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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

B6

Date: JUL 07 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On March 13, 2008, the Nebraska Service Center (NSC) approved the preference visa petition, but on June 24, 2010, the NSC revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was a furniture and accessory retail store located in Miami, Florida. It sought to employ the beneficiary permanently in the United States as a retail store 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)(i).[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). This petition was approved on March 13, 2008. However, on June 24, 2010, the director determined that the beneficiary did not have the requisite work experience to qualify for the position offered before the priority date and revoked the approval of the petition.

On appeal[2] to the AAO, counsel for the petitioner maintained that the beneficiary had the requisite work experience in the job offered or in the related occupation of "collections, Hispanic market" before the priority date. Counsel contended that the beneficiary's job duties with [redacted] – the company that employed the beneficiary from 2000 to 2007 – did not differ substantially from the duties described in the Form ETA 750.

In adjudicating the appeal, the AAO indicated that the beneficiary does not appear qualified for the certified position, that the job offer does not appear to be *bona fide*, and that the petitioner does not appear to have the continuing ability to pay the proffered wage from the priority date, specifically in 2008. On March 4, 2011, the AAO issued a notice of intent to deny and notice of derogatory information (NOID/NDI) to the petitioner, alerting the petitioner of these issues.

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.

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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] Although counsel claims that it never filed an appeal in this matter, this is not supported by the record. Counsel ticked the box "I am filing an appeal" on the Form I-290B filed July 12, 2010. The NSC forwarded the appeal to the AAO for consideration pursuant to 8 C.F.R. § 103.3. The NSC did not certify its decision to the AAO pursuant to 8 C.F.R. § 103.4. Counsel also claims that the petitioner attempted to file a motion with the NSC but that this motion was rejected four times. However, counsel notes that this motion was filed without the requisite filing fee, which is required by 8 C.F.R. §§ 103.5(a)(1)(iii)(B) and 103.7. Therefore, the AAO properly had jurisdiction over this appeal and finds no procedural error by the NSC.

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.[3]

The appeal is ordered dismissed. The petitioner has not met its burden of proving by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered, retail store manager (or in the related occupation of "collections, Hispanic market") before the priority date, or that the petitioner has the continuing ability to pay the beneficiary's wage from the priority date, specifically in 2008, or that it had the intent to employ the beneficiary when the petition was initially approved in March 2008.

The Beneficiary's Qualifications for the Proffered Position

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, 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.

On appeal, counsel asserts that the fact that the DOL has previously approved the labor certification showed that the beneficiary qualified for the position offered.

Counsel's assertions are not persuasive and not supported by the relevant law. Relying in part on *Madany v. Smith*, 696 F.2d at 1008 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to INS under section 204(b) of the Act, 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to

[3] 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).

> the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS (now United States Citizenship and Immigration Services or USCIS), therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on January 20, 2004. The name of the job title or the position for which the petitioner sought to hire a qualified individual is "manager." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

> Working under direct supervision of company president, will manage retail store engaged in selling high quality, custom designed furniture, designed and built in Indonesia or Uruguay, as well as a wide variety of accessories from all over the world. Works under supervision of corporate president in deciding pricing policies to ensure profitability, coordinating sales promotion activities, and preparing merchandise displays. Handles inventories, cash/receipts reconciliation and operating records, and gives information to President who places merchandise orders. Works alongside administrative personnel to ensure collections, particularly among Hispanic clientele, and adequate cash flow. Ensures compliance of employees with established security, sales, and record keeping procedures and practices. Answer customers' complaints or inquiries. Locks and secures store, as necessary.

The DOL categorized this job description as a retail store manager, DOT (Dictionary of Occupational Titles) Job Code 185.167-046.[4]

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[4] The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. Prior to O*NET, the DOL used the Dictionary of Occupational Titles (DOT) occupational classification system. The O*NET website contains a crosswalk that translates DOT codes into SOC codes. See http://online.onetcenter.org/crosswalk/DOT. Here, the DOL assigned the offered position the

Under section 14 of the Form ETA 750A, the petitioner specifically required any applicant for this position to have a minimum of two (2) years of work experience in the job offered or in the related occupation of "collections, Hispanic market."

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. While DOL standardized occupational norms set forth generic descriptions of occupational duties, 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 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

> (A) *General.* Any requirements of training or experience for skilled workers...must be supported by letters from trainers or employers giving the

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DOT code 185.167-046. Using the O*NET crosswalk, this translates to SOC code 41-1011.00 for First-Line Supervisors/Managers of Retail Sales Workers. According to DOL, this occupation includes the following: "Directly supervise sales workers in a retail establishment or department. Duties may include management functions, such as purchasing, budgeting, accounting, and personnel work, in addition to supervisory duties." Sample tasks include the following:

- Provide customer service by greeting and assisting customers, and responding to customer inquiries and complaints.
- Direct and supervise employees engaged in sales, inventory-taking, reconciling cash receipts, or in performing services for customers.
- Monitor sales activities to ensure that customers receive satisfactory service and quality goods.
- Inventory stock and reorder when inventory drops to a specified level.
- Instruct staff on how to handle difficult and complicated sales.
- Hire, train, and evaluate personnel in sales or marketing establishments, promoting or firing workers when appropriate.
- Assign employees to specific duties.
- Enforce safety, health, and security rules.
- Examine merchandise to ensure that it is correctly priced and displayed and that it functions as advertised.
- Plan budgets and authorize payments and merchandise returns.

> name, address, and title of the trainer or employer, and a description of the training received of 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.

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered as a retail store manager or in the related occupation "collections, Hispanic market." On the Form ETA 750, part B, signed by the beneficiary on [redacted] she represented that she worked 40 hours a week at [redacted] as an [redacted] in Uruguay from February 1990 to May 1996.[5] The beneficiary also claimed she worked at [redacted] in Miami, Florida, from February 2000 to date (2003).[6]

To show that the beneficiary had the requisite work experience in the job offered as a retail store manager or in the related occupation of "collections, Hispanic market" before January 20, 2004, the petitioner submitted the following relevant evidence:

- A letter dated December 29, 2003 from [redacted], describing the duties of the beneficiary; and
- A spreadsheet detailing the responsibilities of the beneficiary at [redacted] from 2000 to 2007.

[redacted] in her [redacted] 2003 letter described the beneficiary's duties at [redacted] as follows:

> With 3 employees under her direct supervision, [the beneficiary] is also responsible for all major corporate accounts, accounts receivable, regional and international rates, regional and international reservations, issuing regional and international tickets, reservations of ground packages including hotels, cars, cruises, and trains. She gives motivational classes and teaches those, under her supervision, how to achieve efficiency, team work, and handle customer service at its finest.

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[5] In that position, the beneficiary, according to the job description in the Form ETA 750B, did ticketing, dealt with all aspects of customer service, and supervised five (5) people.

[6] In this position, the beneficiary stated that she managed the tourism department and was responsible for all major corporate accounts, accounts receivable, regional and international rates, and regional and international reservations. She also did ticketing and gave motivational talks and conducted efficiency training. She coordinated and prepared farewells for groups of 100 or more guests on a quarterly basis and was in charge of collections, technical accounting, and administration.

The spreadsheet described the beneficiary's job responsibilities at [redacted] as follows:

> As part of her duties, [the beneficiary] will be responsible for implementing and maintaining operating procedures as well as being well-grounded in work problems. Such problems include but are not limited to, organizational changes, communications, information flow, production methods, and cost analysis. Moreover, an intricate aspect of her position is the ability to develop information and consider available solutions or alternate methods of proceeding in the management of personnel and strategies in the marketing area. [The beneficiary] will also offer these services to other travel agencies. She is very well respected in the field and her expertise is recognized widely in the Caribbean and South America.

Based on these job descriptions, the AAO is not persuaded that the beneficiary possessed the requisite work experience in the job offered as a retail store manager or in the related occupation. There are some aspects of the job as a travel agency manager that are similar as the job described in the Form ETA 750, such as supervising certain individuals to ensure they are doing their jobs properly, but overall, the job that the beneficiary had with [redacted] from 2000 to 2007 is not in the same category as the job offered in the Form ETA 750. The position offered to the beneficiary here is a retail-store manager; whereas the position that the beneficiary held from 2001 to 2007 was a travel agency manager. It is true that both positions are a manager position, but one is for a retail store and the other, a travel agency. Simply put, there is no evidence that the beneficiary ever managed a retail store, which is the job offered.

On appeal, counsel states that the beneficiary did collections at [redacted] and, in fact, she was in charge of major corporate accounts and accounts receivable, technical accounting, and administration, and, thus, the beneficiary has experience in a related occupation. The job offer here, as stated above according to counsel, requires the applicant to have at least two (2) years of work experience as a retail store manager or in the related occupational of "collections, Hispanic market." The record shows that [redacted]. and the petitioner.[7] A review of the record reveals that [redacted], before it was dissolved,[8] was not only a travel agency but also a furniture store.[9] The beneficiary worked for the travel agency division from May 2000 to December 2007, not as a manager of the furniture store division. The record also

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[7] The beneficiary stated in a signed statement submitted in connection with her Application to Register Permanent Residence or Adjust Status (Form I-485) that [redacted] owned both [redacted] and [redacted]

[8] A search of the Florida Department of State's website reveals that [redacted] was dissolved as of September 26, 2008. The Florida Department of State's website can be accessed at the following address: http://www.sunbiz.org/corinam.html (last accessed April 26, 2011).

[9] This information above is obtained from the statement of financial affairs that counsel submitted on appeal to show that bankruptcy proceedings were initiated not by the petitioner but by [redacted] as an individual and from the letter that [redacted] submitted to extend the beneficiary's H-1B visa status on December 2, 2008.

shows that the beneficiary's professional and educational backgrounds are in travel and hospitality management.[10]

The record does not establish that the beneficiary worked in a "collections" position with [redacted]. Although the beneficiary may have had some collections duties, it is not claimed that the beneficiary's job with [redacted] was a "collections" position but, rather, was a manager of a travel agency. As noted by the AAO in its NOID/NDI, it appears more likely than not that any collections duties while at [redacted] were incidental to her position and were performed intermittently. Based on the description of the beneficiary's duties at [redacted] it appears that the beneficiary also had duties related to accounting, administration, and giving motivational classes. However, it cannot be concluded that the beneficiary was employed full-time in the related occupation of "collections" any more than it can be concluded that she was employed as an accountant or a motivational instructor. "Collections" is a particular occupation, and it has not been established that she was employed in that occupation. [11]

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[10] A review of the beneficiary's credentials reveals that the beneficiary has worked in the travel management industry since 1990, earning various certificates, and that she attended Florida [redacted] in 1997, studying hospitality administration, travel, and tourism. The record does not show that the beneficiary was awarded any degree from her study at Florida [redacted]

[11] The DOL assigned a specific job title and Standard Occupational Classification (SOC) code to the occupation "Bill and Account Collectors." See http://www.onetonline.org/link/summary/43-3011.00 (accessed May 27, 2011). It does not appear as if the beneficiary was performing such duties in her position with [redacted] DOL's standardized duties for such a position include the following: "Locate and notify customers of delinquent accounts by mail, telephone, or personal visit to solicit payment. Duties include receiving payment and posting amount to customer's account; preparing statements to credit department if customer fails to respond; initiating repossession proceedings or service disconnection; keeping records of collection and status of accounts." Additional tasks are the following:

- Arrange for debt repayment or establish repayment schedules, based on customers' financial situations.
- Locate and notify customers of delinquent accounts by mail, telephone, or personal visits to solicit payment.
- Advise customers of necessary actions and strategies for debt repayment.
- Persuade customers to pay amounts due on credit accounts, damage claims, or nonpayable checks, or to return merchandise.
- Confer with customers by telephone or in person to determine reasons for overdue payments and to review the terms of sales, service, or credit contracts.
- Locate and monitor overdue accounts, using computers and a variety of automated systems.
- Answer customer questions regarding problems with their accounts.
- Record information about financial status of customers and status of collection efforts.

For these reasons, the AAO cannot conclude that the job descriptions, qualities, and skills needed to manage a retail store are similar or substantially the same as those needed to manage a travel agency. We also cannot conclude that the beneficiary worked in a "collections" position with [redacted] especially since her job has been described by the petitioner as the manager of a tourism department. Therefore, the AAO determines that the beneficiary did not have the requisite work experience to perform the duties of the proffered position before the priority date, and for this reason, the AAO also concludes that the director had good and sufficient cause to revoke the petition's approval, as required by section 205 of the Act; 8 U.S.C. § 1155.[12]

The director did not abuse her discretion in revoking the approval of the petition. Her decision to revoke the approval of the petition was neither arbitrary nor capricious. The director's NOIR contains specific evidence that would have warranted a revocation; it specifically requested that the petitioner produce evidence to demonstrate the beneficiary's qualification for the job offered. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1988) (where a notice of intention to revoke is based only on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, the director cannot revoke the approval of the visa petition). The decision is reasonable under the circumstances considering all of the evidence presented.

The NSC concluded that the claims made in the letters from [redacted] concerning the beneficiary's work experience lacked credibility because the individual who owned [redacted] also owned the petitioner in this matter. The NSC also appears to attach some relevance to the inactivity of [redacted] beginning in 2008. The AAO withdraws these determinations as they relate to the beneficiary's qualification for the proffered position. The AAO does not question that the beneficiary worked for [redacted] in the position as described in the experience letters and in the Form ETA 750. However, the AAO agrees that this evidence does not demonstrate that the beneficiary is qualified for proffered position with two years of experience as a retail store manager or in the position "collections, Hispanic market." It is for these reasons, described above in more detail, that the AAO is dismissing the appeal and upholding the revocation.

- Trace delinquent customers to new addresses by inquiring at post offices, telephone companies, credit bureaus, or through the questioning of neighbors.
- Sort and file correspondence, and perform miscellaneous clerical duties such as answering correspondence and writing reports.

[12] Section 205 of the Act, 8 U.S.C. § 1155, states:

> The Secretary of Homeland Security may, at any time, for what [s]he deems to be good and sufficient cause revoke the approval of any petition approved by [her] under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

Ability to Pay the Proffered Wage

Beyond the director's decision, the AAO also finds that the petitioner did not have the continuing ability to pay the proffered wage from the priority date. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The regulation at 8 C.F.R. § 204.5(g)(2) mandates the petitioner to demonstrate its ability to pay the proffered wage continuously from the priority date until the beneficiary obtains her lawful permanent residence.[13]

As noted earlier, the petitioner filed the Form ETA 750 with the DOL on January 20, 2004. The rate of pay, or the proffered wage, set by the DOL and agreed to by the petitioner is $21,000 per year.

To show that the petitioner has the ability to pay $21,000 per year beginning on January 20, 2004, the petitioner submitted copies of the following evidence:

- Forms 1120, U.S. Corporation Income Tax Return, for 2004-2008;
- The beneficiary's Forms W-2 issued by [redacted] for 2000-2007; and
- The beneficiary's Form W-2 and paystubs issued by [redacted] for 2008 and 2009.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997[14] and to have gross annual income of $219,674.

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[13] 8 C.F.R. § 204.5(g)(2) states:

> *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.

[14] A search of the Florida Department of State's website reveals that "Top Notch Furniture Corp." or the petitioner was incorporated on July 9, 2002, not in 1997 as the petitioner claimed in the petition. On the other hand, [redacted]., according to the Florida Department of State's website, was incorporated on March 3, 1997. The Florida Department of State's website can be accessed at the following address: http://www.sunbiz.org/corinam.html (last accessed April 26, 2011).

Because the filing of a Form ETA 750 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 each 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 each beneficiary's proffered wage, 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 determining the petitioner's ability to pay the proffered wage during a given period, USCIS will examine whether the petitioner employed and paid all of the beneficiaries 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.

No evidence has been submitted to demonstrate that the beneficiary was either paid or employed by the petitioner. The AAO cannot accept any evidence from other entities. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) (stating that a corporation such as the one in this case is a separate and distinct legal entity from its owner and shareholder; the assets of its shareholder or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.); *also see Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) (finding that nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.)

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 be able to demonstrate that it can pay the full proffered wage of $21,000 per year through either its net income or net current assets.

If the petitioner chooses to pay these amounts through its net income, 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 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 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 2004 through 2008, as shown below:

- In 2004 the Form 1120 stated net income (loss)[15] of ($24,007).
- In 2005 the Form 1120 stated net income (loss) of ($37,547).
- In 2006 the Form 1120 stated net income (loss) of ($61,678).
- In 2007 the Form 1120 stated net income (loss) of $65,271.
- In 2008 the Form 1120 stated net income (loss) of ($38,954).[16]

[15] 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).

[16] The petitioner noted on the first page of its 2008 Form 1120 that this was its "final return."

Therefore, the petitioner only had the ability to pay the beneficiary's wage through net income in 2007 but not in 2004, 2005, 2006, and 2008.

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.[17] 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 2004 through 2008, as shown in the table below:

- In 2004, the Form 1120 stated net current assets (liabilities) of $36,811.
- In 2005, the Form 1120 stated net current assets (liabilities) of $23,625.
- In 2006, the Form 1120 stated net current assets (liabilities) of $49,333.
- In 2007, the Form 1120 stated net current assets (liabilities) of $40,390.
- In 2008, the Form 1120 stated net current assets (liabilities) of $0.[18]

Based on the table above, the petitioner had the ability to pay the proffered wage from 2004 to 2007; however, the petitioner did not have sufficient net current assets to pay the beneficiary's wage in 2008. Therefore, the petitioner has failed to establish that it has the *continuing* ability to pay the proffered wage beginning on the priority date, specifically in 2008.

On appeal, counsel asserts that, according to Schedule L of the petitioner's tax return, the petitioner had an inventory valued at $109,301 at the beginning of 2008. Additionally, counsel states that the petitioner had $12,280 in net current assets at the beginning of the 2008 tax year.[19] As noted above, the petitioner actually had net current assets at the beginning of 2008 (end-of-year 2007) of $40,390, which is the difference between the sum of Schedule L, lines 1 through 6, and the sum of year-end current liabilities on lines 16 through 18.

Counsel's assertions are not persuasive. Although the petitioner purportedly had $40,390 in net current assets at the beginning of 2008 (which includes the $109,301 in inventory minus current liabilities), these funds clearly would not have been available to pay the beneficiary the proffered wage in 2008. As noted above and in the AAO's NOID/NDI, the petitioner ceased doing

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[17] 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.

[18] No assets or liabilities were recorded on schedule L for 2008. The record shows that [redacted] the sole owner of the petitioner, filed for bankruptcy protection with the U.S. Bankruptcy Court, Southern District of Florida, Miami Division, on October 30, 2008. [redacted] noted in that filing that the petitioner ceased to be "publicly active" in June 2008.

[19] Counsel refers to allowance for bad debts in the beginning of tax year on schedule L.

business in June 2008.[20] The petitioner had negative net income of $38,954 in 2008, the year it ceased doing business. Accordingly, any money generated by these assets in 2008 was spent on other expenses and debts associated with the business and its termination. By the end of 2008, all of these assets had apparently been liquidated and the money spent. Any claim that a portion of these funds could have been set aside to pay the beneficiary in 2008 is not credible given the overall financial situation of the petitioner.

Finally, 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 [redacted], 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. Nor does it include any evidence or detailed explanation of its milestone achievements. The evidence submitted does not reflect a pattern of significant growth. To the contrary, it is more likely than not that the petitioner could not have employed the beneficiary at the proffered wage in 2008. As noted above, the petitioner ceased doing business in June 2008 and is now dissolved.

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

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[20] June 2008 just happens to be the same month in which the beneficiary allegedly "ported" to a new job pursuant to section 106(c) of 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).

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 June 2008, the month in which the beneficiary allegedly began working for a different employer (or "ported," as explained *infra*). The petitioner failed to establish its ability to pay for the first half of 2008, which was the year the petitioner went out of business. As the beneficiary did not "port" to a new position until June 2008, the petitioner must establish its ability to pay the proffered wage until at least that date. *See infra.*

Citing the flexibility provision of section 106(c) of 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) (AC21)[21], counsel argues on appeal that "any additional information [pertaining to the petitioner's ability to pay the proffered wage] starting in 2008 is not required to be provided since the petition [sic] was ported to a new employer." Counsel also cites in support of

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[21] The historical background of the flexibility provision of § 106(c) of AC21 is as follows. On October 17, 2000, President Bill Clinton signed AC21 into law. 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 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), further states:

> **Long Delayed Adjustment Applicants**- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Section 204(j) of the Act generally provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits an 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). In the instant case, the beneficiary attempted to "port" to a new position under AC21 in June 2008.

her argument a USCIS Interoffice Memorandum by Michael Aytes, Acting Director of Domestic Operations, entitled *Interim Guidance for Processing I-140 Employment-based Immigration Petitions and I-485 and H1-B Petitions Affected by the American Competiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)*, December 27, 2005.[22]

Although counsel is correct that the petitioner would normally be relieved from establishing its ability to pay the proffered wage after beneficiary appropriately "ported" pursuant to AC21[23], counsel ignores the fact that the beneficiary did not "port" until June 2008. Therefore, the petitioner's continuing ability to pay the proffered wage must be established until that date. Accordingly, it is appropriate for USCIS to consider the petitioner's ability to pay to the wage, and its business operations as whole, from January 2008 until June 2008. As noted above, as the petitioner did not have the financial ability to pay the proffered wage during that time period in 2008, and was in fact going out of business at that time, the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary. For this reason the director had good and sufficient cause to revoke approval of petition.

Intent to Employ the Beneficiary at the Time the Petition was Approved

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3) of the Act. *See* 8 C.F.R. § 204.5(c).

The regulation at 20 C.F.R. § 656.3 states in pertinent part:

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[22] 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.")

[23] This is not to suggest that the regulation at 8 C.F.R. § 204.5(g)(2) ceases to apply after a beneficiary ports under AC21. That regulation clearly states a petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Neither AC21 nor section 204(j) of the Act addresses the specific question as to who should continue to demonstrate the ability to pay the proffered wage in the context of the Form I-140 adjudication once the beneficiary successfully ports to another employer. However, as section 204(j) applies to applications for adjustment of status, this question, which would arise as a consequence of the statutory provisions at AC21 and section 204(j) of the Act, is appropriately deferred to the Form I-485 adjustment of status adjudication.

> *Employer* means: (1) a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
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> *Employment* means: (1) permanent, full-time work by an employee for an employer other than oneself. For the purposes of this definition, an investor is not an employee.

Under 20 C.F.R. §§ 656.10(c)(8), 656.17(l), 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 October 15, 1987).

In this matter it does not appear that the petitioner intended to employ the beneficiary permanently in the position certified by the DOL in the Form ETA 750 at the time the petition was originally approved on March 13, 2008. It also does not appear that the petitioner continued to have this intent to employ the beneficiary at any time from March 2008 until she allegedly "ported" under AC21 in June 2008, at which time – similar to its ability to pay the proffered wage -- the petitioner's need to establish its intent to employ the beneficiary would have been extinguished. The petitioner was required to intend to employ the beneficiary in the proffered position until she "ported." The petitioner apparently went out of business in June 2008 as indicated by the petitioner's sole stockholder's bankruptcy filing, its filing of a final tax return, and its eventual dissolution by the state of Florida. Any assertion that the petitioner intended to permanently employ the beneficiary as a manager of its retail store on the eve of, or contemporaneously with, its permanent demise lacks credibility. The director had good and sufficient cause for this reason to revoke approval of petition and is an additional reason the petition was ineligible for approval.[24]

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[24] As the petition's approval was properly revoked, the beneficiary's attempt to "port" to a new position is a nullity. In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. 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. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

The appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 is affirmed, and the petition remains revoked.

Accordingly, as the petition was properly revoked by the Nebraska Service Center, the petition was not valid from the start and, thus, the beneficiary is no longer eligible for benefits under AC21.