officer pursuant to his or her authority under the Act. Here, the instant 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 instant visa petition was not valid from the start and, therefore, does not “remain valid” valid for the purposes of porting under section 204(j) of the Act. Further, the approval of the instant petition was automatically revoked as of March 2, 2010, the date of the petitioner’s voluntary dissolution.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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 appeal will be dismissed and the director’s revocation of the visa petition will be affirmed.

[REDACTED]

(b)(6)

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ORDER:

The appeal is dismissed. The director's revocation of the petition's approval is affirmed.

FURTHER ORDER:

The director's invalidation of the Form ETA 750, case number [REDACTED], filed by the petitioner is withdrawn.