



U.S. Citizenship
and Immigration
Services

(b)(6)



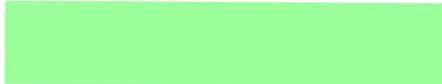
DATE: SEP 10 2014

OFFICE: TEXAS SERVICE CENTER

FILE: 

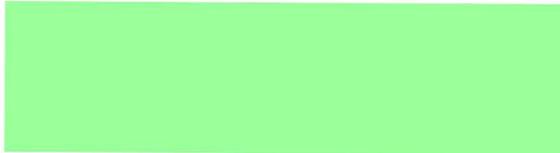
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as Skilled Worker or Professional Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1152(b)(3)(A)

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.

Thank you,

Jason Tu
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director), revoked the approval of the visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before us as a Motion to Reopen and a Motion to Reconsider. The Motion to Reopen will be granted. Our prior decision will be withdrawn. The director's revocation of the petition's approval will be withdrawn. The matter will be remanded to the director for action consistent with the following discussion and the issuance of a new decision.

The petitioner is a retail merchandise business. It seeks to employ the beneficiary permanently in the United States as a maintenance repairer 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 June 13, 2002, which is the date the labor certification was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d).

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on motion.¹ The record shows that the motion is properly filed and timely.

On the Form I-290B, Notice of Appeal or Motion, counsel² asserts that the petitioner has established that the beneficiary is qualified for the offered position of maintenance repairer and that it has the continuing ability to pay the beneficiary the proffered wage. In support of the visa petition, counsel submits new evidence relating to the petitioner's business status, its ability to pay the proffered wage and the experience on which the beneficiary claims to qualify for the offered position.

Procedural History

On March 22, 2004, United States Citizenship and Immigration Services (USCIS) approved the visa petition. On February 24, 2009, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner, informing it of the receipt of information that cast doubt on whether the offered position was a *bona fide* job offer, i.e., open to all qualified U.S. workers. On March 19, 2009, the petitioner responded with evidence of its recruitment efforts. The director considered the submitted evidence but did not find that it established that the petitioner had complied with DOL recruitment requirements. Accordingly, he revoked the petition's approval on May 19, 2009 with a finding of fraud against the petitioner.

On June 17, 2009, the petitioner appealed the director's decision to this office. On January 14, 2013, we properly rejected the appeal as untimely filed and returned the matter to the director for possible consideration as a motion. On February 1, 2013, the director granted the motion and again revoked the petition's approval, finding only that the petitioner had engaged in fraud or willful

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 Current counsel will be referred to as counsel throughout this decision. The petitioner's prior counsel, [REDACTED], will be referred to by name.

misrepresentation in the labor certification process. For this single reason, he invalidated the underlying labor certification pursuant to the regulation at 20 C.F.R. § 656.30(d).

The petitioner again appealed the director's decision. On June 28, 2013, we withdrew the director's finding of fraud against the petitioner and his invalidation of the labor certification, determining that the record contained insufficient evidence to support the director's conclusion that there had been fraud in the labor certification process. Nevertheless, we dismissed the appeal based on the petitioner's failure to establish either the beneficiary's qualifications for the offered position or its ability to pay the proffered wage.

On July 26, 2013, the petitioner filed a Motion to Reopen and a Motion to Reconsider.³ On May 1, 2014, we issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to the petitioner seeking additional evidence relating to the beneficiary's qualifying experience and its ability to pay the proffered wage. The petitioner responded to the NOID/RFE on June 17, 2014.

On July 3, 2014, we issued a Notice of Derogatory Information and Intent to Dismiss (NDI/NOID) to the petitioner, informing it that our review of online business records maintained by the Secretary of the Commonwealth of Massachusetts, Corporations Division, indicated that it had been voluntarily dissolved on December 12, 2013. The NDI/NOID also notified the petitioner that if it was no longer in business, then the visa petition was no longer supported by a *bona fide* job. The petitioner was given 30 days in which to submit a rebuttal and/or evidence of its continued existence. The petitioner timely responded to the NDI/NOID on August 4, 2014 with evidence of its dissolution.

Requirements for Motions to Reopen and Reconsider

The requirements for Motions to Reopen and Reconsider 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

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to

³ On motion, one of the issues raised by counsel is the representation provided the petitioner by its former counsel, [REDACTED]. Counsel contends that the petitioner complied with DOL recruitment requirements, but that Mr. [REDACTED] placed defective advertisements in circulation, advertisements that precluded U.S. workers from applying for the offered position. He asserts, however, that the petitioner cannot raise an ineffective assistance of counsel argument with regard to Mr. [REDACTED] since Mr. [REDACTED] has already been suspended and sanctioned for having violated his ethical and legal responsibilities. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Counsel's assertions regarding Mr. [REDACTED] do not, however, address the reasons that our June 28, 2013 decision affirmed the director's revocation of the petition's approval: insufficient evidence of the beneficiary's qualifications and the petitioner's failure to establish its ability to pay the proffered wage. Accordingly, counsel's assertions regarding Mr. [REDACTED] failure to provide the petitioner with adequate legal representation during the labor certification process will not be addressed in this decision.

establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Although we do not find the petitioner to have met the requirements for a Motion to Reconsider, the petitioner has stated new facts and has submitted new evidence relating to the beneficiary's qualifying experience and its ability to pay the proffered wage. Accordingly, the Motion to Reopen will be granted.

Withdrawal of Prior Decision

Although not raised by the petitioner on motion, our review of the record has noted that the June 28, 2013 dismissal of the appeal was based on evidentiary deficiencies that were not considered by the director in his decision and about which the petitioner had not previously been notified. Accordingly, we will withdraw our decision and remand the matter to the director for his review and the issuance of a new decision.

Prior to reaching his decision, the director shall provide the petitioner with the opportunity to respond to the issues discussed below, which, individually and collectively, support the revocation of the visa petition's approval.

Dissolution of Petitioner

As noted above, online records of the Secretary of the Commonwealth of Massachusetts, Corporations Division, indicate that the petitioner was voluntarily dissolved on December 12, 2013 and the petitioner does not dispute this information. However, in a July 31, 2014 letter submitted in response to the NDI/NOID issued on July 3, 2014, counsel asserts that the offered position identified in the labor certification remains a *bona fide* job offer since the petitioner has "transferred" the Form I-140 petition and underlying labor certification to a new employer, [REDACTED]. For the reasons discussed below, we do not agree.

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. Although USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer, such matters are 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 "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 successor-in-interest to the 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 entity must fully describe and document the transaction transferring

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 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).

ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as that originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of evidence that it is eligible for the immigrant visa in all respects.

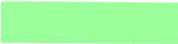
In the present case, the petitioner has submitted a copy of an undated statement purportedly signed by its president and the representatives of two other business entities, [REDACTED] and [REDACTED], for the purposes of establishing the continued viability of the labor certification. The statement indicates that the petitioner's assets were sold to [REDACTED] on November 23, 2013, while the instant Form I-140 petition and labor certification were transferred to [REDACTED]. However, as just discussed, a petitioner cannot transfer an employment-based visa petition or the labor certification supporting that petition to another employer unless that employer is its successor-in-interest. In the present case, the record does not demonstrate that [REDACTED] is the petitioner's successor.⁵

Establishing a valid successor relationship between a petitioner and a new employer first requires the description and documentation of the transfer of the petitioner's ownership or a relevant part thereof to the new employer. Such documentation may include purchase agreements, bank statements reflecting the payment or receipt of funds by the involved parties, audited financial statements reflecting the new employer's acquisition of the petitioner's assets and obligations, evidence of the new employer's acquisition of the petitioner's inventory and equipment, and deeds or other documentation relating to any transfer of real estate. In the present case, however, the petitioner has submitted a statement that indicates its assets have been sold to [REDACTED]. This evidence, which we find to demonstrate that there has been no transfer of any part of the petitioner's ownership to [REDACTED], precludes the petitioner from establishing Abjibapa as its successor-in-interest.⁶ The petitioner does not claim [REDACTED] as a successor-in-interest and the record contains no evidence that would support such a claim.

As the petitioner was dissolved on December 12, 2013 and the record fails to establish that it has a successor-in-interest for immigration purposes, the Form I-140 petition is no longer supported by a valid labor certification and is, therefore, moot. On this basis alone, the visa petition's approval is

⁵ The header on the submitted statement indicates that it was prepared for USCIS and our office. Therefore, it does not constitute independent, objective evidence of the purported transfers and is insufficient to establish a successor-in-interest between the petitioner and either of the identified business entities. Inconsistencies must be resolved by the submission of "independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁶ The record also fails to document that the job opportunity with [REDACTED] is the same as that offered on the labor certification and, further, lacks the evidence necessary to establish that [REDACTED] is eligible for the visa in all respects, including evidence establishing the company's ability to pay the proffered wage. We note that the petitioner previously reported that the beneficiary had ported to employment at [REDACTED] in 2006 under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Records of the Secretary of the Commonwealth of Massachusetts, Corporations Division, reflect that [REDACTED], like the petitioner, was dissolved on December 12, 2013.



automatically revoked unless the petitioner establishes that a valid successor-in-interest existed prior to its dissolution.⁷

USCIS Error in Approval of Petition

Section 205 of the Act, 8 U.S.C. § 1155, states 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 realization by the director that a petition was approved in error may be good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). For the reasons discussed below, the record indicates that USCIS erred in approving the instant visa petition on March 22, 2004 and that its approval is properly revoked pursuant to section 205 of the Act. However, as discussed above, the petitioner has not had an opportunity to address these issues and the matter will, therefore, be remanded.

Beneficiary Qualifications

To establish that a beneficiary is qualified to perform the duties of the offered position, the petitioner must demonstrate that the beneficiary met all of the requirements set forth in the labor certification by the priority date of the visa petition, which in this case is June 13, 2002. 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, United States Citizenship and Immigration Services (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).

⁷ The regulation at 8 C.F.R. § 205.1 states:

(a) *Reasons for automatic revocation.* The approval of a petition or self-petition made under section 204 of the Act and in accordance with part 204 of this chapter is revoked as of the date of approval:

....

(3) If any of following circumstances occur before the beneficiary’s or self-petitioner’s journey to the United States commences or, if the beneficiary or self-petitioner is an applicant for adjustment of status to that of a permanent resident, before the decision on his or her adjustment application becomes final:

....

(iii) *Petitions under section 203(b), other than special immigrant juvenile petitions.*

....

(D) Upon termination of the employer’s business in an employment-based preference case under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act.

In the present case, the labor certification at Part A.14. requires the beneficiary to have two years of experience as a maintenance repairer. The beneficiary states in Part B.15. of the labor certification that he was employed full-time as a maintenance repairer by [REDACTED] in [REDACTED] India from January 1991 until January 1993.

Our June 28, 2013 decision found that the record did not establish that the beneficiary had the two years of experience required by the labor certification. Specifically, we noted that the record failed to explain how the beneficiary, who would have been 16 years-of-age when he began working for [REDACTED] could have been employed in a position requiring the performance of specialty electrical and plumbing work. We also observed that there was an unresolved discrepancy between the period of employment claimed by the beneficiary in the labor certification, which was January 1991 to January 1993, and that reported in the January 17, 2004 and August 3, 2009 experience letters from [REDACTED], which was January 1991 until December 1993. We found the discrepancy to prevent the petitioner from establishing that the beneficiary had the two years of full-time experience required by the labor certification.

On motion, counsel initially asserted that the beneficiary had simply provided an incorrect date for the termination of his employment with [REDACTED] and that his error had been cured by the petitioner's submission of the experience letters provided by [REDACTED] the owner of [REDACTED]. However, the NOID/RFE issued on May 1, 2014 again raised the discrepancy between the dates of employment reported in Mr. [REDACTED] statements and those claimed by the beneficiary on the labor certification, and notified the petitioner that it must resolve this discrepancy in order to establish the beneficiary's eligibility for the offered position. The NOID/RFE also informed the petitioner that the record failed to demonstrate that [REDACTED] had employed the beneficiary on a full-time basis, as indicated on the labor certification.

To resolve the above issues, the NOID/RFE requested independent, objective evidence of the beneficiary's full-time employment with [REDACTED], including any business records or reports that it might have filed with Indian governmental authorities identifying the beneficiary as one of its full-time employees, or any tax or social benefits records for the beneficiary that would reflect income earned from [REDACTED]. In the event that the petitioner was unable to obtain the preceding documents, the NOID/RFE indicated that the petitioner should provide evidence of its efforts to obtain this information and submit reliable secondary evidence demonstrating the beneficiary's employment as defined by the regulation at 8 C.F.R. § 103.2(b)(2), e.g., copies of any notices issued to the beneficiary by [REDACTED] regarding hours of employment or wages. The NOID/RFE also instructed the petitioner to submit the beneficiary's educational records from 1990 through the present, including diplomas, degrees and certificates from any high schools, colleges, universities, technical institutes and other training or educational institutions he might have attended. Finally, the notice advised the petitioner that failure to submit evidence precluding a material line of inquiry would result in the dismissal of the motion pursuant to 8 C.F.R. § 103.2(b)(14).

In response to the NOID/RFE, the petitioner provided a new, undated affidavit from Mr. [REDACTED] in which he states that the beneficiary worked for [REDACTED] as a maintenance repairer on a full-time basis from January 1991 to January 1994, a time period that differs from the employment period

indicated by Mr. [REDACTED] in his January 17, 2004 and August 3, 2009 statements, as well as that claimed by the beneficiary on the labor certification. To explain his revised testimony, Mr. [REDACTED] asserts that he previously stated that the beneficiary had been employed by [REDACTED] from January 1991 to December 1993 because the beneficiary had “demanded” a certificate specifying this time period. In support of Mr. [REDACTED] revised employment timeline, the petitioner has provided an undated affidavit from [REDACTED] an individual who claims to have worked with the beneficiary at [REDACTED]. Mr. [REDACTED] states that the beneficiary was employed full-time from January 1991 until January 1994 by [REDACTED] as a maintenance repairer.

The preceding statements do not, however, resolve the inconsistencies in the beneficiary’s employment experience identified by the NOID/RFE. Inconsistencies must be resolved by the submission of “independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *Matter of Ho*, at 591-92. The petitioner has failed to submit the documentary evidence requested by the NOID/RFE and, further, has not claimed that such documentation is unavailable or submitted any evidence that it attempted to obtain this documentation. The petitioner has also not provided the educational records requested by the NOID/RFE to establish that, at 16 years-of-age, the beneficiary had the skills necessary to perform specialty electrical and plumbing work required by [REDACTED].⁸ Moreover, the new statement from Mr. [REDACTED], which indicates that his prior experience letters did not accurately report the period of the beneficiary’s employment, raises additional questions as to the reliability of all three of his statements and casts further doubt on the qualifying experience claimed by the beneficiary on the labor certification. 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*, at 591-92.⁹

The record does not establish that, as of the June 13, 2002 priority date, the beneficiary had the two years of experience as a maintenance repairer required by the labor certification. For this reason, we find that USCIS erred in approving the visa petition on March 22, 2004 and that the petition’s approval may be revoked for good and sufficient cause pursuant to section 205 of the Act. See *Matter of Ho*, at 590. However, as noted above, the director’s decision did not address this issue. We will, therefore, remand the matter to allow the director to issue a Notice of Intent to Revoke (NOIR) on this ground.

⁸ As the NOID/RFE informed the petitioner, the regulation at 8 C.F.R. § 103.2(b)(14) provides that failure to submit requested evidence precluding a material line of inquiry shall be grounds for denying a benefit request. Accordingly, the visa petition is also subject to denial on this basis.

⁹ Information provided in a report from an overseas investigation unrelated to the present matter indicates that the [REDACTED] began operations in 2009. This information, although we have not relied upon it to reach a decision in this case, raises further questions regarding the beneficiary’s claim on the labor certification to have been employed by [REDACTED] from January 1991 to January 1993, as well as the experience statements submitted in support of that claim. Therefore, in any future proceedings, the petitioner must establish through the submission of independent, objective evidence, e.g., tax documents, articles of incorporation, business licenses, or rental/purchase agreements, that [REDACTED] was in operation at the time the beneficiary claims to have been employed there.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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

A petitioner must establish that its job offer to a 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 a job offer is realistic as of the petition's priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. Where a petitioner has filed 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 sponsored worker. *See Matter of Great Wall*, at 144-145; *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 was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has 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 pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).¹⁰ If the petitioner's net income during the required 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 a petitioner's net income or net current assets do not establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its

¹⁰ 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).

business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it 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 the present case, the labor certification establishes that the proffered wage is \$16.24/hour or \$29,556.80/year, based on a 35-hour week. Accordingly, the petitioner must establish its ability to pay the proffered annual wage of \$29,556.80 to the beneficiary from the June 13, 2002 priority date until March 22, 2004, the date on which the instant petition was initially approved.

The NOID/RFE issued on May 1, 2014, informed the petitioner that the 2001 1120S, U.S. Income Tax Return for an S Corporation, submitted for the record did not establish its continuing ability to pay the proffered wage beginning on the June 13, 2002 priority date and requested the submission of the company's 2002 federal tax return or its 2002 annual report or audited financial statement, the most recent financial evidence of the petitioner's ability to pay at the time of the March 22, 2004 approval of the visa petition. The NOID/RFE also notified the petitioner that USCIS databases indicated that on the date it filed the labor certification in the present case, it had already filed an employment-based immigrant visa petition on behalf of another individual and must, therefore, demonstrate that, on March 22, 2004, it had the ability to pay the proffered wages of both sponsored workers from the June 13, 2002 priority date forward. The NOID/RFE requested the second beneficiary's name, the receipt number and priority date of the petition filed on behalf of this individual, the proffered wage listed on the labor certification supporting the relating visa petition and earnings statements, Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement, 1099 MISC or other documentation establishing the wages, if any, paid to this beneficiary in 2002.

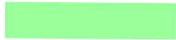
The NOID/RFE also informed the petitioner that it could submit any other evidence it wished in support of a claim that, like the petitioner in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the totality of its circumstances established its ability to pay the proffered wage.

In its June 17, 2014 response to the NOID/RFE, the petitioner submitted its tax returns for the years 2002 through 2004, but provided no information regarding the second beneficiary noted above. Therefore, although the petitioner's 2002 return reflects net income of \$37,280.00 and net current assets of \$70,821.00, either of which may be sufficient to pay the beneficiary the proffered wage of \$29,556.80, it has not established its continuing ability to pay the wages of both sponsored workers beginning on the June 13, 2002 priority date.

In that the record does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the June 13, 2002 priority date, we find that USCIS erred in approving the petition on March 22, 2004. For this reason as well, the approval of the visa petition is subject to revocation for good and sufficient cause under section 205 of the Act. *See Matter of Ho*, at 590.

For the reasons stated above, the record supports the revocation of the approval of the instant visa petition. However, as these issues have not been previously considered by the director, the matter

(b)(6)



NON-PRECEDENT DECISION

Page 12

will be remanded for his review and the issuance of a new decision. Prior to issuing his decision, the director shall provide the petitioner with the opportunity to respond to the issues discussed above.

ORDER: The Motion to Reopen is granted. The prior decision of the AAO is withdrawn. The director's decision of February 1, 2013 is withdrawn and the matter is remanded to the director for action consistent with the above discussion, including the issuance of a new decision.