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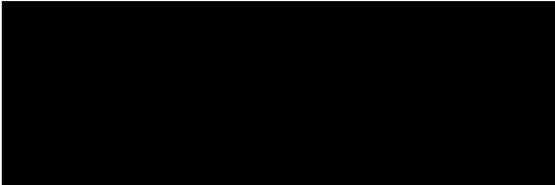
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAR 31 2008**

LIN-04-088-51937

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:

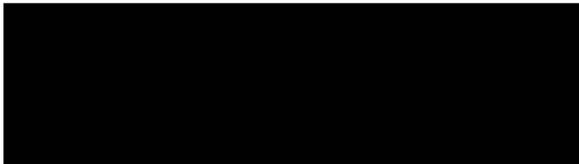
SELF-REPRESENTED

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

CC:



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

The petitioner is an IT developing and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst (programmer analyst I) pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date to the present, and denied the petition accordingly.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

This matter has a lengthy procedural history that will be discussed in detail. The petition was filed on February 6, 2004 with a concurrent Form I-485, Application to Register Permanent Residence or Adjust Status. On March 18, 2005 the director issued a request for evidence (RFE), requesting the petitioner to establish its ability to pay the proffered wage for 2002 through 2004. The petitioner did not provide a response to the RFE. Instead, the beneficiary's current employer, TalentLink, Inc. (TalentLink or the third party), submitted a response with TalentLink's payroll report, tax returns for 2003 and 2004, Form 941 employer's quarterly federal tax returns for the third and fourth quarters of 2004, bank statements from July 2002 to April 2005 and a letter dated March 18, 2005 from TalentLink indicating that it employed the beneficiary in the same or similar occupation for which the I-140 petition had been filed. Counsel for the third party asserted that the beneficiary was entitled to "port" the I-140 filed on his behalf to TalentLink pursuant to the provisions of section 204(j) of the Act, 8 U.S.C. § 1154(j), as added by section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21). The director ultimately denied the petition, observing that the petitioner had not established its ability to pay the proffered wage beginning on the priority date to 2004.

Citizenship and Immigration Services' (CIS) regulations only entitles a person or entity with legal standing in a proceeding as an affected party to file to appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). In this matter, the Form G-28, Notice of Entry of Appearance as Attorney or Representative, that was submitted for the record for the instant appeal, was signed by the president of TalentLink, not by an authorized representative of the petitioner, and counsel signed the Form I-290B and checked the box "I am an attorney or representative, and I represent: TalentLink, Inc." TalentLink did not ever claim to be a successor-in-interest to the petitioner, nor does the record contain any evidence to show that TalentLink qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Although the record contains a Form G-28 signed by the an authorized representative of the

¹ 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).

petitioner for the instant I-140 petition, however, there is no evidence showing that the petitioner authorized counsel to file the instant appeal. As TalentLink is not a recognized party in this matter, the new employer's counsel would not generally be authorized to file the appeal in this matter. An appeal not properly filed will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

However, given the novel issue raised by counsel on appeal, i.e., that AC21 permits the new employer to have legal standing in this proceeding as a successor petitioner, the AAO must address this as well as any related issues before it can properly conclude that the appeal has been improperly filed and must thereby be rejected. To make this determination, the AAO must therefore discuss the following: (1) whether a new employer takes the place of an original petitioner in AC21 situations, where the beneficiary's I-485 has been pending for 180 days or more; (2) whether a petition that has not been approved is "valid" for purposes of 8 U.S.C. § 204(j) as added by section 106(c) of AC21; and (3) whether the petition in this matter was properly denied.²

With regard to the first issue, counsel for the third party contends that his client, TalentLink is the successor employer of the I-140 petition because the portability provisions of AC21 are applicable to this matter based on the fact that the beneficiary's application for adjustment of status had been pending for more than 180 days at the time it was adjudicated.

In general, an alien may acquire permanent resident status in the United States through two legal mechanisms: the alien may pick up their approved visa packet at an overseas consulate and be "admitted" to the United States for permanent residence; or, if the alien is already in the United States in a lawful nonimmigrant or parolee status, the alien may "adjust status" to that of an alien admitted for permanent residence. *Cf.* § 211 of the Act, 8 U.S.C. § 1181 ("Admission of Immigrants into the United States"); § 245 of the Act, 8 U.S.C. § 1255 ("Adjustment of Status of Nonimmigrant to that of Person Admitted for Permanent Residence").

Governing adjustment of status, section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an *approved* petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or [sic] may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (i) the alien makes an application for such adjustment,
- (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (iii) an immigrant visa is immediately available to him at the time his application is filed.

(Emphasis added.)

² Although no appeal lies from the denial of an application for adjustment of status under section 245 of the Act, 8 C.F.R. § 245.2(a)(5)(ii), the beneficiary's purported new job and the portability considerations of AC21 are properly addressed by the AAO, provided the review in this matter is limited to the I-140 petition. The issues related to the petition include its continued "validity," the "successor" petitioner construct proffered by counsel, and the revocation of the petition itself.

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was filed, he would be eligible to and chose to apply to adjust his status in the United States to that of a permanent resident instead of pursuing consular processing abroad if the petition had been approved. Furthermore, based on the record of proceeding, as the beneficiary's I-485 was pending more than 180 days at the time he ported to a new job under AC21, it would appear, with an approval, that the approved petition would remain valid with respect to a new position with a different sponsor.³

Even so, this does not answer the more specific question of whether a new employer may take the place of and become the petitioner of an I-140 petition in AC21 situations. To address this issue, it is important to closely analyze section 106(c) of AC21 and determine the interpretation of the statute as intended by Congress. Specifically, section 106(c) of AC21 added the following to section 204(j) to the Act:

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.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

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.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

³ It should be noted that at the time AC21 came into effect, legacy INS regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. See 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to 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) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

Counsel asserts that the beneficiary is eligible to port under section 106(c) of AC21 as long as "a Form I-485, Application to Adjust Status, on the basis of the employment-based immigrant petition has been filed and remained unadjudicated for 180 days or more; and the new job is in the same or similar occupational classification as the job for which the certification was initially made." As a simple paraphrasing of the statute, the AAO concurs with counsel's statement. With an approved petition, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, in the instant case there was no an approved petition when the beneficiary ported to his new job. In addition, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Contrary to counsel's assertions and as discussed in greater detail below, the statutory language provides no benefit or right for a new employer to "substitute" itself for the previous petitioner as a successor employer or petitioner. The statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

There is no mention in AC21 of the new employer taking the place of the prior petitioner or any other language that would support counsel's novel. Section 106(c) states that the underlying I-140 petition "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." Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions. Counsel fails to show that the statutory language confers any employment rights to subsequent employers and fails to explain how this legal construct was arrived at given that there is no mention of employment rights conferred to new employers under AC21 in either the statute or the legislative history, *supra*.

In conclusion, counsel has failed to show that the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). Based on a review of the statute and legislative history, the AAO must reject counsel's unsupported legal construct of section 106 (c) of AC 21 which would entitle a new employer the benefit to replace the original I-140 petitioner as an affected party in these proceedings.

The second issue in this proceeding is whether a petition that has not been approved is valid for purposes of 8 U.S.C. § 204(j) as added by section 106(c) of AC21.

As discussed above, it is recognized that, as the I-140 was initially approved and as the I-485 was pending more than 180 days at the time AC21 was enacted on October 17, 2000, section 106(c) would normally apply in this case. However, section 106(c) does not specifically address the issue of a pending petition and whether it would "remain valid" with respect to a new position with a different employer.

Citing the CIS memorandum discussing the portability provisions of section 106(c) of the American Competitiveness in the Twenty First Century Act of 2000 (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000)⁴, counsel asserts that the beneficiary may port to a new employer as long as the I-140 is approvable or would have been approvable had it been adjudicated within 180 days of filing. However, counsel's reliance on the memorandum is misguided. The memorandum refers only to petitions that have been approved based on the beneficiary's eligibility for the requested classification. In this case, the initial petition was denied because the beneficiary is not eligible for the requested classification. Further, as will be discussed below, CIS memoranda do not establish judicially enforceable rights.

Upon review, counsel's assertions are not persuasive. The operative language in section 106(c) is the following phrase: "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 or to situations in which an I-140 petition has not approved yet.⁵ See S. REP. 106-260; see also H.R. REP. 106-1048. Critical to section 106(c) of AC21, however, the petition again must be "valid" to begin with if it is to "remain valid with respect to a new job." Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Although counsel points to CIS memoranda to assert that the AAO should construe section 106(c) in a light favorable to the beneficiary and his new employer, counsel does not discuss the actual language of the statute. As indicated above, statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552. We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837. Furthermore, we are to construe the language in question in harmony with the thrust of related

⁴ William R. Yates, Associate Director for Operations at Citizenship and Immigration Services (CIS), *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, HQPRD 70/6.2.8-P (May 12, 2005) (hereinafter "2005 memorandum").

⁵ CIS has not as yet published any regulations governing the application of section 106(c) of AC21. The agency has offered guidance on this provision in the form of two policy memoranda and has amended the Adjudicator Field Manual (AFM) to account for the law. Neither the memoranda nor the AFM define the term "valid." See Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, CIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000*, HQCIS 70/6.2.8-P (August 4, 2003); Memorandum from Michael A. Pearson, Executive Assoc. Comm., Office of Field Operations, INS (now CIS), *Initial Guidance for Processing H-1B Petitions as Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313) and Related Legislation*, HQCIS 70/6.2.8-P (June 19, 2001); see also § 20.2(c) of the AFM. However, with regard to revocations of I-140 petitions, the August 4, 2003 memorandum from William R. Yates states that, if an "approval of the Form I-140 is revoked, . . . the approved Form I-140 is no longer valid with respect to a new offer of employment and the Form I-485 may be denied." Memorandum from William R. Yates, Acting Assoc. Dir. for Operations, CIS, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000*, HQCIS 70/6.2.8-P (August 4, 2003); § 20.2(c) of the AFM.

provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. at 291 (again, holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561; *Matter of W-F-*, 21 I&N Dec. 503.

Contrary to the ordinary meaning of the word, counsel's position that section 106(c) applies in this matter would have CIS construe the term "valid" to include denied and patently unapprovable petitions. *See Webster's New College Dictionary* 1218 (2001) (defining "valid" as "well-grounded," "producing the desired results," or "legally sound and effective.") As an approved petition is required for CIS to approve an application for adjustment of status, *supra*, it is extremely doubtful that Congress intended the term "valid" to include petitions that are unapprovable or ultimately denied. § 245(a) of the Act, 8 U.S.C. § 1255(a)

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.

Section 245(a) of the Act, 8 U.S.C. § 1255(a), requires the adjustment applicant to have an "approved" petition in order to be granted adjustment of status. However, in passing AC21, Congress did not address the issue of I-140 approvals or amend section 204(b) of the Act, 8 U.S.C. § 1155(b), to restrict CIS authority in approving immigrant petitions. Nor did Congress amend section 245(a) of the Act, 8 U.S.C. § 1255(a), to lose or delete the requirement of an "approved" petition for granting adjustment of status with section 106(c) of AC 21.

Moreover, as discussed in greater detail below, the petition in the present matter was filed on behalf of an alien who was not "entitled" to the classification and the petition was ultimately denied. Section 106(c) of AC21 does not repeal or modify sections 204(b) or 245 of the Act, which require applicants to have an approved petition prior to being granted immigrant status or adjustment of status, nor did it repeal or modify section 205 of the Act to grant any immunity from denial, as proposed by counsel. Accordingly, this petition cannot be deemed to have been "valid" for purposes of section 106(c) of AC21.

In conclusion and as a final note on this issue, while section 106(c) did not create any right to immunity or protection from section 205 of the Act, it is recognized that this section, with an approval of the petition, does provide adjustment of status applicants with a restricted benefit to change jobs assuming the underlying I-140 is bona fide and valid. Again, however, section 106(c) is based on the underlying assumptions that the I-140 petition had been approved. Despite the time it may have taken CIS to approve a petition, it is assumed that, whether the petition was processed within six months or six years, any problems and issues would be found before the I-485 adjustment application was adjudicated, as was the case in the instant petition. Contrary to the assertions of counsel, for the reasons discussed above, there is no evidence that Congress intended section 106(c) of AC21 to convey a right to an automatically approved I-140 petition simply based on the passage of time.

The third issue in this proceeding is whether the petition in this matter was properly denied. On appeal, counsel asserts that the instant petition filed on behalf of the beneficiary is approvable.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages as of the priority date and thereafter until the beneficiary obtains lawful permanent residence, 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 priority date in this case is July 22, 2002. The proffered wage as stated on the Form ETA 750 is \$56,389 per year. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$4,315,551, to have a net annual income of \$11,830, and to currently employ 40 workers. On the Form ETA 750B, signed by the beneficiary on July 18, 2002, the beneficiary did not claim to have worked for the petitioner. Therefore, the petitioner must establish its continuing ability to pay the proffered wage from 2002, the year of the priority date, to the present.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary did not claim to have worked for the petitioner and the petitioner did not submit W-2 forms, 1099 forms or other payment documents for the beneficiary for the relevant years. The petitioner failed to demonstrate that it paid the beneficiary the proffered wage in 2002 through the present, and thus failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986)

(citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 Chang* at 537.

The petitioner submitted Form 1120 U.S. Corporation Income Tax Return filed by ORI, Inc. for the calendar year 2002 and Form 1120 U.S. Corporation Income Tax Return filed by the petitioner for a period from August 21, 2002 to December 31, 2002. Counsel claimed that the petitioner was a subsidiary of ORI, Inc. until August 20, 2002, therefore, both 2002 tax returns of ORI, Inc. and the petitioner should be considered as financial sources in determining the petitioner's ability to pay the proffered wage in 2002. The tax returns submitted support counsel's assertion. The AAO will consider both tax returns in determining the petitioner's ability to pay in 2002, the year of the priority date.⁶ The 2002 tax returns demonstrate the following financial information pertinent to the petitioner's ability to pay the proffered wage as of the priority date:

- ORI, Inc.'s Form 1120 tax return for 2002 stated a net income⁷ of \$21,011.
- The petitioner's Form 1120 tax return (8/21/02-12/31/02) stated a net income of \$(4,887).

Therefore, for the year 2002, the petitioner's net income during the period from August 21, 2002 to December 31, 2002 together with its parent corporation, ORI, Inc.'s net income for the whole calendar year of 2002 was

⁶ Since the petitioner was a subsidiary of ORI, Inc. until August 20, 2002 and the petitioner filed its own tax return for the rest of year 2002, ORI, Inc. was responsible for the petitioner financially only during the period from January 1 to August 20, 2002. However, ORI, Inc. did not file its tax return for that period instead of the whole calendar year, and it is difficult to separate ORI, Inc.'s net income or net current assets during that period from ones during the rest of the year. Therefore, the AAO will consider both tax returns together as primary financial evidence to establish the petitioner's ability to pay the proffered wage in 2002.

⁷ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

not sufficient to pay the beneficiary the proffered wage of \$56,389 that year, and thus the petitioner failed to establish its ability to pay the proffered wage for 2002 with its net income.

As alternative method to determine the petitioner's ability to pay the proffered wage, 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.⁸ 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.

- ORI, Inc.'s net current assets during 2002 were \$30,404.
- The petitioner's net current assets during 2002 were \$(831,194).

Therefore, for the year 2002, neither the petitioner nor its parent corporation had sufficient net current assets to pay the beneficiary the proffered wage, and thus, the petitioner failed to establish its ability to pay the proffered wage as of the priority date through the examination of net current assets.

The record before the director closed on June 2, 2005 with the receipt by the director of the response to the RFE. As of that date the petitioner's federal tax returns for 2003 and 2004 should have been available. However, counsel did not submit the petitioner's tax returns, annual reports or audited financial statements for 2003 and 2004. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2003 and 2004. The tax returns, annual reports or audited financial statements would have demonstrated the amount of the petitioner's net income or net current assets, and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The record contains TalentLink's tax returns for 2003 and 2004, Form 941 employer's quarterly tax returns, bank statements and payroll reports. However, as previously discussed, TalentLink did not qualify as the successor-in-interest to the petitioner, nor could it replace the petitioner in the instant case as a successor petitioner

⁸According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

under section 106(c) of AC 21. Therefore, TalentLink's financial documents are not necessarily dispositive in determining the petitioner's ability to pay the proffered wage for any of the relevant years. In addition, TalentLink did not claim and submit any evidence to document the beneficiary's porting to a new job until the response to the director's RFE which was received by the director on June 2, 2005. In the letter dated March 18, 2005, the new employer stated that the beneficiary had ported to a new job pursuant to section 106 of AC 21 in the beginning of March 2005. Therefore, even if the beneficiary had been allowed to port to a new job under AC 21, the new employer would have to establish its ability to pay the proffered wage in the instant case from 2005, but for 2003 and 2004, the original petitioner would still be responsible. In any event, the petitioner cannot establish its ability to pay the proffered wage in 2003 and 2004 with tax returns or other regulatory-prescribed evidence of TalentLink or any other entities. The petitioner failed to establish its ability to pay the proffered wage for 2003 and 2004.

On appeal, counsel argues that the petitioner had the ability to pay the proffered wage in 2002 because the service center had already approved eight immigrant petitions. However, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

CIS records show that the petitioner filed three hundred and sixty-two (362) immigrant and nonimmigrant petitions. Among them, at least eight immigrant petitions were approved.⁹ Therefore, the petitioner must establish its ability to pay for nine (including the instant beneficiary) in 2002 through 2004. Given the record

⁹ The eight approved petitions are as follows:

LIN-02-214-552147 was filed with the priority date of June 29, 2001 and approved on November 20, 2002, and the beneficiary obtained lawful permanent residence on November 22, 2004;
LIN-03-012-51667 was filed with the priority date of December 7, 2001 and approved on November 5, 2002, and the beneficiary obtained lawful permanent residence on September 7, 2004;
LIN-03-013-51270 was filed with the priority date of December 7, 2001 and approved on October 31, 2002, and the beneficiary obtained lawful permanent residence on August 18, 2004;
LIN-03-013-52373 was filed with the priority date of December 7, 2001 and approved on October 31, 2002, and the beneficiary obtained lawful permanent residence on December 6, 2004;
LIN-03-013-52636 was filed with the priority date of October 18, 2002 and approved on November 1, 2002, and the beneficiary obtained lawful permanent residence on August 20, 2004;
LIN-03-041-50197 was filed with the priority date of February 12, 2002 and approved on April 24, 2003, and the beneficiary obtained lawful permanent residence on December 9, 2004;
LIN-03-055-51695 was filed with the priority date of December 7, 2001 and approved on February 11, 2003, and the beneficiary obtained lawful permanent residence on October 5, 2004; and
LIN-04-005-54007 was filed with the priority date of November 15, 2000 and approved on February 3, 2005, and the beneficiary obtained lawful permanent residence on February 5, 2005.

as a whole and the petitioner's history of filing immigrant petitions, the AAO finds that the petitioner did not establish its continuing ability to pay all the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

Therefore, the petitioner had not established that it had the ability to pay all the beneficiaries of the approved and/or pending petitions the proffered wage for the years from 2002 to 2004 through an examination of wages paid to the beneficiary, or its net income or its net current assets.

Counsel's assertions on appeal cannot overcome the ground of the director's denial. The AAO concurs with the director's decision and finds that the director properly denied the petition finding that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date and continuing to the present.

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

Finally, regarding TalentLink's request for oral argument, the regulations provide that the "affected party" must explain in writing why oral argument is necessary. 8 C.F.R. § 103.3(b)(1). Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the third party corporation simply requested without any explanation. Even if the third party corporation persuaded this office why it could not adequately address the issues in this matter in writing, as explained and for the reasons stated herein, TalentLink is not an affected party in this proceeding. Therefore, the request for an oral argument from an unaffected party is not properly received and must be denied.

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

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