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U.S. Citizenship
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Services

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FILE: [REDACTED]
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Office: TEXAS SERVICE CENTER Date: JUL 27 2005

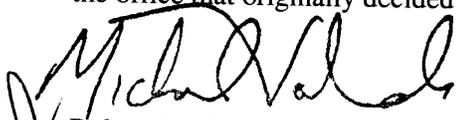
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the by the Director, Texas Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with notice of intent to revoke the approval of the preference visa petition. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on certification. The decision of the director will be affirmed.

The petitioner is a software applications development and consulting firm. It sought to employ the beneficiary permanently in the United States as a software engineer II. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was initially filed on November 20, 2000. It was initially approved on May 5, 2001. The alien beneficiary subsequently filed an application to adjust his status to that of lawful permanent resident. Upon further review of the record, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on August 22, 2003. The director concluded that the petitioner had failed to establish that the beneficiary intended to work for the petitioner and that the petitioner failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner was afforded thirty days to offer additional evidence or argument in opposition to the proposed revocation. The petitioner responded with additional documentation.

On October 3, 2003, the director issued a request for additional evidence to the petitioner. Upon review of the petitioner's response to this request and other evidence contained in the record, the director revoked the petition's approval on May 7, 2004, pursuant to section 205 of the Act, 8 U.S.C. § 1155, based upon the petitioner's failure to establish its continuing ability to pay the proffered wage. The director also discussed the possible applicability of the "American Competitiveness in the Twenty-First Century Act" (AC21) (Public Law 106-313) as it related to the beneficiary's self-employment as the petitioner's subcontractor. The case was certified for review to the AAO.

On certification, the petitioner, through counsel, does not directly address the petitioner's ability to pay the proffered wage but states that the alien's election to pursue an identical position with a different employer, occurring after the director issued the revocation and notice of certification constitutes a significant change in circumstances and now merits consideration under the portability provisions of AC21. This legislation, enacted in 2000, permits individuals who have filed for adjustment of status and whose cases have been pending for more than 180 days to change jobs or employers, without affecting the validity of the underlying approved Immigrant Petition for Alien Worker (I-140) or labor certification as long as the new job is in the same or a similar occupational classification. For the reasons presented below, it is concluded that the I-140 was properly revoked. This decision then goes on to discuss the issue of whether AC21 is applicable to the facts presented here, and what is the proper venue for such a determination.

Section 205 of the Act, states: "[t]he Attorney General 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."

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 [Citizenship and Immigration Services (CIS)].

At the outset, the director's discussion throughout the underlying record relating to the applicability of AC21 was irrelevant because no request for portability was ever submitted by the beneficiary related to his self-employment. Moreover, AC21 applicability is only appropriate, except for limited exceptions, for review in the adjudication of the application for the beneficiary's adjustment of status to permanent residence, not during the adjudication of the I-140. Thus, if the beneficiary wishes to assert that he qualifies for portability, he must make such an argument before the official with jurisdiction over the I-485. In this case, however, since that official certified the matter to the AAO, the AAO will discuss all the issues of this case, including possible eligibility for portability.

In this case, the question of the revocation rests upon the petitioner's continuing ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$66,414.40 per annum. As reflected in Part 5 of the I-140, the petitioner claims that it was established in 1994, produces an annual gross income of 1.5 million dollars, a net annual income of \$5,000 and has twenty-one employees. The ETA 750B, signed by the beneficiary in January 1998, does not claim that the petitioner has employed him. Rather he states that he is self-employed through his own firm, called "International Business Connections, Corp."

Relevant to the petitioner's ability to pay the proposed annual wage offer of \$66,414.40, a copy of a compilation forecasting the petitioner's statement of income and expenses was initially submitted in support of the petitioner's ability to pay the proffered wage. In the August 22, 2003, notice of intent to revoke, the director informed the petitioner that the regulation at 8 C.F.R. § 204.5(g)(2) required either federal tax returns, annual reports, or audited financial statements to demonstrate a continuing financial ability to pay a proffered wage. A compilation presents an employer's financial information that is the representation of management. An accountant is not required to make inquiries or perform other

procedures to verify or corroborate the information supplied by management. As such, it provides limited probative value of a petitioner's ability to pay a proposed wage offer and may not be offered in lieu of one of the required forms of evidence.

The director's notice of intent to revoke also questioned the bona fides of the job offer based upon the beneficiary's conflicting descriptions of his employment history as working for the petitioner and for himself. The director afforded the petitioner an additional thirty days to submit additional evidence or argument to address the director's concerns outlined in the notice of intent to revoke.

In response, as evidence of its ability to pay the certified wage of \$66,414.40, the petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 1998 and its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002. These returns indicate that the petitioner uses a standard calendar year to file its returns. They contain the following information:

Year	1998	2002
Taxable income (before NOL deduction) (Form 1120)	\$ -0-	-\$493,951
or Ordinary Income (Form 1120S)		
Current Assets	\$ 209,861	\$263,308
Current Liabilities	\$ -0-	\$-0-
Net current assets	\$ 209,861	\$263,308

As expressed above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net taxable income, as an alternative method of demonstrating the ability to pay a proposed wage offer, CIS will review a petitioner's net current assets as a measure of liquidity and as an available resource out of which the proffered wage may be paid. A corporation's year-end current assets and current liabilities are shown on Schedule L of the federal tax return. If a corporate petitioner's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted a copy of the alien's Wage and Tax Statement (W-2) for 2002. It shows that the petitioner paid the beneficiary \$33,580 in wages during that year.

An undated letter from the petitioner's p [REDACTED], [REDACTED] also accompanied these submissions. He explains that the petitioner employed the beneficiary initially as a subcontractor since 1997 and recorded his earnings through Form 1099's. In 2001, the petitioner put the beneficiary on the payroll as a salaried employee. Mr. [REDACTED] further states that the beneficiary intends to continue to work for the

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner and that internal reorganization and consolidation will enable the petitioner to pay the full proffered salary once the beneficiary's case is approved. Counsel's cover letter also mentions that the petitioner paid more than \$400,000 in wages as shown on its 2002 tax return and has been steadily expanding. He also claims that the petitioner can access additional funds from its shareholders.

The director issued an additional request for evidence on October 3, 2003. She requested that the petitioner provide additional evidence of its ability to pay the proffered wage for the years 1999 through 2001. She specifically requested that the petitioner supply copies of its 1999 through 2001 federal tax returns with all schedules. The director also asked for additional details concerning the petitioner's planned reorganization as well as information related to AC21.

In response, the petitioner provided partial copies of its 1999, 2000, and 2001 federal tax returns. The corporate tax return for 1999 shows that the petitioner reported \$352 as taxable income before the NOL deduction. The 2000 corporate Form 1120S reveals that the petitioner declared -\$224,826 as ordinary income. The tax return for 2001 reflects that the petitioner reported -\$287,074 as ordinary income. Schedule L was not included in these tax returns so the petitioner's net current assets for these years may not be reviewed.²

In a letter dated December 19, 2003, submitted with the petitioner's response to the director's request for evidence, Mr. ██████ again states that the beneficiary was working for the petitioner since 1997 and had been issued Form 1099. He expresses confidence that the beneficiary could have been compensated at the certified wage level. He also states that the company has continued to expand and has never missed a payroll. Mr. ██████ states that the company expects to become profitable in 2004 and that the reorganization and reduction of staff that are envisioned with the beneficiary's adjustment of status will enable him to devote more time to the support operations.

As stated above, the director revoked the petition on May 7, 2004. She found that the petitioner's tax returns inadequately reflected sufficient resources to cover the proffered wage. She also concluded that the petitioner's plans to reorganize and reduce its staff by one employee in order to accommodate the addition of the beneficiary as a permanent employee were not sufficiently clear in the record to demonstrate the petitioner's ability to pay the proffered wage. The director further observed that Mr. ██████ forecast of profitability during 2004 failed to convincingly demonstrate the petitioner's ability to pay the certified wage given the petitioner's reported losses as shown on its tax returns. Although the director found the mutual intent of the petitioner and beneficiary sufficiently manifested by the record to support the bona fides of the original job offer, she engaged in a discussion of the applicability of AC21 to the beneficiary's self-employment through his own company.

On certification, counsel asserts that the petitioner beginning in 2001 until June 2004 exclusively employed the beneficiary, and that portability based on his self-employment by his own company is not the issue. Counsel also submits supporting documents indicating that the beneficiary has received a job offer to work as a software engineer as of June 7, 2004, from another firm, and that the applicability of AC21 is now relevant

² Other supporting attachments such as Schedule M appear to have been omitted also.

to this employment. For the reasons stated initially, the applicability of AC21 to the beneficiary's self-employment through his own company was not relevant to this particular case.

With reference to the director's revocation of the I-140 based on the petitioner's failure to demonstrate its continuing ability to pay the proffered wage, it is noted that CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by credible 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. Wages paid in lesser amounts will also be given consideration. To the extent that either the petitioner's net income or its net current assets could cover any shortfall resulting from a comparison of the proffered wage to the actual wages paid, the petitioner's ability to pay the proffered wage may also be demonstrated. In the instant case, the only first-hand evidence of payment of wages to the beneficiary consists of his W-2 issued in 2002 by the petitioner, showing that he was paid \$33,580.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, as mentioned above, CIS will also examine the net taxable 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). Showing that the petitioner's gross income reached a certain level, or that cumulative salaries increased, as is asserted here, is not persuasive because it does not include consideration of the total expenses incurred in order to generate the revenue and represents an incomplete portrait of the petitioner's financial status. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

For purposes of this review, the petitioner's taxable income before the NOL deduction (line 28) as indicated on its Form 1120 corporate tax return or its ordinary income (line 21) as shown on its Form 1120 S return will be treated as net income because they most fairly represent consideration of the petitioner's total income and total deductions. In this case, as shown above, although the petitioner reported no net income in 1998, its net current assets of \$209,861 could cover the proffered wage of \$66,414.40. Thus the petitioner's ability to pay the proffered wage was demonstrated during this year.

In 1999, the petitioner's net income of \$352 was not sufficient to pay the proffered salary. Similarly, in 2000 and 2001, the petitioner's reported net income of -\$224,826 and -\$287,074, respectively, were well below the funds needed to pay the proposed wage offer. Net current asset levels could not be examined, although the director specifically requested complete tax returns including all attachments. Such failure is not 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).

In 2002, however, the petitioner's net current assets of \$263,308 was sufficient to cover the \$32,834.40 difference between the proposed wage offer of \$66,414.40 and the actual wages paid of \$33,580. The petitioner's ability to pay the proffered wage during this year was demonstrated.

With regard to Mr. [REDACTED] confidence that new funds would be forthcoming from shareholders if necessary, the AAO concurs with the director's observation that the record does not clearly establish the character or nature of such funds. Moreover, as noted by the 2002 tax return (Schedule L), it appears that the corporate petitioner was carrying a \$1,278,116 obligation in shareholder loans. Similarly, with reference to the petitioner's president's other projected plans to consolidate or reorganize and reduce the support staff by one person, as noted by the director, such a hypothesis is not sufficiently supported by the record, is too vague and does not satisfy the requirements of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioner demonstrate a *continuing* ability to pay the proffered wage beginning at the priority date and continuing until the beneficiary obtains lawful permanent resident status. Since the beneficiary was already working for the petitioner as a software engineer at the time, it is also unclear how further economies could have been effected.

In the context of the financial information contained in the record, the petitioner's assertion that profitability is expected in 2004 supports its future prospects for success and establishes its ability to pay the proffered wage is unpersuasive. Reliance upon *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) where it was determined that the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wage, is inapposite here. *Matter of Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, as noted above, the petitioner has consistently employed the beneficiary well below the proffered wage. Further, the five tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Here, the petitioner's net income, as set forth in its corporate tax returns reveal fairly significant losses. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The AAO cannot conclude that the director erred in revoking the approval of the petitioner's I-140 based on the petitioner's failure to show its continuing ability to pay the beneficiary's wage offer as of the priority date of January 14, 1998. A petitioner must establish its continuing ability to pay based on the requirements set forth in 8 C.F.R. § 204.5(g)(2), which states that annual reports, federal tax returns or audited financial statements must be provided to establish the ability to pay the certified wage. Based on the financial data that was provided to the record, the petitioner has not demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the

petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record at the time the decision was rendered, warranted such denial.

On certification, the director requested the AAO to provide guidance regarding certain aspects of the beneficiary's prospects for adjustment under the provisions of section 106(c) of AC21. The director specifically sought guidance for making determinations that the new job is for a "same or similar" position.

Prior to addressing the director's specific query, the AAO notes that the proper venue for a determination that an alien is qualified to utilize the portability provisions of section 106(c) of AC21 is in the context of an application for adjustment of status to lawful permanent residence. Under section 106(d) of AC21, as stated above, an I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer from the new employer must be for a "same or similar" job. Therefore, the proper venue for such determinations lies with the individual with jurisdiction over the application for adjustment of status.

With regard to the director's specific inquiry, the AAO notes that the proper factors to consider in making a determination as to whether the new job is the same or similar to the position set forth in the I-140 proceedings are the specific duties of the two positions and the DOT and/or SOC codes. Because section 106(c) of AC21 refers to a same or similar job, factors such as location, type of employer, and wage rate are less critical to the determination than the specific duties and activities that make up the actual job. The AAO notes, however, that while a significant wage variation should not be the sole reason for a determination that the position is not the same or similar, it may lead to questioning whether the responsibilities of the new position match those of the initial job.

Finally, the AAO notes that in the instant case the director must first make a determination as to whether or not the beneficiary is eligible for portability under section 106(c) of AC21. Since the foregoing decision results in the revocation of the petition, affirming the director's determination that it was approved in error, the director must make a determination as to whether the petition qualifies the

beneficiary for portability. The statutory language in section 106(c) states that the petition "will remain valid" if certain conditions are met. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. A petition that is revoked under section 205 of the Act is considered to be revoked effective from the date of approval. The AAO would not consider a petition that was revoked because it was approved in error ever to be a valid petition for purposes of section 106(c) of AC21. (The AAO notes that CIS does draw a distinction between revocations for cause and automatic revocations where the petitioning employer simply opts to withdraw the petition after it was approved and the I-485 was pending for 180 days and there is no question regarding the *bona fides* of the petitioner.)

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.