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

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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 3 1 2008

SRC-03-114-52660

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager (store manager) pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i). 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 no longer desired a worker and there is no established successor-in-interest to use the labor certification. The director also determined that the American Competitiveness in the Twenty First Century Act of 2000 (AC 21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000), does not allow the beneficiary to "port" at the I-140 stage because his/her I-485 has been pending more than 180 days. The director denied the petition accordingly.

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. Further elaboration of the procedural history will be made only as necessary.

On appeal, counsel argues that the petitioner was never closed, but only the shares of the company were assigned from Humayara Enterprises to Young Circle Enterprises, thus termination of the I-140 is not appropriate; that the underlying labor certification remains valid and the portability for the beneficiary is held under section 106(c) of AC21; and that the I-140 filed on behalf of the beneficiary is approvable as both organizations had the ability to pay at the time of relative filing.

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 appeal[1].

Given the novel issues raised by counsel on appeal, i.e., that AC21 permits the new employer to have legal standing in this proceeding, the AAO must address this as well as any related issues before it can determine whether the petition has been properly denied. To make this determination, the AAO must therefore discuss the following: (1) whether Young Circle enterprises takes the place of the petitioner, Humayara Enterprises, Inc. in AC21 situations, where the beneficiary's I-485 has been pending for 180 days or more; (2) whether the petition that has been denied is still "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]

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[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).

[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 denial of the petition itself.

With regard to the first issue, counsel contends that Young Circle Enterprises is the "same employer" as the petitioner as the shares of company were assigned from the petitioner to Young Circle Enterprises. The record contains documentation pertinent to the transactions of the shares of the petitioner and the establishment of both companies. Articles of Incorporation of Humayara Enterprises, Inc., and Certificate from State of Florida Department of State show that the petitioner was established as a Florida corporation on September 10, 1999 with three initial directors: [redacted] and [redacted]. The petitioner's Form 1120S U.S. Income Tax Return for 2002 shows that the petitioner had three shareholders: [redacted] (40% shares owner), [redacted] (20% shares owner), and [redacted] (40% shares owner) at the end of year 2002. On appeal, counsel submits documentary evidence regarding the transaction of shares of the petitioner. The Minutes of the Meeting of the Board of Director of Humayara Enterprises, Inc. held on January 30, 2003 show that while [redacted] and [redacted] resigned their offices, directors and stockholders of the corporation, [redacted] was appointed as the sole president, secretary, treasurer and director of the corporation. Submitted Closing Statement, Bill of Sale, Affidavit of Assignment of Stock in Humayara Enterprises, Inc., and Seller's Affidavit show that on January 30, 2003, [redacted] purchased the 60 percent of interest in business known as "Stop & Save" Store located at 3301 Sheridan Street, Hollywood, Florida 33021 for $46,000 from the other shareholders of Humayara Enterprises, Inc. and became the sole owner of the corporation. The record also contains Articles of Incorporation of Young Circle Enterprises, Inc., and its Certificate from State of Florida Department of State which show that Young Circle Enterprises, Inc. was established as a Florida corporation on April 15, 2002 with the business address at 7800 NW 42nd Court, Davie, FL 33324 and with two officers: [redacted] as President and [redacted] as Secretary and Vice President of the corporation. Both corporations are currently active[3] and each of them has its own federal employer identification number.[4] Therefore, while counsel's assertion that the petitioner was never closed, but only the shares of the company were assigned is correct, his assertion that the shares of the petitioner were assigned from Humayara Enterprises to Young Circle Enterprises, and thus Young Circle enterprises is the same employer as the petitioner is misplaced. The record contains no evidence that Young Circle Enterprises 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).

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;[5] 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:

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[3] *See* Florida Department of State Division of Corporation official corporation database website at http://www.sunbiz.org/corinam.html (accessed on March 11, 2008).

[4] *See* the petitioner's tax returns and Young Circle Enterprises, Inc.'s tax returns at Page 1.

[5] Counsel asserts on appeal that, if the beneficiary had pursued consular processing instead of applying for adjustment of status, he would have become a permanent resident in 1997. There is no evidence in the record to support this assertion. However, even assuming hypothetically that the beneficiary had chosen consular processing instead, it is quite possible the consular officer abroad would have noticed the same issues of ineligibility, denied the immigrant visa application, and referred the matter back to CIS.

> 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,
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> (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.)

In this matter, as the beneficiary was present in the United States at the time the I-140 petition was approved, he was 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. Furthermore, based on the record of proceeding, as the beneficiary's I-485 was pending more than 180 days at the time AC21 was enacted and the provisions of section 106(c) of this act came into effect on October 17, 2000, it would appear, absent revocation, that the approved petition would remain valid with respect to a new position with a different sponsor.[6]

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 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.

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).

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[6] 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.

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).

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, 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.

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 is revoked.[7] *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 as well as to comments made by Senator Feinstein 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.

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[7] 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.

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 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 revocation, 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 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 (April 29, 2002 in the instant case) and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *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 petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, describes the job opportunity in details. The job offer consists of the name of job title "store manager" set forth at Item 9, the duties of "manage night shift for convenience store that sells groceries, alcoholic beverages, cigarettes, lotto, money orders & related merchandise. Plan work schedules. Order merchandise & prepare displays. Supervise sales & inventory. Comply with security & record keeping procedures. Operate cash register & reconcile revenues" set forth at Item 13, the minimum requirements that an applicant must have three years of experience in the job offered of store manager set forth at Item 14 and that the beneficiary will supervise one employee set forth at Item 17.

On the petition, the petitioner did not reveal its number of current employees. On May 14, 2005, the director issued a request for evidence (RFE) for the information and its supporting documents among other things. In response to the director's RFE, counsel submitted 1099 forms issued by the petitioner to its two workers and indicated that "as for the employee that the beneficiary would have supervised, this would have been one of the workers that was issued a Form 1099." The petitioner did not report any salaries and wages or cost of labor on its tax returns but as 1099 issued under Other Deductions on Line 19 of the form 1120S. All the compensation the petitioner paid was in 1099 forms as nonemployee compensation. The 1099 forms submitted in the record show that the petitioner paid [redacted] $16,200 in 2001, and $9,498 in 2002; the petitioner also paid [redacted] $10,112 in 2002. The record also contains a 1099 form issued by Young Enterprises, Inc. to [redacted] for 2003 in the amount of $8,990. However, counsel did not specify who would be the employee supervised by the beneficiary. On appeal, counsel asserts that the "copy of 2002 1099 for [redacted], shows that the business was active and had employees other than [the beneficiary]." The record does not contain any evidence showing

that the petitioner had any employees in 2003 and onwards or that Mohammad Abul Khair has continued to work for the petitioner in 2003 and onwards.

The labor certification is certified for a full time supervisory position. The manager's main duties are to supervise other employees. It is a material part of the terms and condition of the job opportunity for a manager to supervise employees. Without a sufficient number of employees to be supervised by the beneficiary, the labor certification application might not have been certified because a supervisory position cannot exist without enough number of employees to be supervised. Furthermore, although counsel and the petitioner claim that the petitioner had at least one employee, evidence was not submitted to support that the petitioner had at least one employee from the priority date to the present. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

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 determined that the petitioner failed to establish that its job offer to the beneficiary is a realistic one because it failed to demonstrate that it had employees to supervise at the time the labor certification was applied and continues to the present. The director's August 2, 2005 decision is herewith affirmed.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss whether the petitioner has demonstrated that the beneficiary possessed the requisite three years of experience prior to the priority date and whether the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The underlying labor certification requires three years of experience in the job offered. The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 18, 2002 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked for Causeway Drive-Thru Food Store in Lauderdale, Florida as a store manager from May 2001 to the present, i.e. April 18, 2002 when the form ETA 750B was signed. Prior to that, he represented that he worked for Kwik Stop in Miami, Florida as a store manager from November 1996 to October 2000. He does not provide any additional information concerning his employment background on that form.

The record of proceeding contains an experience letter dated April 7, 2001 from the president of Kwik Stop (Food Store) in Miami, Florida (Kwik Stop April 7, 2001 letter). Shahid N. Chondhury certifies that the beneficiary was employed as a store manager for exact four years from November 1, 1996 to October 30, 2000. However, the Kwik Stop April 7, 2001 letter does not verify the beneficiary's full-time employment. Without such verification, the AAO cannot determine whether the alleged four years of experience meets the requirements of the three years of full-time experience in the job offered as set forth on the Form ETA 750. In addition, the record does not contain any evidence, such as the business registration documentation, payroll or personnel records of the company and the beneficiary's income records from the company, etc. to demonstrate that the business existed, and that the beneficiary worked for the company on full-time basis during the relevant period. The Florida Department of State Division of Corporation official corporation database website does not list any business entity with the name of Kwik Stop at 11741 Quail Roost Drive, Miami, FL 33157 and [redacted].[8] Furthermore, on his Form G-325A, Biographic Information, submitted with the concurrently filed I-485 application for adjustment of status signed on February 20, 2003, the beneficiary claimed that he worked for Kwik Stop from November 1996 to October 2000 while in the meantime, he also claimed on the same form that he lived at 5771 SW 36th Court, #302, Davie, Florida from 1996 to September 2000. Neither the Kwik Stop April 7, 2001 letter nor the beneficiary explained how the beneficiary managed to work for a company 45 miles away from his residence for the four years. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition" and "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Without further independent objective evidence to verify the beneficiary's full-time employment with Kwik Stop in Miami, Florida as a store manager, the AAO cannot accept the Kwik Stop April 7, 2001 letter as primary evidence to establish the beneficiary's qualifications for the proffered position. Therefore, the petitioner failed to demonstrate that, on the priority date, the beneficiary had the experience required by the Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.

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

[8] *See* http://www.sunbiz.org/corinam.html (accessed on March 11, 2008).

> 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The priority date in this case is April 29, 2002. The proffered wage as stated on the Form ETA 750 is $600 per week ($31,200 per year). On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of $278,752, and to have a net annual income of $48,283. On the Form ETA 750B, signed by the beneficiary on April 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 since the instant beneficiary has not obtained lawful permanent residence yet.

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 its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002 as evidence of the petitioner's ability to pay the proffered wage. However, the petitioner's 2001 tax return is not necessarily dispositive since the priority date in the instant case is April 29, 2002 and the petitioner is only obligated to demonstrate that it had the ability to pay the proffered wage from the year of the priority date. The petitioner's 2002 tax return demonstrates the following financial information pertinent to the petitioner's ability to pay the proffered wage as of the priority date:

> In 2002, the Form 1120S for the petitioner stated a net income[9] of $22,477.

Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage of $31,200.

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.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

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[9] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."
Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

[10] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. However, the petitioner did not report its assets and liabilities on the schedule L of the Form 1120S although the petitioner was required to complete Schedule L.[11] The petitioner's tax return for 2002 shows that the petitioner had zero net current assets at the end of tax year 2002. Therefore, for the year 2002, the petitioner did not have sufficient net current assets to pay the instant beneficiary the proffered wage.

The record before the director closed on July 28, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax returns for 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 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. Without these documents, the AAO cannot determine whether the petitioner had the ability to pay the proffered wage in these years. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2003 and 2004.

The record contains the petitioner's bank statements for 2002. However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash considered in determining the petitioner's net current assets.

The record also contains Young Circle Enterprises' tax returns for 2003 and 2004. However, as previously discussed, the record does not contain documentary evidence that Young Circle Enterprises has assumed all of the rights, duties, and obligations of the petitioner and thus failed to establish that Young Circle Enterprises qualifies as the successor-in-interest to the petitioner. Therefore, the petitioner cannot establish its ability to pay the proffered wage in 2003 and 2004 with assets of Young Circle Enterprises. The previous discussion also reveals that Young Circle Enterprises cannot replace the petitioner in the instant case as a successor petitioner under section 106(c) of AC 21. Counsel and Young Circle Enterprises 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

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[11] Note for Schedule L indicates that the corporation is not required to complete Schedule L and M-1 if question 9 of Schedule B is answered "Yes." The petitioner answered question 9 of Schedule B "Yes," and therefore, it did not complete Schedule L of the Form 1120S for 2002. Question 9 of Schedule B is "Are the corporation's totals receipts (see instructions) for the tax year **and** total assets at the end of the tax year less than $250,000? If 'Yes,' the corporation is not required to complete Schedule L and M-1." (Emphasis in original). The petitioner was in error in answering "Yes" to the question because it reported gross receipts or sales of $275,960 and total assets of $36,523.

which was received by the director on July 28, 2005. In the letter dated July 26, 2005, counsel stated that "the beneficiary will be porting to a new employer pursuant to section 106 of AC 21." In the response, counsel also submitted a letter dated June 22, 2005 from Giash Uddin, President of Young Circle Enterprises, confirming Young Circle Enterprises' new job offer. 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 Young Circle Enterprises or any other entities.

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 another Immigrant Petitions for Alien Worker (SRC-03-107-51350) in 2003. That petition was filed on February 27, 2003, and the beneficiary's application for adjustment of status was pending as of November 20, 2007. The petitioner must establish its ability to pay for two in 2003 through the present. If the petition has a priority date in 2002, the petitioner must also establish its ability to pay for two that year. Given the record 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 the present through an examination of wages paid to the beneficiary, or its net income or its net current assets.

The petition will 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 dismissed. The decision of the director is affirmed.