

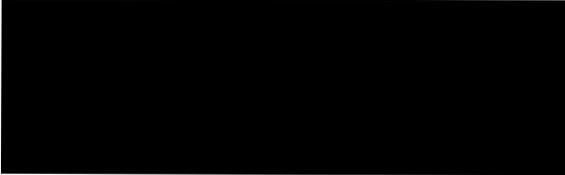
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 21 2008**
WAC-04-224-51830

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann for
Robert P. Wiemann, Chief
Administrative Appeals Office

Cc: [REDACTED]

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a film production company. It seeks to employ the beneficiary permanently in the United States as a research director pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not submitted any evidence in support of its ability to pay the beneficiary's proffered wage. The director denied the petition accordingly.

The instant appeal was filed on August 8, 2005 through counsel. The Form G-28, Entry of Appearance as Attorney or Representative, submitted in conjunction with the Form I-290B, indicates that the beneficiary retained counsel to file the appeal. Counsel signed the Form I-290B and also checked the box "I am an attorney or representative, and I represent: [REDACTED]." [REDACTED] is the beneficiary of the instant petition. Counsel states on the Form I-290B that "[b]ecause the beneficiary no longer works for the original I-140 petitioner, she cannot force that petitioner to provide the evidence of ability to pay requested." It indicates that counsel no longer represents the petitioner in the instant case. The record does not contain any evidence showing that the petitioner retained, consented or authorized counsel to file the instant appeal. Citizenship and Immigration Services' (CIS) regulations prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Therefore, the instant appeal was not properly filed by an entitled party. As the appeal was not properly filed, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(I). A copy of this decision will be provided to counsel since he was the attorney of record for the instant petitioner.

Even if CIS were not required to reject the appeal, the petition could not be approved. To make this determination, the AAO must therefore discuss the following: (1) whether a petition that has been denied is still "valid" for purposes of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000); and (2) whether the petition in this matter was properly denied.¹

On appeal, counsel argues that because the beneficiary no longer worked for the original I-140 petitioner, she cannot force that the petitioner to provide the evidence of ability to pay requested, and that the beneficiary is entitled to utilize the portability provisions of section 106(c) of AC21² because her concurrently filed I-485 application for adjustment of status has been pending over 180 days.

¹ Although no appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii), the beneficiary's purported new job and the portability considerations of AC21 are properly addressed by the AAO, provided the review in this matter is limited to the I-140 petition. The issues related to the petition include its continued "validity," the "successor" petitioner construct proffered by counsel, and the revocation of the petition itself.

² William R. Yates, Associate Director for Operations at Citizenship and Immigration Services (CIS), *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) (hereinafter "2005 memorandum").

Counsel relies on a memorandum from William Yates (Mr. Yates), CIS Associate Director for Operations, on May 12, 2005 entitled “Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21].”

Counsel’s reliance on the memorandum is misguided. The memorandum refers only to petitions that have been approved based on the beneficiary’s eligibility for the requested classification. In this case, the initial petition was denied because the beneficiary is not eligible for the requested classification. Further, as will be discussed below, CIS memoranda do not establish judicially enforceable rights.

Finally, counsel fails to address the merits of the petition. The director denied the petition because the petitioner failed to submit required evidence of the requisite job offer in response to a specific request, and thus failed to establish the alien’s eligibility for the requested classification. We will affirm the director’s determination that the petitioner has not established the beneficiary’s eligibility for the classification sought. The petitioner failed to submit the requisite job offer and, beyond the director’s decision, did not establish that the beneficiary met at least two of the regulatory criteria required to establish his eligibility for immigrant classification as a researcher director under section 203(b)(2) of the Act.

I. The Portability Provision of Section 204(j) of the Act is Invoked Only in Adjustment of Status Proceedings where the Underlying Visa Petition was Approved.

The pertinent portability provision at section 204(j) of the Act applies only to adjustment of status proceedings where the underlying immigrant visa petition has been approved. Contrary to counsel’s intimation, the portability provision does not require CIS to approve a visa petition where eligibility has not been established merely because the petition was concurrently filed with an application to adjust status that has been pending for at least 180 days.

A. The Relevant Statutory and Regulatory Provisions

Section 106(c)(1) of AC21 amended section 204 of the Act by adding the following provision, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j):³

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.

Section 204(a)(1)(F) of the Act includes immigrant classification of alien beneficiaries as outstanding professors or researchers under section 203(b)(1)(B) of the Act, the classification sought in this case.

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), states:

³ AC21 included a related portability provision regarding the continuing validity of alien labor certifications which was codified at section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv). Because the classification requested here does not require a labor certification, we will not address that provision in this decision.

Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status

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 Attorney General [now the CIS], 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.

(Emphasis added.)

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

B. Filing Procedures Prescribed by Regulation Do Not Support Counsel's Contention

At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, Application to Adjust Status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 204(j) of the Act at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or a similar occupational classification.

After enactment of the portability provisions of AC21, CIS implemented the "concurrent filing" process whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). CIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, CIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

C. The Statutory Framework and Recent Judicial Determinations Show That the Underlying Visa Petition Must Be Approved Before Any Portability Determination is Made

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). See also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

Webster's New College Dictionary 1218 (2001) defines "valid" as "well-grounded," "producing the desired results," or "legally sound and effective." Since an approved petition was required to file an application for adjustment of status at the time the portability provision was enacted, it is extremely doubtful that Congress intended the term "valid" to include petitions that simply remain pending after the close of the 180-day period.⁴

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs CIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

As noted above, if the alien seeks adjustment of status in the United States, the statute and regulations allow such adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien "entitled" to immigrant classification under the Act "may file" a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that CIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted CIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until CIS approves the petition.

⁴ We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word "pending." See section 101(a)(15)(V) of the Act, 8 U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by CIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with CIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. It would be irrational to believe that Congress intended to throw out the entire statutorily mandated scheme regulating immigrant visas whenever that scheme requires more than 180 days to effectuate. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing frivolous visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.

Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

In this case, the petition was filed on behalf of an alien who was not entitled to the requested classification. As will be discussed below, the director correctly denied the petition because the petitioner failed to establish its ability to pay the proffered wage, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Beyond the director’s decision, the petitioner also failed to establish that the beneficiary possessed the requisite experience for the proffered position. The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require CIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was never approved, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

II. The Petitioner Has Not Established the Beneficiary’s Eligibility for the Classification Sought

The petitioner seeks immigrant classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2).

The regulation 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation 8 C.F.R. § 204.5(k)(3) states in pertinent part:

Initial evidence. The petitioner must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B)

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 27, 2001. The proffered wage as stated on the Form ETA 750 is \$60,508 per year. The Form ETA 750 requires six years of college studies, a Master's degree in Humanities and one year of experience in the job offered or one year of experience in the related occupation of research associate. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$87,775 in 2002, to have a net annual income of \$(24,978) in 2002, and to currently employ one worker. On the Form ETA 750B signed by the beneficiary on November 14, 2001, the beneficiary claimed to have worked for the petitioner in the position of research associate since April 1998.

With the initial filing on August 18, 2004 the petitioner submitted the Form I-140, the Form ETA 750 and a letter from the petitioner's president to confirm the job offer. The petitioner did not submit any further evidence required by the regulations quoted above until response to the director's March 22, 2005 request for additional evidence (RFE).

In response to the director's RFE, counsel submitted the beneficiary's master of arts degree in anthropology and transcripts from the University of Arizona issued on August 12, 1993. Counsel also submits an experience letter dated May 31, 2005 from [REDACTED] i, Ph.D of the University of California Los Angeles ([REDACTED]'s May 31, 2005 letter). This experience letter states in pertinent part that:

I hereby verify that [the beneficiary] has worked for the UCLA Film & Television Archives for a total of 20 months during the following periods:

10/16/96 – 04/16/96
03/11/96 – 05/06/96
01/01/97 – 12/31/97

Each time [the beneficiary] was classified as a Research Assistant (III).

During her employment from 1/1/97 to 12/31/97 [the beneficiary] directly under my supervision on the Hearst News Reel project, funded by the NEH.

The regulation requires that evidence for experience or training be in the form of a letter from a current or former employer or trainer and include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. I [redacted]s May 31, 2005 letter does not include the title of the writer. The letter shows that only for the employment during 01/01/97 - 12/31/97 the writer was in the position of the beneficiary's supervisor. It is not clear whether the letter is qualified as an experience letter from the beneficiary's former employer as primary evidence to establish the beneficiary's requisite experience for the proffered position. [redacted]s May 31, 2005 letter does not verify the beneficiary's full-time employment. Instead, the beneficiary's statement on the Form ETA 750B indicates that this employment was on a part-time basis. The beneficiary stated on Item 11 of the Form ETA 750B that she attended UCLA Extension in the field of "Film & TV Production" from September 9, 1994 to April 1998, culminating in the receipt of "Level I & II Certificates." With the twenty months, especially the twelve months of experience under the writer's direct supervision on a part-time basis, [redacted]s May 31, 2005 letter cannot establish that the beneficiary possessed the requisite one year of full-time experience for the proffered position. Furthermore, the experience letter did not include a specific description of the duties the beneficiary performed as required by the regulation. Without a specific description of the duties, the AAO cannot determine whether the beneficiary's experience with UCLA Film & Television Archives qualifies her to perform the duties of the proffered position set forth in Item 13 of the Form ETA 750A. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case and thus, the petitioner failed to demonstrate that the beneficiary possessed the requisite one year of experience in the job offered or related occupation for the proffered position as required by the ETA 750 with [redacted]s May 31, 2005 letter.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial 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 Sonogawa*, at 612.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, November 27, 2001 in the instant case. *See* 8 CFR § 204.5(d). The petitioner did not submit any evidence to establish its ability to pay the proffered wage with initial filing. Therefore, the director expressly requested the petitioner to provide evidence of the petitioner's ability to pay the beneficiary's wage, and specifically requested the petitioner to provide a copy of this evidence from 2001 through 2004. In response to the director's RFE, counsel submitted transcripts of the beneficiary's tax returns for 2001 through 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 submitted the beneficiary's tax returns for 2001 through 2004. The beneficiary's tax returns show that the beneficiary had wage income of \$26,000 in 2001 and 2002, \$27,100 in 2003 and \$31,550 in 2004. However, the record does not contain the beneficiary's W-2 or 1099 forms for these relevant years. Therefore, it is not clear whether these wage incomes were paid by the petitioner. Therefore, the petitioner failed to demonstrate that it paid the beneficiary any amount of compensation in the relevant years. These amounts were not equal or greater than the proffered wage. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2001 to 2004.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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). However, the record does not contain the petitioner's tax returns, annual reports or audited financial statements for 2001 through 2004.

The record before the director closed on June 10, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax returns for 2001 through 2004 should have been available. However, the petitioner did not submit its tax returns for these years. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns, annual reports or audited financial statements for 2001 through 2004. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner failed to demonstrate that the beneficiary possessed the requisite experience prior to the priority date as required by the Form ETA 750. The petitioner also failed to establish its continuing ability to pay the proffered wage from the priority date of November 27, 2001 to the present. Therefore, the AAO finds that the petition is properly denied.

In conclusion and for the reasons stated above, the AAO finds that (1) AC21 did not grant any rights or benefits to the third company in this matter such that it could be considered a "successor employer" or "beneficial owner" of the instant I-140 petition; (2) the denied petition in this matter cannot be deemed to have been "valid" for purposes of section 106(c) of AC21; and (3) the I-140 petition was properly denied. Consequently, the beneficiary has no recognized claim under section 106(c) of AC21 and, as the beneficiary is not the petitioner in this matter, neither the beneficiary nor her counsel is authorized to file the instant appeal. 8 C.F.R. § 205.2(d); 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(I). The appeal must therefore be rejected.

Even if the appeal had been properly filed, the petition would be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is rejected. The decision of the director is affirmed.