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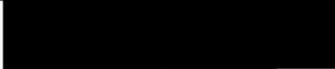
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**JUL 24 2008**

WAC 01 246 53311

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:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), on December 30, 2005, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). On February 8, 2006, in a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 AAO maintains plenary power to review each appeal on a de novo basis. 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."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). On appeal, counsel<sup>1</sup> submits a brief and additional evidence. For the reasons discussed below, the petitioner has not demonstrated that it had the ability to pay the proffered wage at the time the petition was filed. As the petition was not valid when filed, the petitioner may not rely on the provision at section 204(j) of the Act. Moreover, it is significant that the beneficiary's new employer is also unable to demonstrate an ability to pay the proffered wage.

The petitioner is a business development company. It seeks to employ the beneficiary permanently in the United States as a graphic artist. As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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.

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

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<sup>1</sup> Former counsel submitted a brief to the record dated March 28, 2006. On December 13, 2006, the AAO received a Notice of Substitution of Counsel for the Form I-140 on Appeal but it was only accompanied by a Form G-28 Notice of Appearance as Attorney or Representative signed by the beneficiary. According to 8 C.F.R. § 103.3(a)(1)(iii), the beneficiary of a visa petition is not an affected party. The AAO attempted to FAX the counsel identified on the correspondence dated December 13, 2006, but was not able to contact counsel. For this reason, new counsel is not recognized.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 19, 2001. The proffered wage as stated on the Form ETA 750 is \$25.22 per hour for a 40-hour week, which amounts to \$52,457.60 annually. The Form ETA 750 also required a four-year college degree in advertising/design, and two years of work experience in the proffered position.

The approval of this petition was revoked as a result of an interview with the beneficiary with regard to her Application to Register Permanent Residence or Adjust Status (Form I-485). This application contained the beneficiary's Forms W-2 issued to the beneficiary by the petitioner, indicating she earned \$13,553.42 in tax year 2000, \$12,450.48 during tax year 2001, \$9,850 in 2002, and \$7,670 in 2003. When questioned by a Citizenship and Immigration Services (CIS) adjudications officer with regard to the beneficiary's request to invoke the American Competitiveness in the Twentifirst Century Act of 2000, (Public Law 106-313) (AC21) and move to another employer, the beneficiary stated that she decided to take another job instead of working for the petitioner because the petitioner was not doing well in terms of revenue.<sup>2</sup>

On December 30, 2005, the director issued a Notice of Intent to Revoke the Petition (NOIR) to the petitioner. In the NOIR the director stated that the petitioner had indicated on the Form I-140 petition that it intended to pay the beneficiary a salary of \$1,009.90 per week or \$52,457.60 a year, and that the ETA 750 indicated the same proffered wage. The director then examined the beneficiary's Forms W-2 issued by the petitioner and stated that the petitioner had not complied with the requirement to show that it could pay the proffered wage. The director cited to *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988), in which it is held that the realization by the district director that he made an error in judgment in initially approving a visa petition, might, in and of itself, be good and sufficient cause for revoking the approval, provided the district director's revised opinion was supported by the record. The director also cited *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) in which the Board of Immigration Appeals held that a notice of intent to revoke approval of a petition was not properly issued unless there is "good and sufficient cause." The director noted that the Board also held that "good and sufficient cause" for issuing such a notice existed when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial.

In response, counsel noted that the Form I-140 petition was approved on January 28, 2002, and then stated that CIS should adjudicate the beneficiary's Form I-485 application because she qualified under the portability provision of AC21. Counsel stated that the job flexibility provision of AC21, Section 106, provides

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<sup>2</sup> The record indicates that another company, Atlas Shippers International Sea and Air Freight, submitted a letter dated August 5, 2004, stating that it wanted to employ the beneficiary under the portability terms of the American Competitiveness Act (AC21). This company also submitted the first page of its Form 1120 for tax year 2004 that indicated taxable income before net operating loss deduction and special deductions of \$13,533. The record also contains Forms 1120 for Atlas Shippers for tax years 2000, 2002, and 2003, as well as an unaudited financial report for the period ending in December 2001.

that a petition for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated 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 similar occupational classification as the job for which the petition was filed. Counsel noted that in order to adjudicate the I-485 application, there had to be an approved I-140 petition. Counsel also asserted that the beneficiary's I-140 petition was valid when the beneficiary filed her application for a change of employer under AC21.

Counsel then asserted that CIS interprets AC21 to mean that an approved I-140 petition is not valid for the job flexibility provisions if the I-140 is revoked or the Form I-140 is withdrawn before the alien's Form I-485 has been pending 180 days, or if at any time CIS revoked approval of the Form I-140 based on fraud. Counsel noted that the director did not make any allegations of fraud in his NOIR; but rather stated that the original petitioner failed to prove its ability to pay the proffered wage based on the beneficiary's Forms W-2.

Counsel then stated that the director's NOIR should be rescinded because the director failed to consider other evidence of the original petitioner's ability to pay the proffered wage. Counsel noted that the original petitioner submitted its 2000 income tax return that showed an ordinary income of \$120,182, a sum more than sufficient to pay the hourly rate of \$25.22 or the yearly salary of \$52,457.60.

Counsel also asserted that CIS did not state whether the petitioner failed to prove its ability to pay as of the priority date or whether it failed to show its continuing ability to pay the proffered wage. Counsel noted that CIS stated that the petitioner did employ the beneficiary as of June 7, 2001 at wages that were below the proffered wage. Counsel again noted that June 7, 2001 was not the priority date of the petition and that the petitioner had established its ability to pay the proffered wage as of January 19, 2001 through its Form 1120 for tax year 2000. Counsel also noted that there is no requirement that the petitioner pay the proffered wage until the beneficiary obtains permanent residency status.

On February 8, 2006, the director revoked the petition's approval. In his decision the director again noted the beneficiary's wages for tax years 2001 to 2004 as established by her Forms W-2 presented at her adjustment of status interview. The director noted that the petitioner employed the beneficiary since October 1999, as indicated on Form G-325 and that the beneficiary had been working for the petitioner in the proffered position of graphic artist. The director stated that the petitioner did not provide any explanation of why the beneficiary was not paid the proffered wage as established by the DOL Form ETA 750. The director stated that it appeared that the petitioner never intended to pay the proffered wage to the beneficiary.

With regard to the beneficiary porting to a new company through the provisions of AC21, the director stated that the petitioner must establish the beneficiary's eligibility on the underlying petition before the portability provisions of section 106 of the Act could apply. The director noted that based on the record, the petitioner did not intend to pay the proffered wage, and had failed to pay the beneficiary the proffered wage while she was employed by the petitioner for four years after the I-140 petition was approved. The director finally stated that the petitioner had not established that the beneficiary qualified for the classification sought, and had not submitted sufficient evidence to overcome the grounds of revocation outlined in the NOIR.

On appeal, counsel states that CIS does not have the authority to revoke the petitioner's I-140 petition's approval because the petition was approved by a different government agency. Counsel further states that even if CIS had the authority to revoke the petition, the revocation should be rescinded because CIS erroneously concluded that the petitioner did not demonstrate the ability to pay the proffered wage. Counsel

noted that the petitioner demonstrated its ability to pay the beneficiary the proffered wage at the time the 2001 priority date was established based on the petitioner's 2000 tax return. Counsel also stated that the petitioner should not be required to demonstrate its continuing ability to pay the proffered wage since the beneficiary changed jobs and employers pursuant to AC21. Counsel states that when a beneficiary invokes AC21, the original petitioner becomes a disinterested party and has no reason to prove its continuing ability to pay the proffered wage.

Counsel states that at the beneficiary's adjustment of status interview, the current petitioner did not demonstrate its continuing ability to pay the proffered wage because the beneficiary found a substitute petitioner, Atlas Shippers. Counsel states that the petitioner had the *bona fide* intent of employing the beneficiary and she intended on accepting the job upon her adjustment to permanent legal resident status. Counsel states that CIS may not deny a petition based solely on the fact that the beneficiary earned less than the proffered wage prior to her adjustment to lawful permanent resident status. Counsel states that despite both parties' *bona fide* intentions, the petitioner's financial difficulties during the I-485 adjudication process forced the petitioner to conditionally dissolve. Counsel notes that the beneficiary did not immediately avail herself of the right to change jobs and employers under AC21 after 180 days had passed following the approval of the I-140 petition, but rather after the beneficiary's I-485 application for adjustment of status was pending for 875 days. Counsel states that these facts undermine the CIS allegation that the proffered position was not a *bona fide* job offer.

Counsel also states that it appears that CIS will allow a beneficiary to port off of an unapproved I-140 petition, despite ability to pay issues that occur after the filing of the petition; however, it will deny a beneficiary the right to port off of an approved I-140 petition where ability to pay issues arise after the I-140 petition is filed. Counsel calls such results arbitrary and capricious. Finally counsel states that even if the petitioner's I-140 petition is revoked, the beneficiary is eligible to port pursuant to AC21 because her I-485 application was pending for over 180 days before she found a substitute petitioner and the petition was not revoked based upon fraud.

The AAO notes that counsel's assertion that the CIS does not have the authority to revoke the instant petition is not persuasive. The authority invested in the Attorney General with regard to immigration matters was transferred legislatively to the Secretary of Homeland Security, and CIS acts based on the authority given to it by the Secretary of Homeland Security. As previously stated, 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 AAO notes 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. at 450. Upon a review of the record, there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the petitioner did not have the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtained lawful permanent residence. Although counsel is correct in that the petitioner does not have to pay the beneficiary the proffered wage until the beneficiary adjusts to permanent resident status, counsel's assertions with regard to the petitioner's ability to pay the proffered wage as of the January priority date and until the beneficiary received lawful permanent residence<sup>3</sup> are not persuasive.

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<sup>3</sup> The AAO notes that the instant petition was filed on August 1, 2001, and the petition was approved on January 25, 2002. The petitioner would not have had its 2001 tax return available by either date. The AAO

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

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*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.

Thus, in the instant petition, the petitioner has to establish its ability to pay the proffered wage as of January 19, 2001, and continuing until the beneficiary received lawful permanent residence. In the instant petition, the record indicates that the beneficiary worked for the petitioner in tax years 2000, 2001, 2002, and 2003.<sup>4</sup> With regard to the instant petition, as counsel correctly noted, the priority date for the instant petition is January 19, 2001. Thus, the petitioner's tax return for tax year 2000 is not dispositive in these proceedings, although, for illustrative purposes, the AAO will refer to this tax return in these proceedings. The petitioner's financial statement for the year ending in December 2000 submitted with the initial petition is also not dispositive in these proceedings. First, because it covers a period of time prior to the establishment of the 2001 priority date, and second, because the statement is not audited.

The AAO notes that the instant petition was filed on August 1, 2001, and the petition was approved on January 25, 2002. The petitioner's tax return for 2001, the year in which the priority date was established, was not available as of either of these dates. Nevertheless the AAO notes that CIS can examine the petitioner's ability to pay the proffered wage in the context of the adjustment of status interview based on the regulatory requirement to establish the petitioner's ability to pay as of the priority date and continuing to the date the beneficiary obtains lawful permanent residence.

The AAO further notes that the record reflects that the director requested further evidence on October 29, 2001 with regard to the petitioner's ability to pay the beneficiary's wages, asking for federal tax returns for tax years 1999 and 2000, as well as copies of the petitioner's Form DE-6 for the last four quarters of 1999 and the petitioner's W-2 and W-3 Forms documenting wages paid to employees in tax year 1999. On December 18, 2001, in response, the petitioner stated that its actual operations began in 2000, and only in February 2000 did the petitioner start hiring full-time employees. The petitioner submitted its DE-6 forms for the final quarter of 1999 and the first three quarters of 2000. The petitioner's DE-6 Forms for 2000 indicated that the petitioner employed five employees. The petitioner's 2000 tax return also indicated wages of \$62,379 for that year.

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also notes that the petitioner in a letter submitted to the record dated December 18, 2001 stated that the petitioner's actual operations began on January 1, 2000, and only in February 2000 did it start hiring employees to work fulltime. The petitioner's 2000 tax return also indicated that wages of \$62,379 were paid to an undisclosed number of employees.

<sup>4</sup> The beneficiary's wages during this period of time are \$12,450.48 during tax year 2001, \$9,850 in tax year 2002, and \$7,670 in tax year 2003. The significant reduction in the beneficiary's wages in 2002 and 2003 could also indicate that the beneficiary was working part-time, rather than full-time, which would also be a violation of the ETA 750 job description of full time employment.

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, Citizenship and Immigration Services (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*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The record of proceeding does not provide any guidance on how the director initially arrived at his or her determination to approve the instant petition. 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, based on documents submitted with the initial petition and then by the beneficiary as part of her I-485 application, the petitioner established that it employed and paid the beneficiary \$13,533.42 in 2000. The beneficiary's W-2 forms for tax years 2001, 2002, and 2003 established that the petitioner paid the beneficiary \$12,450.48 in 2001, \$9,850 in 2002, and \$7,670 in 2003. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and until the beneficiary obtained lawful permanent residence. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2001, 2002, and 2003.

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. *See 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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this

proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng*, 719 F. Supp. at 537

Based on the petitioner's tax return for tax year 2000, the petitioner had net income of \$120,182. This figure is sufficient to pay the entire proffered wage of \$52,457.60 for tax year 2000; however, as noted previously, the petitioner's 2000 tax return is not dispositive in these proceedings. If the petitioner had submitted its tax returns for the additional years in question in response to the director's NOIR or on appeal, the AAO could examine whether the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of \$52,457.60 in 2001. Since the petitioner submitted no other tax returns to the record beyond its tax return for 2000, the AAO cannot examine whether the petitioner had sufficient net income in the tax years on and subsequent to the 2001 priority date year. Therefore the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages of \$12,450.48 during tax year 2001, \$9,850 in 2002, and \$7,670 in 2003, and the proffered wage of \$52,457.60. As of the 2001 priority date and through tax year 2003, the petitioner did not have sufficient net income to pay the proffered wage.

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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a 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. Once again, the petitioner did not submit any other tax returns beyond its 2000 tax return, and as previously stated, the petitioner's tax return for tax year 2000 is not dispositive in these proceedings. Therefore the AAO cannot examine the petitioner's ability to pay the difference between the beneficiary's wages and the proffered wage during 2001 through 2003 based on the petitioner's net current assets.

As previously stated, because the petitioner has not provided its tax returns for the years following the 2001 priority year either in response to the director's NOIR, or on appeal, the AAO cannot examine whether the

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had 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.

Counsel's assertions on appeal with regard to the beneficiary's ability to utilize the portability provisions of the American Competitiveness Act, AC21 are moot, as the petitioner could not establish its ability to pay the proffered wage as of the priority year when it initially filed the I-140 petition, or during the subsequent years until the beneficiary obtained lawful permanent residence. Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility.

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):

*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 unadjudicated 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.

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. 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.

Section 204(a)(1)(F) of the Act includes immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the [underlying] petition.

Section 212(a)(5)(A)(iv) of the Act , 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

Long Delayed Adjustment Applicants- A certification made under clause (k) with respect to an individual whose petitioner is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after 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 certification was issued.

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). In the instant petition, however, the I-140 petition was never valid, and thus the beneficiary cannot invoke AC21 portability provisions.

The AAO acknowledges that the appeal in the instant petition revolves around the idea that the petition was approved and was valid up to the actual adjustment of status interview whereupon the director determined that the job offer had not continued to be valid. However, the initial petition was approved in error. The record indicates that the petitioner had one and a half years of business operations when it filed the instant petition, and could provide only one tax return for the year prior to the 2001 priority year. The DE-6 forms indicate the petitioner employed five employees in tax year 2000 with total wages noted on the petitioner's W-3 form of \$55,634.97.

The AAO also notes that while the director's decision did not examine the new employer's ability to pay the proffered wage, based on the new employer's tax returns for 2002 and 2003 submitted to the record, the new employer has neither sufficient net income nor net current assets to pay the entire proffered wage of \$52,457.60.<sup>6</sup> The provisions of AC21 do not support the proposition that the beneficiary may port from an original petitioner that cannot establish its ability to pay the proffered wage as of the priority date and continuing to another company that also cannot establish its ability to pay the proffered wage, either as of the priority date or continuing. The AAO also notes that the record does not reflect that the beneficiary's second employer is a successor-in-interest to the initial petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Nevertheless, as previously stated, the totality of the circumstances affecting the petitioning business can be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the 2001 priority year was an uncharacteristically unprofitable year for the petitioner. Furthermore both counsel and the beneficiary have stated that the initial petitioner "conditionally" dissolved, although no exact dates were provided as to the actual dissolution of the business. The instant petitioner does not have the longevity or long-term reputation within an industry that the petitioner in *Sonegawa* exhibited. Thus, an examination of the totality of the petitioner's circumstances supports the director's decision to revoke the instant petition.

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<sup>6</sup> Atlas Shippers, the beneficiary's new employer, had net income of \$9,833 in 2002 and \$5,377 in 2003, and net current assets of -\$48,470 in 2002 and -\$152,955 in 2003.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2001 priority date. Although counsel on appeal attempts to link the concept of the petitioner's ability to pay the proffered wage to the beneficiary's eligibility for adjustment of status, the relevant issue for which the petition should be revoked is whether the petitioner demonstrated its continuing ability to pay the proffered wage at the time of filing the I-140 petition and continuing until the beneficiary received lawful permanent residence.

Although the director revoked the petition on the basis that the petitioner never intended to pay the beneficiary the proffered wage based on previous wages, the record indicates that the petitioner never established its ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtained lawful permanent residence. Even if the AAO did not look past the priority date and examine the ability of the new employer to pay the proffered wage, the petition was not approvable when filed because the petitioner showed no evidence of its ability to pay the proffered wage as of the 2001 priority date. Further, the new employer cannot show its ability to pay the proffered wage in the relevant period of time. Thus the petitioner's job offer does not appear realistic, as of the 2001 priority date and continuing through the tax years 2002 and 2003. For this reason, the petition should never have been approved.

The director therefore is correct in revoking the approval of the instant petition. 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 AAO also notes 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).

**ORDER:** The appeal is dismissed. The approval of the employment-based immigrant visa petition is revoked.