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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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File: [Redacted]  
WAC-97-158-50678

Office: CALIFORNIA SERVICE CENTER Date: **JUN 27 2008**

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

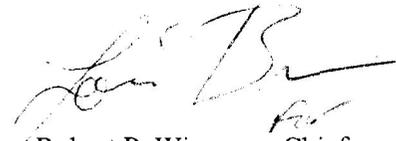
Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Director, California Service Center (director) initially approved the employment-based preference visa petition. Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition (NOIR). 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.

With respect to revocation, 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). Accordingly, the director has the authority to revoke the petition at any time. Whether the beneficiary is in the United States or not, has no bearing on this issue.

The petitioner is an automotive repair and body shop and seeks to employ the beneficiary permanently in the United States as an automobile body repairer (Auto Body Reconstruction Specialist). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s April 6, 2006 decision, the petition was revoked based on a determination, after the beneficiary was interviewed at a local Citizenship and Immigration Services (CIS) office in connection with his I-485 adjustment application, that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtained permanent residence.

On appeal, counsel submits additional evidence. For the reasons discussed below, the petitioner has not demonstrated that the petition was approvable when filed. As the beneficiary is not the beneficiary of a valid petition, the provisions of section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), are not applicable.

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).<sup>1</sup>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. The procedural history in this case is long, and will be outlined in greater detail.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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 was realistic when the priority date was established. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

The history of the case is lengthy, but pertinent to this matter, and in order to fully understand its progression, is summarized in a chronology as follows:

- On April 3, 1995, the petitioner filed Form ETA 750 on behalf of the beneficiary for the position of an automobile body repairer (Auto Body Reconstruction Specialist), at a pay rate of \$500 per week, equivalent to an annual salary of \$26,000 per year;
- On March 14, 1997, the Form ETA 750 was approved;
- On May 15, 1997, the petitioner filed Form I-140 on behalf of the beneficiary. The petitioner listed the following information on the I-140 Petition: established: 1973; gross annual income: \$363,000; net annual income: \$12,000; and current number of employees: 7.
- On June 4, 1997, the director approved the I-140 petition;
- On July 11, 1997, the beneficiary filed an I-485 Adjustment of Status application based on the approved I-140;
- On April 9, 1999, the beneficiary was interviewed at the local Los Angeles District Office in connection with his I-485 Adjustment of Status application;
- On January 15, 2002, the Los Angeles District Office transferred the file back to the director at the Service Center and recommended that the I-140 petition be revoked;

- On July 16, 2004, the director issued a Notice of Intent to Revoke (NOIR) on the basis that the petitioner had not demonstrated its ability to pay the proffered wage from the time of the priority date until the beneficiary obtained permanent residence. Specifically, the petitioner, a sole proprietor, only provided tax returns for 1996 and 1998,<sup>2</sup> which showed that the sole proprietor had an adjusted gross income in each year insufficient to cover the proffered wage and support the sole proprietor's family. The NOIR requested that the petitioner provide a statement of monthly household expenses for the sole proprietor's family, as well as tax returns with all schedules and attachments from 1996 onward.
- In response to the NOIR, counsel provided that, "as this case has been pending . . . for several years, we wish to utilize the Law of Portability of 2000<sup>3</sup> and substitute another employer for this case." In support, counsel submitted a new Form I-140 for the "substituted" employer, along with the new employer's federal tax return for the year 2003. Counsel did not provide any of the specific documentation requested in the NOIR related to the initial I-140 petitioner.
- On April 6, 2006, the director revoked the petition, based on the petitioner's failure to demonstrate its ability to pay the proffered wage, which effectively revoked the petition as of the date of the petition's approval. Section 205 of the Act. Specifically, the revocation provided that the petitioner only provided its federal tax returns for 1996 and 1998, and that both returns failed to show sufficient income to pay the proffered wage, and demonstrate that the sole proprietor could support his family. Further, the NOIR had requested a statement of the sole proprietor's expenses, along with tax returns for all of the relevant years. The petitioner did not provide any information related to these requests, and, therefore, failed to overcome the basis for the petition's revocation.
- On April 6, 2006, the Service Center issued a Notice of Intent to Deny the beneficiary's I-485 Adjustment of status application;
- On April 13, 2006, the petitioner appealed the I-140 revocation.

Counsel provided on appeal that the beneficiary "has been employed and paid full salary since 1997 and in 2004 he changed employers as per the Law of Portability of Pres. Clinton [AC 21] and is now paid salary of \$700 p/week gross since 2004." Counsel further provides that, "the tax returns of the new employer and of the applicant for 2004 and 2005 are enclosed to show that there is no problem with ability to pay."

Counsel did not address, or provide evidence related to the initial petitioner's ability to pay the proffered wage. The evidence of record before the director is as follows.

The petitioner is a sole proprietor, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they

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<sup>2</sup> The record contains a California State Tax summary from the petitioner's accountant, which reflects partial information for the year 1997.

<sup>3</sup> Counsel refers to the American Competitiveness in the Twenty First Century Act of 2000 (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports himself and his wife and resides in Glendale, California. The portions of the tax returns submitted reflect the following information:

<b>Tax Return for Year:</b>	<b>Sole Proprietor's AGI (1040)</b>	<b>Petitioner's Gross Receipts (Schedule C)</b>	<b>Petitioner's Wages Paid (Schedule C)</b>	<b>Petitioner's Net Profit from business (Schedule C)</b>
<b>1998</b>	\$5,771	\$371,300	\$17,800 (costs of labor \$131,614)	-\$29,146
<b>1997</b>	\$39,419	Schedule C not provided	Schedule C not provided	-\$14,128
<b>1996</b>	Page 1 not provided	\$363,112	\$24,980 (costs of labor \$78,216)	\$12,375

If we reduced the sole proprietor's AGI by the proffered wage, the sole proprietor would be left with \$13,419 to support his family in 1997, and -\$6,979 in 1998 (after factoring wages already paid to the beneficiary in that year in the amount of \$13,250). We cannot determine the amount that the sole proprietor would have remaining in 1996 as the sole proprietor's full Form 1040 was not provided. Further, we cannot determine the sole proprietor's monthly expenses as the sole proprietor did not provide any expense estimate in response to the NOIR.

Counsel's assertion that the beneficiary has actually received the proffered wage since 1997 is not supported by the record. Form G-325 filed with the beneficiary's I-485 Adjustment of Status application lists that the beneficiary was employed with the initial petitioner from February 1997 to May 2001. A letter from the petitioner provides that it hired the beneficiary on January 15, 1998. Further, the petitioner did not provide evidence that it paid the beneficiary the full wage in any of the relevant years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record lacks evidence that the petitioner had the ability to pay the full proffered wage in any year. Significantly, even if we only look at the petitioner's ability to pay as of the date the petition was filed in 1997, the petitioner has not demonstrated an ability to pay the proffered wage as of the priority date in 1995 through the filing date in 1997.

As the petitioner has not provided any evidence on this issue on appeal, it has failed to overcome the basis for revocation.

Therefore, the petition was properly revoked for good and sufficient cause under Section 205 of the Act, 8 U.S.C. § 1155, as the petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence.

Related to counsel's assertion regarding the beneficiary's portability, the petitioner provided copies of the beneficiary's tax returns for the years 2004 and 2005, as well as his W-2 statements for 2003, 2004, and 2005 showing payments by the new employer, "There is a Difference Body Shop," in the amount of \$32,007.50 for 2003; \$35,525 for 2004; and \$33,600 for 2005. Counsel also provided Forms 1040, including Schedules C for the new employer, a sole proprietorship, for the years 2003 and 2004.

As the initial petition was revoked, the beneficiary would seek portability based on a revoked, and unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

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 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 (i) with respect to an individual whose petition 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.

Section 204(a)(1)(F) of the Act includes the 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 petition.

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).

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).

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.

Statute and regulations allow 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).<sup>4</sup>

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.

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

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<sup>4</sup> 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).

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. 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 visa petitions and adjustment applications, thereby increasing CIS backlogs, in the hopes that the application might remain unadjudicated for 180 days.<sup>5</sup>

In the case at hand, the I-140 petition was revoked for good and sufficient cause as the petitioner had failed to establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner failed to provide any evidence on appeal to overcome the basis for denial. The beneficiary would therefore not have a valid immigrant visa petition approved on their behalf to be 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).

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 denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

Accordingly, the petition was properly revoked with good and sufficient cause based on the petitioner’s failure to establish that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains permanent residence. 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.

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<sup>5</sup> 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 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> 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.