U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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Date: APR 04 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted] WAC 04 256 53964

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Elizabeth M'Cormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a financial institution, providing businesses and individuals financial funding to purchase, among other things, cars, boats, and recreational vehicles. It seeks to employ the beneficiary permanently in the United States as a financial manager, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(3)(i).[1] The director denied the petition, finding that the petitioner had failed to demonstrate that the beneficiary qualified to perform the duties of the proffered position. The director also determined that the petitioner had failed to meet its burden of proving by a preponderance of the evidence its continuing ability to pay the proffered wage from the priority date.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

This matter has a complex procedural history. The petitioner submitted two Immigrant Petitions for Alien Worker (Form I-140): one was certified and filed by internet on July 18, 2004, and the other was mailed to and receipted into the California Service Center (CSC) on September 13, 2004.[3] The instant petition mailed to and received by the CSC was accompanied by an approved Application for Alien Employment Certification (Form ETA 750) for a beneficiary named Linda

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[1] 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.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

[3] The petition certified and filed by internet was given this receipt number: WAC-04-800-48690. The petition mailed to and received by the California Service Center has the following receipt number: WAC-04-256-53964, and is the petition under consideration on appeal. The Nebraska Service Center issued two decisions, both dated February 23, 2010. The petitioner claims on motion to have only filed one petition.

[redacted][4] In his notice of intent to deny (NOID) dated January 6, 2009, the director, among other things, instructed the petitioner to complete and submit part B of the Form ETA 750 to substitute the alien beneficiary named in the Form I-140 petition in place of the original beneficiary on the Form ETA 750, Application for Alien Employment Certification.[5] Upon receipt of the petitioner's response, the director denied the petition, finding that the petitioner had failed to demonstrate that the beneficiary had the requisite work experience to qualify to work in the job offered. The director also determined that the petitioner had failed to show that it had the continuing ability to pay the proffered wage from the priority date.

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[4] The AAO notes that the petitioner's majority shareholder is [redacted] If he is related to the original beneficiary, the petitioner may not have fairly performed recruitment for the position; this would call into question the validity of the labor certification. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). As the appeal will be dismissed on other grounds, the AAO will not remand the matter to the director for further investigation of this issue.

[5] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the Department of Labor (DOL) at the time of filing this petition. The DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, the DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). The DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). The DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from [redacted]Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). As the petition naming the instant beneficiary was filed along with the approved Form ETA 750 for another alien beneficiary prior to July 16, 2007, the AAO will accept the substitution request as timely.

On March 29, 2010, the petitioner filed two Notices of Appeal or Motion (Form I-290B): on one Notice of Appeal or Motion, the petitioner marked the box that said "I am filing an appeal. My brief and/or additional evidence will be submitted to the AAO within 30 days," and on the other, the petitioner marked the box that said "I am filing a motion to reopen and a motion to reconsider a decision. My brief and/or additional evidence is attached." Both the motion and the appeal were filed on the denial in the instant case, WAC-04-256-53964. Along with the motion and the appeal, the petitioner submitted various documents, including a corporate diagram and timeline of merger and/or acquisition, intended to show that the beneficiary had worked for essentially the same employer since 1969. The petitioner also submitted copies of its tax transcripts issued by the Internal Revenue Service (IRS) for the years 2001 through 2003 to demonstrate that the petitioning corporation had the ability to pay the beneficiary's wage continuously from the priority date.

On August 12, 2010, the director accepted the motion but determined that the petitioner had not overcome its burden of proving by a preponderance of the evidence that it had the ability to pay the proffered wage from the priority date and that the beneficiary qualified to perform the duties of the position. The petition remained denied, accordingly.

On appeal to the AAO, counsel for the petitioner contends that the petitioner has provided sufficient and compelling evidence to demonstrate that the beneficiary is qualified to perform the duties of the proffered position, having significantly more than five years of work experience in the job offered before the petitioner filed the Form ETA 750 with the DOL for processing.

As set forth in the director's February 23, 2010 denial, the issues in this case are (1) whether the beneficiary has the requisite work experience to perform the duties of the position, and (2) whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must demonstrate that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on February 28, 2001. The petitioner seeks to hire a financial manager. The Form ETA 750 specifically requires the prospective applicant to have a minimum of five years experience in the job offered. The job description in box 13 of the Form ETA 750 lists the job duties for financial manager as: "Analyze financial data for proposals, budgets and operating reports."

The petitioner explained why the beneficiary qualified for the position offered:

> In May 1979, [redacted] [the beneficiary] earned his bachelor'[s] degree in economics and business administration from [redacted] in Orange,

> California. From July 1969 to February 2000, [redacted] performed management responsibilities as an employee of [redacted] continued to utilize his background in economics and business administration with Aramco Gulf Operations, Ltd. until he left the company in August 2002.
>
> [redacted] background finds him well qualified for the permanent fulltime position of financial manager, the position that [redacted] is unable to fill. The original of our certified Form ETA 750 is enclosed.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires the beneficiary to have a minimum of five years of work experience in the job offered. On the Form ETA 750 part B, signed by the beneficiary on January 31, 2010, he represented that he worked at "Arabian Oil Company Limited" in Saudi Arabia as an assistant superintendent from August 1984 to February 2000.

To show that the beneficiary had at least five years work experience before the priority date, the petitioner submitted the following evidence:

- A copy of the beneficiary's Bachelor of Arts' diploma from [redacted];
- A letter dated June 4, 1979 from [redacted] stating that the beneficiary was accorded a Bachelor of Arts in Economics and Business Administration;
- A copy of the beneficiary's school transcripts from [redacted]
- A document called "End-of-Service Certificate" stating that the beneficiary was an employee of [redacted] from 01/07/1969 (July 1, 1969) to 27/2/2000 (February 27, 2000) and of [redacted] for [redacted] Operations with the [redacted] from 28/2/2000 (February 28, 2000) to 8/9/2002 (September 8, 2002), holding the last position as an environment protection specialist;
- A letter dated January 26, 2010 from [redacted] certifying that the beneficiary was an employee of [redacted] and of [redacted] Joint Operations for [redacted] between July 1, 1969 and September 8, 2002);
- Various printouts describing the operation of [redacted]; and
- A diagram created by counsel describing the evolution of the [redacted] since its inception in 1958.

Upon review, the director concluded that none of the evidence submitted above showed that the beneficiary had the requisite work experience as a financial manager. The director indicated that the beneficiary provided an inconsistent statement when he filed the Biographical Information form (Form G-325) in connection with his application to register for permanent residence or adjust status (Form I-485) – the beneficiary claimed in that form that he worked for [redacted] in Saudi Arabia from January 1969 to August 2002. The director also determined that it was implausible for the beneficiary to retain his fulltime employment with [redacted] while he earned his degree in the United States in 1979. In addition, the director stated that the petitioner failed to submit other corroborating documents such as tax records, paystubs, etc. to demonstrate that the beneficiary was employed by the [redacted]

Upon *de novo* review, the AAO agrees with the director that the record does not establish that the beneficiary has the requisite work experience as a financial manager as of the filing date of the Form ETA 750.

For purposes of determining whether or not the beneficiary had the requisite work experience in the job offered, counsel indicates that the relevant experience is the beneficiary's position as a superintendent at [redacted] which he listed on the Form ETA 750B.

In the letter from [redacted] the author describes the beneficiary's duties at the [redacted] as the following:

> This is to certify that [redacted] [the beneficiary], Saudi nationality (born June 22, 1944), was a fulltime employee with the [redacted] from July 1, 1969 to February 27, 2000, where he held the positions of Material Clerk (control section) from July 1969 to January 1979, Material Officer (inventory section) from August 1979 to August 1984, and Assistant Superintendent (marine and aviation department) from August 1984 to February 2000.
>
> . . .
>
> As Assistant Superintendent of marine and aviation department, [redacted] duties were the preparation and maintenance of financial information, yearly budgets and reports required for the successful operations of the marine, marine maintenance, and aviation sections of our company.

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

> 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.

The letter dated December 3, 2003 from [redacted] is deficient in that the letter does not describe the duties performed by the beneficiary with sufficient specificity for the AAO to determine that the beneficiary more likely than not has five years experience in the job offered, i.e., financial manager. The job duties to be performed by the beneficiary in the Form ETA 750 are: "Analyze financial data for proposals, budgets and operating reports." The letter from [redacted] ates that the beneficiary performed the following: "preparation and maintenance of financial information, yearly budgets and reports." The duties that the beneficiary performed for [redacted] do not include the analysis of financial data, but simply the preparation and maintenance of the books of the company. As the beneficiary's experience did not involve the analysis of financial data, the letter does not establish that the beneficiary has five years of experience as a financial manager. The letter from [redacted] is also deficient in that it does not establish the authority of the author to describe the duties performed by the beneficiary for a different employer, the [redacted]

As noted by the director, the evidence is inconsistent with respect to the beneficiary's employment history. On the Form G-325, the beneficiary indicates that he was employed by [redacted] from 1969 - 2002 as an economist/business administration. On the Form ETA 750B he states that he worked at the [redacted] from 1984 - 2000 as an assistant superintendent, performing the duties of a financial manager as listed on the Form ETA 750A. On the Form ETA 750B, he does not list his employment at Aramco from 2000 - 2002, or any of his employment from 1969 - 1983 for either Aramco or the Arabian Oil Company.

Counsel argues that the beneficiary only listed the relevant work on the Form ETA 750B, for the [redacted] between 1984 - 2000, when he worked as an assistant superintendent. Counsel's argument is undermined by the beneficiary's own description of his occupation on the G-325 from 1969 - 2002 as economist/business administration, and by the petitioner's letter dated July 19, 2004, where the petitioner stated that he considered all of the beneficiary's work from 1969 - 2002 as relevant to the duties of the proposed position.

The Form ETA 750B requires the beneficiary to list all employment relevant to the current job. The beneficiary's failure to list this additional experience as relevant on the Form ETA 750B and to explain the inconsistency between the work experience he listed on the Form ETA 750B and the G-325A is not explained with objective independent evidence, and calls into question the credibility of the remaining evidence.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. at 591-592.

Counsel submits a diagram describing the evolution, history and operations of the [redacted] and informational materials from the company websites and other internet sites. Counsel claims that the beneficiary's experience was gained essentially through the same employer from 1969 - 2002. Some of the informational materials indicate that Aramco took over the operations of the Arabian Oil Company in 2000. However, neither the undated End-of-Service certificate from Al Khafji Joint Operations (between the [redacted]) nor the letter from a representative of a different company [redacted] outlines a corporate realignment indicating that the beneficiary's 1969 - 2002 work experience was within the same corporate structure, or establishes [redacted] Operations's authority to credibly issue a letter as evidence of the beneficiary's work experience for work he performed for the [redacted] Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The beneficiary through his counsel stated that he no longer kept any pay stubs for employment that ended over ten years ago.[6] He also claimed that he did not have tax returns because no citizens of the Kingdom of Saudi Arabia filed income taxes. As noted above, no independent evidence resolves the inconsistencies of record with respect to the beneficiary's prior work experience.

Based on the evidence submitted and under the circumstances described above, the AAO concludes that the petitioner has not provided credible evidence showing that the beneficiary had at least five years experience in the job offered prior to the priority date.

The director also determined that the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary receives permanent residence. The AAO agrees.

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

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

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[6] According to the evidence submitted, the last day of the beneficiary's employment with [redacted] was September 8, 2002.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the petitioner set the rate of pay or the proffered wage on the Form ETA 750 as $40,000 per year. To show that it has the ability to pay $40,000 per year beginning on February 28, 2001, the petitioner submitted copies of the following evidence:

- IRS Forms 1120, U.S. Corporation Income Tax Return, for 2001-2003;
- Amended tax return for 2001; and
- IRS Tax Transcripts for 2001-2003.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation with [redacted] as the two shareholders. On the petition, the petitioner claims to have been established on July 3, 1991 and to currently employ 4 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 individual labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, no evidence has been submitted to show that the beneficiary has worked for the petitioner before or after the priority date. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay $40,000 per year through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 sales and profits and wage expense is

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the years 2001 through 2003, as shown below:

- In 2001 the Form 1120 stated net income (loss) of ($232,290).[7]
- In 2002 the Form 1120 stated net income (loss) of $7,838.

[7] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss).

- In 2003 the Form 1120 stated net income (loss) of $20,943.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in any of the years above.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. 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. The petitioner's tax returns demonstrate its net current assets (liabilities) for the years 2001 through 2003, as shown in the table below:

- In 2001, the Form 1120 stated net current assets (liabilities) of $3,815,245.
- In 2002, the Form 1120 stated net current assets (liabilities) of $3,307,730.
- In 2003, the Form 1120 stated net current assets (liabilities) of $3,393,408.

Therefore, the petitioner has sufficient net current assets to pay the proffered wage in 2001, 2002, and 2003. However, the petitioner in this case fails to submit its tax returns for the years 2004 through 2008. The director denied the petition for this additional reason.

On appeal, counsel indicates that since the beneficiary has changed jobs or has "ported" to work for another employer, USCIS should only determine if the petition was approvable or would have been approvable had it been adjudicated within 180 days from the time the I-140 petition and the Application to Register Permanent Residence or Adjust Status (Form I-485) were concurrently filed. This, according to counsel, is consistent with Michael Aytes' Interoffice Memorandum dated December 27, 2005.[9]

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[8] 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.

[9] Counsel specifically refers to Question 1 and Answer, which state:

> How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under § 106(c) of the AC21?
>
> If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:
>
> > A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated

On October 17, 2000, [redacted]igned into law the 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). This law increased the number of H-1B visas available for highly skilled temporary workers. *Id.* The law also amended the Act to permit the beneficiaries of I-140 petitions whose adjustment applications were pending for more than 180 days to change employers without invalidating their I-140 petitions. *Id.* at § 204(j) of the Act. The amendment added the following language to the Act:

> Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence – A petition under subsection (a)(1)(D) 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 of the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(j) and section 106(c) of the AC21 generally provide relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits an

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> within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on it[s] merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.
> B. If a request for additional evidence (RFE) is necessary to resolve a material issue, other than post-filing issues such as ability to pay, an RFE can be issued to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

(The Interoffice Memorandum dated December 27, 2005 is accessible on the internet at http://www.uscis.gov under "Law" section). The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

application for adjustment of status to remain pending when (1) it has remained unadjudicated for at least 180 days, and (2) the beneficiary's new job is in the same or similar occupational classification as the job for which the visa petition was approved. *See Perez-Vargas v. Gonzales*, 478 F.3d 191, 193 (4th Cir. 2007); *also see Sung v. Keisler*, 505 F.3d 372, 374 (5th Cir. 2007).

Counsel's argument that the petitioner does not have to establish its ability to pay beyond the date the beneficiary would have been eligible to port to a new employer is erroneous. As a threshold issue, the beneficiary must first establish his eligibility to port to a new employer under § 204(j) of the Act in order for the petitioner to be relieved of its obligation to establish the ability to pay the beneficiary through the date he obtains permanent residence. As the Form I-140 petition in this case has never been approved, the beneficiary is not eligible to port under § 204(j).

In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals, citing a 2005 AAO decision, reasoned that in order to remain valid under § 204(j) of the Act, the Form I-140 petition must have been valid from the start. The court stated, with respect to the portability provision at section 204(j) of the Act, that:

> in order for a petition to "remain" valid, it must have been valid from the start. The agency here held that the petition should not have been approved; in other words, the petition was not, and had never been, valid. Plaintiffs assert that, to the contrary, a petition is "valid" for purposes of the Portability Provision as soon as the agency approves the petition. We are unpersuaded.
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> ***5** We agree with the division of the AAO that addressed this issue in *In re Applicant [Name Redacted by the AAO]*, No. WAC 02 282 54013, 2005 WL 1950775 (A.A.O. Jan. 10, 2005). There, the AAO noted that "[t]he term 'valid' is not defined by the statute, nor does the congressional record provide any guidance as to its meaning." *Id.* ... The AAO concluded that, "to be considered 'valid' in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien that is 'entitled' to the requested classification." *Id.* The AAO reasoned that, "[c]onsidering the statute as a whole, it would severely undermine the immigration laws of the United States to find that a petition is 'valid' when that petition ... was *approved, if it was filed on behalf of an alien that was never 'entitled' to the requested visa classification.*" *Id.* (emphasis added). We agree with the AAO's cogent analysis.

In *Herrera*, the court reviewed the decision of USCIS to disallow § 204(j) benefits to an alien who ported to a new employer, following which the original petition was revoked. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.

In the present case, the beneficiary, through counsel, requested in February 2010, in response to the director's request for evidence that the beneficiary be allowed to port to a new employer under § 204(j). As the beneficiary requested to port before the I-140 had been approved, e.g. before the petition is valid, he is not eligible for benefits under section 204(j). Thus, the original petitioner must establish the ability to pay from the date of filing until the beneficiary obtains permanent residence.

The record, as noted above, contains no copies of the petitioner's federal tax returns, annual reports, or audited financial statements for 2004-2008. The AAO, therefore, cannot conclude that the petitioner has the ability to pay the proffered wage from the priority date.

Although not raised by the petitioner, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonegawa.* Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1991. Nor does it include any evidence or detailed explanation of its milestone achievements.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* After a review of the petitioner's tax returns and other evidence, this office concludes that the petitioner has not

established that it had the ability to pay the salary offered as of the priority date and continuing to present.

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

ORDER: The appeal is dismissed. The director's decision remains undisturbed.