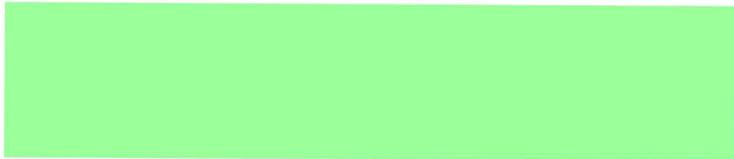




U.S. Citizenship
and Immigration
Services

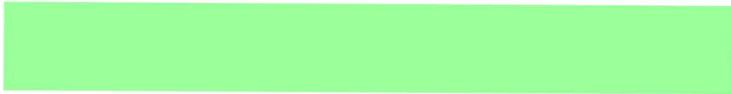
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DATE: **SEP 22 2014** OFFICE: TEXAS SERVICE CENTER

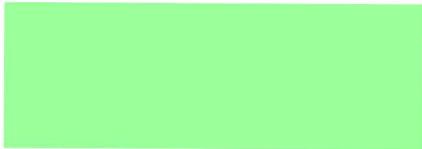
FILE: 

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 employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's Form I-485, Application to Register Permanent Resident or Adjust Status, the director served the petitioner¹ with notice of intent to revoke the approval of the petition (NOIR).² The petitioner submitted a response to the NOIR. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a nonprofit organization. It seeks to permanently employ the beneficiary in the United States as a pastoral assistant. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).³ The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

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." 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).

The director's NOR concluded that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and that the petitioner had not established that the beneficiary possessed the minimum experience required to perform the offered position by the priority date. The director had good and sufficient cause to revoke the approval of the petition, as the petition was approved in error. We will discuss the issues in detail below.

We note that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record

¹ The petitioner's name is listed on the petition as [REDACTED]; however, the petitioner's tax returns and website indicate that the petitioner's actual name is [REDACTED].

² On the Form I-290B, the petitioner's counsel states that the "revocation was issued without notice of intent to revoke, in violation of the regulations and procedures promulgated within the [Immigration and Nationality Act]." This statement is incorrect, as a NOIR was issued and counsel's law firm responded to the NOIR on behalf of the petitioner.

³ 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet its burden of proof.

Regarding the petitioner's ability to pay the proffered wage, the director quoted the regulation at 8 C.F.R. § 204.5(g)(2), which requires the petitioner to establish that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The regulation requires the petitioner to provide annual reports, federal tax returns or audited financial statements and states that, in appropriate cases, additional evidence such as bank account records and personnel records may be submitted by the petitioner or requested by USCIS. The director stated in the NOIR that during a site visit to the petitioner's address conducted by USCIS, the signatory on the petition, [REDACTED] misstated the number of petitions filed by the petitioner. The director also stated that the petitioner was unable to document payment of any wages to the beneficiaries of its other petitions and that no W-2 wages were reported by the petitioner.⁴

Regarding the beneficiary's qualifications, the director stated in the NOIR that the letter submitted as evidence of the beneficiary's experience contradicts the basic principles of Islam. The director stated that he beneficiary is female and that the letter indicates that she performed worship services, which are normally conducted by men. The director also stated that the letter indicates that the beneficiary conducted baptisms; however, baptisms are not conducted in Islam. The director stated that it appears that the beneficiary misrepresented her prior work experience.

The NOIR sufficiently detailed the evidence of record. The issues addressed in the NOIR would warrant a denial if unexplained and un rebutted, and thus, the NOIR was properly issued for good and sufficient cause.

The appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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 upon appeal.⁵

⁴ If a petitioner has filed multiple petitions, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

⁵ 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).

As set forth in the director's October 1, 2013 NOR, the two primary issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and whether or not the beneficiary possessed the minimum experience required to perform the offered position by the priority date.

Ability to Pay the Proffered Wage

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on July 19, 2002. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840.00 per year based on a 40 hour work week).

The record indicates the petitioner is structured as a nonprofit organization and filed its tax returns on IRS Form 990, Return of Organization Exempt from Income Tax. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30.⁶ On the Form ETA 750, signed by the beneficiary on June 27, 2002, the beneficiary did not claim to have worked for the petitioner.

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

⁶ The petitioner's fiscal year 2002 tax return covers the priority date of July 19, 2002.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not employ and pay the beneficiary in any relevant period.⁷

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income⁸ figure reflected on the petitioner's federal income tax return, 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). 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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

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

⁷ In response to the NOIR, the petitioner indicated that the NOIR implied that the beneficiary must be employed by the petitioner prior to her obtaining legal permanent residence. However, the NOIR referred to the payment of wages to the beneficiaries of the petitioner's other petitions, including religious worker petitions it had filed for other beneficiaries. It did not state that the petitioner had to employ the beneficiary prior to her obtaining lawful permanent residence.

⁸ A nonprofit organization issues a statement of activities (income statement). The statement of activities reports revenues and expenses according to three classifications of net assets: unrestricted net assets, temporarily restricted net assets and permanently restricted net assets. The statement of activities explains how net assets changed from one date to another. Net assets generally increase when revenues are recorded and decrease when expenses are recorded. See FASB Accounting Standards Codification® Topic 958 at <https://asc.fasb.org> (accessed August 8, 2014). In a for-profit business, revenues minus expenses is called net income. In a nonprofit organization, the change in net assets is a surplus or deficit that is carried forward.

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, 558 F.3d at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The petitioner’s IRS Forms 990, Return of Organization Exempt from Income Tax, demonstrated its surplus (or deficit) as detailed in the table below:

- In fiscal year 2002, the petitioner’s IRS Form 990 stated a surplus of \$76,833.⁹
- In fiscal year 2003, the petitioner’s IRS Form 990 stated a deficit of -\$68,739.
- In fiscal year 2004, the petitioner’s IRS Form 990 stated a surplus of \$33,780.

Therefore, for fiscal year 2003, the petitioner did not establish that it had sufficient surplus to pay the proffered wage. Further, the petitioner has provided no evidence of its ability to pay the proffered wage subsequent to fiscal year 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets.¹⁰ Net current assets are the difference between the petitioner’s current assets and current liabilities.¹¹ If the total of a

⁹ For years prior to 2008, surplus (or deficit) is shown on IRS Form 990, Part I at line 18.

¹⁰ In a nonprofit organization, current assets minus current liabilities is also known as net working capital or net working deficit.

¹¹ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and

corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's did not submit audited financial statements detailing its net current assets.¹² Therefore, for fiscal year 2003, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Further, the petitioner has provided no evidence of its ability to pay the proffered wage subsequent to fiscal year 2004. At the time of the petition's approval in August, 2006, the petitioner had not established the ability to pay the proffered wage to the instant beneficiary. The record also demonstrates that as of the petition's approval, the petitioner had not established its ability to pay the proffered wages to the beneficiaries of its other immigrant visa petitions. As such, the director's decision to approve the petition was erroneous, and the director had good and sufficient cause to revoke the approval of the petition based on the petitioner's failure to establish the ability to pay the proffered wages to the beneficiary.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2002 and 2004. Further, in its response to the director's NOIR, the petitioner did not address the fact that it was unable to document payment of any wages to the beneficiaries of its other petitions and that it reported no W-2 wages.

On appeal, the petitioner asserts that the director failed to consider its net assets of \$451,617 in 2003¹³ as evidence of its ability to pay the proffered wage. However, we do not use net assets in our determination of a nonprofit petitioner's ability to pay the proffered wage, as its net assets may not be available to pay the wage due to restrictions on their use. Net assets do not generally represent assets that can be liquidated during the course of normal business. The petitioner has not established that its net assets were available to pay the proffered wages of the beneficiaries of all of its petitions in fiscal year 2003.¹⁴

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her

accrued expenses (such as taxes and salaries). *Id.* at 118.

¹² For years prior to 2008, Part IV of IRS Form 990 provides the organization's balance sheet. The organization's assets and liabilities are listed in order of their liquidity or maturity. However, IRS Form 990 does not indicate which assets and liabilities are current.

¹³ Form 990, page 1, Part I, Line 21.

¹⁴ The petitioner's fiscal year 2003 tax return shows that its net assets consisted of \$50,642 in unrestricted cash and \$400,975 in permanently restricted funds.

clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not established its historical growth, the overall number of employees, the occurrence of any uncharacteristic expenditures or losses, its reputation, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on 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 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: blank

High School: blank

College: blank

College Degree Required: blank

Major Field of Study: blank

TRAINING: blank

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: blank

The labor certification also states that the beneficiary qualifies for the offered position based on

experience as a pastoral assistant with [REDACTED] India from July 1996 until September 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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 an experience letter from [REDACTED] letterhead stating that [REDACTED] employed the beneficiary as a pastoral assistant from July 1996 until September 1999 on a full-time basis. The letter lists her duties, including assisting pastors in conducting worship services and planning baptisms. The letter does not provide the title of the signatory of the letter.

As previously noted, the director stated in the NOIR that the letter from [REDACTED] contradicts the basic principles of Islam. The director stated that he beneficiary is female and that the letter indicates that she performed worship services, which are normally conducted by men. The director also stated that the letter indicates that the beneficiary conducted baptisms; however, baptisms are not conducted in Islam. The director stated that it appears that the beneficiary misrepresented her prior work experience.

In response to the NOIR, the petitioner submitted a letter from Mr. [REDACTED] letterhead stating that there was an error in translating the word “baptism” in the letter from [REDACTED].⁵ He states that the word “baptism” in the letter was used to translate the Arabic word “Aqiqah” and that, while baptism and Aqiqah “might have some similarities... they are two different religious customs and cannot be used to describe one another or use as a translation.” The director stated in the NOR that the letter does not list the title of its signatory and therefore does not comply with the regulations.

¹⁵ Based on Mr. [REDACTED] letter, it appears that a foreign language document was translated into English. The record does not contain the foreign language version of the letter from [REDACTED] that was translated into English. The regulation at 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

Because the petitioner failed to submit the foreign language version of the letter, and failed to submit a certified translation of the letter, we cannot determine whether the letter supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the letter from [REDACTED] is not probative and will not be accorded any weight in this proceeding.

On appeal, the petitioner submits two additional letters from Mr. [REDACTED] letterhead dated October 25, 2013. One letter is identical to the experience letter from [REDACTED] stating that [REDACTED] employed the beneficiary as a pastoral assistant from July 1996 until September 1999 on a full-time basis with one exception: it omits the word "baptism" from her list of duties. The duplication of the letters creates doubt that either [REDACTED] wrote the letters. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The record does not contain independent, objective evidence of the beneficiary's full-time employment with [REDACTED] such as paystubs or payroll records evidencing payment of the wages referenced in the letters.¹⁶

The second letter from Mr. [REDACTED] submitted on appeal is identical to the letter from Mr. [REDACTED] submitted in response to the NOIR with two exceptions: it has a date added and it includes the title of "Chairman" under Mr. [REDACTED] name. This letter appears to have been submitted to correct the deficiency noted by the director in the NOR: that the letter does not list the title of its signatory. However, the duplication of the letters creates doubt that Mr. [REDACTED] wrote and signed both letters. *See Matter of Ho*, 19 I&N Dec. at 591. The petitioner has not resolved the inconsistencies regarding the beneficiary's work experience with independent, objective evidence.

The petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

AC21

Beyond the decision of the director,¹⁷ the petitioner states on appeal that the beneficiary ported to a new employer before the director revoked the approval of the Form I-140 petition and, therefore, pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), the NOR was issued in error. The petitioner asserts that a Form I-140 remains valid after the Form I-485

¹⁶ It is incumbent on the petitioner to resolve any inconsistencies in the record by 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. at 591-592.

¹⁷ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

has been pending 180 days, even though the approval of the Form I-140 was subsequently revoked, because the revocation was not based on fraud. We disagree.

In this case, the petitioner filed the Form I-140 petition on July 31, 2006 and it was approved on August 16, 2006. The beneficiary of the Form I-140 filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on June 12, 2007 based on the approved Form I-140. The beneficiary indicated her intent to port to a new employer pursuant to AC21 on August 20, 2013. The Form I-140 NOR was issued on October 1, 2013. The Form I-485 was denied by the director on November 5, 2013.

AC21 allows an application for adjustment of status to be approved despite the fact that the 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 the new employer must be for a "same or similar" job. The petitioner submitted a letter dated July 25, 2013 from [REDACTED] President of [REDACTED] of New York. The letter states that [REDACTED] has offered the beneficiary a full-time, permanent job for the position of pastoral assistant at a salary of \$10.50 per hour. The letter requests a "change in employers" pursuant to AC21.

The facts in this case are similar to the facts in *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). In *Herrera*, the petitioner filed a Form I-140 petition in 1999 and the petition was approved later that year. In February 2000, the beneficiary of that petition filed a Form I-485 application. On April 1, 2002, the beneficiary indicated her intent to port to a new employer pursuant to AC21. On July 25, 2002, the director of the California Service Center issued a notice of intent to revoke the Form I-140. Upon receipt of a response from the petitioner, the director revoked the approval of the Form I-140. The next day, the director denied the beneficiary's Form I-485 application. 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,¹⁸

¹⁸ Section 245(a) of the Act provides that:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 204(a)(1)(F) of the Act provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C), 1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification."

the 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.¹⁹ Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* AC21 does not affect USCIS' revocation authority under Section 205 of the Act, 8 U.S.C. § 1155.

The petitioner referenced a memorandum issued on August 4, 2003, entitled "Continuing Validity of form I-140 Petition in accordance with Section 106(c) of [AC21]," (2003 Memo).²⁰ The petitioner

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

¹⁹ The Ninth Circuit stated:

Had Congress intended to constrain the agency's revocation authority, it easily could have expressed that intent clearly. For example, it could have stated so explicitly in the Portability Provision, or it could have amended 8 U.S.C. § 1155, which provides that the agency may revoke its previous approval of a petition "at any time" for "good and sufficient cause."

Herrera v. USCIS, 571 F.3d at 888.

²⁰ The AAO is not bound by USCIS-internal documents. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). USCIS internal

asserts that the 2003 memo indicates that “the only time when the I-140 is still not valid is if it is revoked based on fraud.” The petitioner notes that the petition in the instant case was not revoked for fraud. However, as noted by the Ninth Circuit in *Herrera*, the 2003 Memo “concerns the processing of I-485 applications, not the conditions under which the agency may revoke its previous approval of an I-140 petition.” The terms of AC21 do not affect the terms of Section 205 of the Act, 8 U.S.C. § 1155, which permits revocation “at any time” for “good and sufficient cause.” *Herrera v. USCIS*, 571 F.3d at 889.

The director had good and sufficient cause to revoke the approval of the petition in the instant case, as the petition was approved in error. The NOR was properly issued in this case.

Signatures on Form ETA 750, Form I-140 and Form G-28

Beyond the decision of the director, the record of proceeding contains signature discrepancies which cast doubt on whether the petitioner actually signed the Form ETA 750, the Form I-140, and the Form G-28.

The Form ETA 750 reflects the signature of [REDACTED] Director, on behalf of the petitioner, dated June 27, 2002.²¹ However, the petitioner’s website indicates that Mr. [REDACTED] was the resident Alim in Botswana, Africa from 1999 to 2004.²² It is unclear how he signed the Form ETA 750 from Botswana. The signatures for the petitioner on the Forms I-140 and G-28, both dated June 6, 2006, also appear to be those of [REDACTED]. However, the signatures of Mr. [REDACTED] on the Form ETA 750, the Form I-140 and the Form G-28 are all different; they do not match.²³

memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

²¹ The petitioner’s fiscal year 2002 tax return lists Mr. [REDACTED] as President and Secretary of the petitioner, but it does not list him as a Director. Part V of the IRS Form 990 required taxpayers to list officers, directors, trustees and key employees even if not compensated.

²² [REDACTED] (accessed August 8, 2014).

²³ The signature line on the Form ETA 750 for the employer provides that the employer is certifying, under penalty of perjury, certain conditions of employment listed at Part A.23. of the Form ETA 750.

The signature line on the Form I-140 for the petitioner provides that the petitioner is certifying, “under penalty of perjury under the laws of the United States of America, that this petition and the evidence submitted with it are all true and correct.” The regulation at 8 C.F.R. § 103.2(a)(2) provides:

Signature. An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by 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. at 591-592. The petitioner must resolve these inconsistencies in any future proceedings.

The petition's approval will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for our decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

If the petitioning U.S. employer did not sign the petition, the petition has not been properly filed. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), a petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

Further, the regulation at 8 C.F.R. § 292.4(a) requires that Form G-28 must be signed by the petitioner to authorize representation in order for the appearance to be recognized by USCIS.