



U.S. Citizenship
and Immigration
Services

(b)(6)

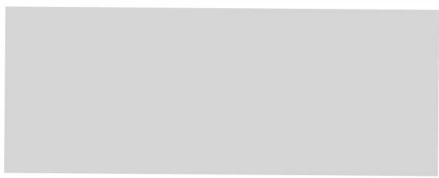


DATE: **MAR 26 2015** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
 Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) revoked the approval of the visa petition and the petitioner appealed the director's decision to the Administrative Appeals Office (AAO). We summarily dismissed the appeal. The director reopened on his own motion and revoked the petition in a second decision dated June 18, 2013. The petitioner appealed. The AAO summarily dismissed that appeal. The matter is now before us as a combined motion to reopen and reconsider. The motion to reopen will be granted. We will withdraw our summary dismissal, and enter a new decision affirming the director's revocation. The petition's approval will remain revoked.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). DOL accepted the labor certification on April 16, 2001, establishing the petition's priority date. See 8 C.F.R. § 204.5(d).

We conduct appellate review on a *de novo* basis.² We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.³ An application or petition that fails to comply with the technical requirements of the law may be denied even if the director does not identify all of the grounds for denial in the initial decision.⁴

On June 18, 2013, the director revoked the approval of the visa petition under section 205 of the Act, 8 U.S.C. § 1155, which states that the Attorney General (now Secretary of Homeland Security) may, at any time, for what he deems to be good and sufficient cause, revoke the approval of a petition approved by him under section 204 of the Act.⁵ The director found the January 29, 2002 approval of the petition to have been in error as the record failed to establish both the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the offered position as of the April 16, 2001 priority date. In *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988), the Board of Immigration Appeals (BIA) held that the realization that a petition was approved in error may "in and of itself" be good and sufficient cause for revoking the approval of that petition, "provided the . . . revised opinion is supported by the record." *Id.*

¹ The petitioner lists its name on the labor certification and immigrant petition as [REDACTED] however, the petitioner's corporate name is "[REDACTED]" according to its federal tax returns.

² See 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003) (we may deny a petition even if the director fails to identify the additional grounds for denial in the initial decision).

³ The instructions to Form I-290B, Notice of Appeal or Motion, permit the submission of additional evidence on motion. 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

⁴ *Supra* n. 2; see also *Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 D.3d 683 (9th Cir. 2003).

⁵ The director previously revoked the petition's approval on May 29, 2009. On March 18, 2013, he *sua sponte* reopened the matter, withdrew his previous decision and issued a second Notice of Intent to Revoke to the petitioner. See 8 C.F.R. § 103.5(a)(5)(ii).

The procedural history in this case before United States Citizenship and Immigration Services (USCIS) is documented by the record and will be incorporated into this decision as necessary.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that “[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” In this matter, the petitioner has provided evidence on motion that may be considered “new” under 8 C.F.R. § 103.5(a)(2). Therefore, the petitioner has met the requirements for a motion to reopen.

The petitioner’s motion is timely and properly filed. We will grant the motion to reopen, withdraw our July 31, 2013 decision, and enter a new decision.⁶

Sufficiency of Notice of Intent to Revoke

The threshold issue on motion is whether the director adequately advised the petitioner of the basis for his revocation of the approval of the petition, as required by regulation. 8 C.F.R. §§ 205.2(a), (b) (requiring notice to the petitioner and an opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval); *see also* 8 C.F.R. § 103.2(b)(16) (USCIS must notify a petitioner of derogatory information unknown to it prior to entering an adverse decision based on that information, and provide an opportunity to rebut the information). Notice of intent to revoke must be issued for good and sufficient cause. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) (good and sufficient cause exists when the record, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof).

The director issued a Notice of Intent to Revoke (NOIR) the petition’s approval to the petitioner on March 18, 2013, informing it that USCIS did not find the record to establish the petitioner’s ability to pay the proffered wage or the beneficiary’s qualifications for the offered position.

The NOIR indicated that the record contained the petitioner’s tax return for the year prior to the priority date, however, the petitioner submitted none of the financial documentation required by the regulation at 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage from the priority date forward.⁷ The director requested that the petitioner submit its federal income tax returns, annual reports, or audited financial statements from 2001 onward, as required by regulation.

We find that the NOIR specifically advised the petitioner of issues that, if “unexplained and unrebutted,” would warrant the revocation of the instant petition’s approval, i.e., the record’s failure to satisfy the requirements of the regulations at 8 C.F.R. §§ 204.5(g)(2). Accordingly, the director

⁶ On July 31, 2014, we summarily dismissed the petitioner’s July 3, 2013 appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v). On motion, the petitioner overcame the grounds for summary dismissal, and established, by a preponderance of evidence, that it timely offered new facts and evidence on appeal.

⁷ The director raised an additional ground in the NOIR regarding the beneficiary’s qualifications. The evidence submitted on motion overcomes that ground of ineligibility.

properly issued the NOIR for good and sufficient cause, and the petitioner received adequate notice of the director's intent to revoke the approval of the petition and an opportunity to respond.

In that the NOIR was properly issued, we will consider whether, on motion, the petitioner has overcome the basis for the director's revocation of the visa petition's approval.

A visa petition may not be revoked except for good and sufficient cause. However, where the evidence of record does not establish a petitioner's eligibility for the immigration benefit sought, the approval of that petition was in error and is revoked for good and sufficient cause. *See Matter of Ho*, 19 I&N Dec. at 582. Here, the director revoked the approval of the visa petition because he found that the record did not establish the petitioner's ability to pay the proffered wage or the beneficiary's qualifications for the offered position as of the petition's April 16, 2001 priority date. A petitioner must establish the elements for the approval of a petition at the time of filing. 8 C.F.R. § 103.2(b)(1); *see Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Ability to Pay

The director revoked the petition's approval upon a finding that the petitioner failed to establish its ability to pay the beneficiary's 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 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's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *Id.*; *see Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). 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. 8 C.F.R. § 103.2(b)(1).

Parts A.10. and A.12. of the labor certification reflect that the proffered wage in this matter is \$12.75 an hour or \$23,205.00 a year, based on a 35-hour workweek.⁸ At the time of the NOIR, the record

⁸ DOL regulations permit a 35-hour workweek if the job opportunity is for a permanent, full-time position. *See* 20 C.F.R. §§ 656.3, 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours per week. *See* Memo, Farmer, Admin. For Reg'l. Mgmt., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

of proceeding contained only the petitioner's Form 1120, U.S. Corporation Income Tax Return, for calendar year 2000; it did not contain any tax returns, annual reports, or audited financial statements from the priority date year, 2001, or after.

In determining a petitioner's ability to pay the proffered wage, USCIS may examine whether the petitioner employed and paid the beneficiary. However, evidence of wages paid to the beneficiary, alone, are insufficient to satisfy the regulation. 8 C.F.R. § 103.2(b)(1) (petitions "must be" filed with all initial evidence required by applicable regulations); 8 C.F.R. § 204.5(g)(2) (stating that the required evidence "shall be" in the form of tax returns, audited financial statements, or annual reports).

In determining a petitioner's ability to pay, USCIS examines the net income figure reflected on the petitioner's documentation, without consideration of depreciation or other expenses. 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 neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In response to the director's March 18, 2013 NOIR, the petitioner submitted the following evidence in attempt to establish its ability to pay: the beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements from 2002 to 2012; IRS Forms W-3, Transmittal of Wage and Tax Statements, from 2005 to 2006, and 2008 to 2012; and annual reports submitted to the Massachusetts Secretary of the Commonwealth from 2001 to 2012.⁹ In addition, the petitioner stated that it had not been able to obtain any additional evidence from its accountant because of the "hectic tax filing season." The petitioner did not identify what documents were in the possession of its accountant, but indicated that it would provide additional financial documentation "if necessary."

The director found the evidence of record insufficient to establish the petitioner's ability to pay the proffered wage from the April 16, 2001 priority date onward, and revoked the approval of the petition.

On motion, the petitioner supplements the preceding evidence with copies of additional Forms W-3 for 2002 to 2005 and 2009 to 2010, and a July 31, 2013 letter from [REDACTED], the petitioner's accountant. Mr. [REDACTED] states that the petitioner began operations in [REDACTED] and employed approximately 75 individuals annually since that time. He asserts that as the gross wages paid by the petitioner to all employees averages approximately \$625,000 annually, and it has "demonstrated the ability to pay [the beneficiary] the offered wage of \$23,850 [sic] per year." No additional documentation accompanied the account's letter, and it did not explain their unavailability.

The evidence discussed above does not establish the petitioner's ability to pay the proffered wage

⁹ These annual reports bear various titles including: Massachusetts Corporation Annual Report; Annual Report for Domestic and Foreign Corporations; and Annual Report.

from the April 2001 priority date onward.

Although the record contains the petitioner's 2000 federal income tax return, the most recent tax return available on the date the visa petition was filed, the petitioner has subsequently failed to provide any of the financial documentation required by regulation to establish its ability to pay from the April 16, 2001 priority date forward. Despite this issue being one of the two grounds for issuing the NOIR, and for revoking the petition's approval, the petitioner has not provided any of the regulatory required evidence of its ability to pay outlined at 8 C.F.R. § 204.5(g)(2) to the director, or on appeal or motion. The petitioner has not explained or indicated that the evidence is unavailable.

While we note the petitioner's submission of its annual reports to the Massachusetts Secretary of the Commonwealth for the years 2001 to 2012, such reports are not the annual reports that 8 C.F.R. § 204.5(g)(2) indicates may be submitted to establish ability to pay. Instead, pursuant to Chapter 156D, § 16.22 of the General Laws of Massachusetts, the reports submitted by the petitioner are intended to provide the Massachusetts Secretary of the Commonwealth with limited information on the corporation, regarding: its name and address; the names and addresses of its directors and officers; a description of its business activities in Massachusetts; information regarding its authorized shares, and its issued and outstanding shares; as well the period of its fiscal year. *See also* 950 C.M.R. § 113.57. The annual reports provided are informational returns only and fail to provide any financial information that would "evidence that the prospective United States employer has the ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2). A definition provided by the U.S. Securities and Exchange Commission (SEC) describes the annual reports envisioned by the regulation well:

The annual report ... is usually a state-of-the-company report, including an opening letter from the Chief Executive Officer, financial data, results of operations, market segment information, new product plans, subsidiary activities, and research and development activities on future programs.

See SEC, "Annual Report," at <http://www.sec.gov/answers/annrep.htm> (accessed January 6, 2015). An annual report, including the type described by the SEC, would permit us to analyze a petitioner's ability to pay, because it would contain financial information and information on the petitioner's continuing operation. The reports provided by the petitioner here are insufficient because they provide no financial information or any other means by which we could determine a petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

Nothing in the record from the petitioner suggests that it is unable to provide the evidence required by 8 C.F.R. § 204.5(g)(2). While the petitioner indicated that a "hectic tax filing season" prevented it from obtaining financial evidence from its accountant at the time of the NOIR, the petitioner subsequently failed to provide these documents on appeal in July 2013 or on motion in July 2014. The failure to provide requested evidence that precludes a material line of inquiry may be grounds to deny a petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has not complied with the requirements of the regulation at 8 C.F.R. § 204.5(g)(2) on appeal or on motion. Neither has the

petitioner indicated that such documentary evidence is unavailable, nor submitted secondary or tertiary evidence in its place, as required by 8 C.F.R. § 103.2(b)(2)(i). “The non-existence or other unavailability of required evidence creates a presumption of ineligibility.” *Id.*

Because the record contains no tax returns, audited financial statements, or annual reports, from the year of the priority date or onward, and particularly in the year of the 2001 priority date, we cannot determine whether the petitioner could establish its ability to pay the proffered wage.¹⁰

Although counsel does not assert on appeal or on motion that the petitioner, pursuant to *Matter of Sonogawa*, may establish its ability to pay based on the totality of its circumstances, we will, nevertheless, consider whether the overall magnitude of the petitioner’s business activities demonstrates its continuing ability to pay the proffered wage, beginning on the priority date. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967) (factors considered included: the number of years the business operated; its record of growth; the number of individuals it employs; abnormal business expenditures or losses; reputation within its industry; whether the beneficiary is replacing a former employee or an outsourced service).

As previously noted, the record contains a letter from the petitioner’s accountant, Mr. [REDACTED] who states that the petitioner began operating in [REDACTED] and employed approximately 75 individuals annually since that time. Mr. [REDACTED] asserts that the gross wages paid by the petitioner to all its employees demonstrate its ability to pay the beneficiary the proffered wage. While Mr. [REDACTED] belief that the petitioner’s ability to pay may be established on the basis of having paid substantial wages during the relevant period is misplaced, we, nevertheless, note that the Forms W-3 submitted for the record reflect substantial “wages, tips and other compensation” paid by the petitioner. This is indicia that the petitioner employs a large workforce and has increased the wages it pays, if not its workforce, during the relevant period of time. Moreover, the petitioner indicates that it has been in business since [REDACTED] a period of more than 30 years.

However, while these are substantial and positive factors, the record contains no regulatory-required evidence of the petitioner’s financial history. In the absence of the tax returns, audited financial records or annual reports required by 8 C.F.R. § 204.5(g)(2) or an explanation as to why such evidence cannot be provided and the submission of secondary or tertiary evidence, we cannot determine the petitioner’s financial circumstances. *Sonogawa* does not stand for the proposition that a petitioner’s reputation or business history may stand in lieu of regulatory required evidence. See 8 C.F.R. § 103.2(b)(1) (to demonstrate eligibility, the petition “must be properly completed and filed with all initial evidence); 8 C.F.R. § 204.5(g)(2) (stating the required initial evidence to demonstrate a petitioner’s ability to pay); 8 C.F.R. § 103.2(b)(8)(ii) (stating that USCIS may deny a benefit request submitted without “all required initial evidence”). Moreover, the record contains no evidence that the petitioner’s ability to pay may be assumed from its standing or reputation within the restaurant industry or the community it serves. Accordingly, we do not find the evidence of

¹⁰ The regulation at 8 C.F.R. § 204.5(g)(2) permits the submission of additional evidence “in appropriate cases.” The regulation does not state that additional evidence can demonstrate a petitioner’s ability to pay the proffered wage without the submission of the regulatory required evidence.

record sufficient to demonstrate that the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage.

The record does not establish the petitioner's ability to pay the proffered wage from the April 16, 2001 priority date forward. Therefore, we find that USCIS erred in initially approving the visa petition on January 29, 2002 and that its approval is properly revoked for good and sufficient cause under section 205 of the Act.¹¹ See *Matter of Ho*, 19 I&N Dec. at 582.

Conclusion

We withdraw our July 31, 2014 decision which summarily dismissed the petitioner's appeal, and enter a new decision based on the record on motion.

A petitioner must establish the elements for the approval of a petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In this case, the record does not establish the petitioner's ability to pay the proffered wage from the April 16, 2001 priority date forward. Accordingly, we find that USCIS erred in approving the visa petition on January 29, 2002 and that it is properly revoked for good and sufficient cause under section 205 of the Act. *Matter of Ho*, 19 I&N Dec. at 582.

The director's June 18, 2013 decision will be affirmed in part and withdrawn in part. 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 Motion to Reopen is granted. Our prior decision is withdrawn. The director's June 18, 2013 decision is affirmed in part and withdrawn in part. The approval of the petition remains revoked.

¹¹ The director revoked the petition's approval on an additional ground, regarding the beneficiary's qualifications. The evidence submitted on motion overcomes that ground of ineligibility.