(b)(6)

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

DATE: MAY 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On July 27, 2007, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center (NSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The NSC director ("the director") initially approved the employment-based immigrant visa petition on July 1, 2008, but on May 7, 2010 revoked the approval of the petition and stated that the decision to approve the petition was erroneous. The petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The appeal will be dismissed, and the director's decision to revoke the approval of the petition will be affirmed.

The petitioner is a [redacted] It seeks to employ the beneficiary permanently in the United States as a baker, 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).[2] As required by statute, the petition is submitted along with a certified Form ETA 750 (Application for Alien Employment Certification). As noted above, the petition was initially approved on July 1, 2008, but that approval was revoked in May 2010. The director determined that the decision to initially approve the petition was erroneous. The evidence of record, according to the director, did not establish that the petitioner has the continuing ability to pay the proffered wage from the priority until the present date, especially in 2006 and 2007.

On appeal, counsel for the petitioner maintains that the petitioner had the ability to pay the proffered wage in 2006 and 2007 and urges the AAO to consider the totality of the business' circumstances per *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also asks the AAO to consider the personal income and assets of the owner of the petitioner as evidence of the petitioner's ability to pay.

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]

Before we adjudicate the merits of the appeal, the threshold issue here is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition.

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[1] [redacted] is a trade name for coffee and bakery shops in the United States of America.

[2] 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.

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

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

This means that the director must provide notice before revoking the approval of any petition. Specifically, 8 C.F.R. § 205.2 reads:

> (a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Both *Matter of Arias* and *Matter of Estime* held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

Here, the director indicated in the Notice of Intent to Revoke (NOIR) dated January 5, 2010 that the beneficiary's wage in 2007 was less than the proffered wage, and that the petitioner did not

have sufficient net income or net current assets in either 2006 or 2007 to pay the proffered wage. In addition, the director stated that the petitioning business had been dissolved as of July 10, 2009.[4] Based on the information provided in the NOIR, the AAO finds that the director has adequately provided the petitioner with specific derogatory information to revoke the approval of the petition.

With respect to the issue relating to the petitioner's ability to pay – the merits of the appeal – the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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

The 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 Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 labor certification was accepted for processing by DOL on September 8, 2003. The offered wage specified on Form ETA 750 is $12.56 per hour or $26,124.80 per year based on a 40 hour work week.

To demonstrate the ability to pay $12.56 per hour or $26,124.80 per year from September 8, 2003, the petitioner initially submitted copies of its federal tax returns, filed on the Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2006. Later in response to the Request for Evidence (RFE) that the director sent to the petitioner on May 9, 2008, the petitioner submitted copies of the following additional evidence:

- The IRS Form 1120S for 2007;
- The IRS Form W-2 issued by the petitioner to the beneficiary for 2007;
- The IRS Forms W-2 Wage and Tax Statement issued by [redacted] to the beneficiary for the years 2006 and 2007;
- The federal income tax returns of [redacted] on the IRS Forms 1065 U.S. Return of Partnership Income for the years 2004 through 2007;

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[4] The director found that the business was dissolved in 2009 from the website of the Illinois Secretary of State, Corporations Division [redacted] (last accessed May 21, 2013).

- The petitioner's articles of incorporation showing that [redacted] registered the petitioning business in 1993;
- [redacted] checking and savings or investment accounts issued in 2007; and
- [redacted] individual tax return (filed on the IRS Form 1040 U.S. Individual Income Tax Return) for 2006.

The evidence submitted above shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1993.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date 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, United States Citizenship and Immigration Services (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 determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Based on the evidence submitted above, the beneficiary received the following compensation from the petitioner in 2007:

Tax Year	*Actual wage (AW) (Box 1, W-2)*	*Yearly Proffered Wage (PW)*	*AW minus PW*
2007	$5,387.50	$26,124.80	($20,737.30)

Therefore the petitioner has not established the ability to pay from the priority date and continuing until at least 2007. 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 $26,124.80 from 2003 until 2006, and $20,737.30 – which is the difference between the proffered wage and the actual wage – in 2007.

The petitioner can pay those amounts – $26,124.80 from 2003 to 2006; and $20,737.30 in 2007 – 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 USCIS 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 (loss)[5] for the years 2003-2007, as shown below:

Tax Year	*Net Income (Loss)*	*Remainder of the PW*
2003	$255,598	$26,124.80
2004	$203,028	$26,124.80
2005	$30,022	$26,124.80
2006	($6,658)	$26,124.80
2007	$10,066	$26,124.80

Therefore, the petitioner has established the ability to pay the proffered wage in 2003, 2004, and 2004, but not in 2006 and 2007.

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.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected

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[5] For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S if the S corporation's income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005), or line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, 2007, at http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income in is found on line 23 (2003), line 17e (2004-2005), and line 18 (2006-2007) of schedule K.

[6] 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.

to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown below:

Tax Year	*Net Current Assets*	*Remainder of the PW*
2006	($9,978)	$26,124.80
2007	($22,110)	$26,124.80

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's proffered wage in either 2006 or 2007.

The director declined to consider the personal income and assets of Mr. as evidence of the petitioner's ability to pay. The director specifically stated:

> A corporation, including an S Corporation [referring to the petitioner], is a separate and distinct legal entity from its owners or shareholders Consequently, any assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). USCIS will not consider the financial resources of individuals [Mr.] or entities [other businesses owned by Mr. such as LLC] who have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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."

We agree. Further, the AAO agrees with the director that the owner's compensation from the petitioning business is insufficient to cover the remainder of the beneficiary's proffered wage in either 2006 or 2007. A review of the petitioner's federal tax returns reveals that the owner only received $5,200 as owner's compensation in 2006 and 2007.

On appeal, as noted earlier, counsel urges the AAO to consider the totality of the petitioner's business circumstances in accordance with *Matter of Sonegawa*, 12 I&N Dec. at 612. In response to the director's NOIR, counsel for the petitioner submitted the following evidence to demonstrate the business' special circumstances in 2005 and 2006:

- A statement from Mr. president of the petitioner, stating that the business was closed for four months in 2005 due to extensive building remodeling and that in 2006 the Illinois Department of Transportation conducted massive renovation of the Dan Ryan Expressway, closing the 79th Street on and off ramp, which significantly affected the business (less people visited the shop due to the road construction).

On appeal, to show the value of the business, counsel states that the owner was able to sell the business for $625,000 in 2008 and submits the following additional evidence:

- A letter dated May 17, 2010 from [redacted] stating that the petitioning business [redacted] was sold on April 30, 2008 to [redacted] for $625,000; and
- A copy of the closing statement of the sale of the business dated April 30, 2008.

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.

Unlike *Sonegawa*, the petitioner in this case has not provided 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 petitioner's business does not appear to be well-recognized locally and/or nationally. The record does not show that the petitioner's products and services are subjects of discussion in various business journals and newspapers. None of the evidence submitted show that the petitioner is a viable business with a good reputation. The petitioner's gross sales/receipts were constantly declining from 2004 to 2007. In April 2008, the business was sold. Based on the evidence submitted, the sales price was $625,000; but [redacted] only received $67,541.85, only about 11% of the total sales price.

[redacted] statement that the business suffered special losses due to the store closure for four months in 2005 and because of extensive road construction nearby the business is not supported by any corroborating documents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14

I&N Dec. 190 (Reg. Comm. 1972)). Assessing the totality of the circumstances in this individual case, the AAO agrees with the director that the initial decision to approve the petition was erroneous and that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his permanent residence.

In addition, on appeal counsel contends that the director failed to consider the fact that the beneficiary ported to a new employer in 2009.[7] Citing section 106(c) of the American Competitiveness in the 21st Century Act of 2000 (AC21) and the Yates December 2005 Memo,[8] counsel argues that once the I-140 petition has been approved and the Form I-485 (Application to Register Permanent Residence or Adjust Status) has not been adjudicated for over 180 days, and once the beneficiary successfully ported to another similar employment, the director no longer could revoke the approval of petition. Counsel also states, "Only where the I-140 is later revoked for fraud would an alien be unable to avail himself of the benefits of AC21."

The AAO disagrees. Section 106(c) of AC21, which amended section 204(j) of the Act; 8 U.S.C. § 1154(j), does not provide any safe harbor provision once the beneficiary successfully ported to another similar employment. Section 204(j) of the Act simply and generally provides relief to the alien beneficiary who changes jobs after his visa petition has been approved. More specifically, this section permits the beneficiary's application for adjustment of status (Form I-485) 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.*

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[7] The record contains a letter from president of d.b.a stating, "At this time, we seek to employ [the beneficiary] as a baker." The letter above, according to counsel, was submitted when the beneficiary was invited for his adjustment interview on July 30, 2009. In his brief, counsel states that the beneficiary ported almost half a year before the director sent the NOIR on January 5, 2010. We note that the petitioning business was sold in April 2008. If it were true that the beneficiary started to work for the new company in or around July 2009, then the beneficiary could not have ported pursuant to section 204(j) of the Act, since the business where he ported from was already nonexistent in July 2009. At any rate, it is not clear from the evidence submitted above, when or if the beneficiary ported, pursuant to section 204(j) of the Act.

[8] *See* Memorandum from William R. Yates, Acting Director for Domestic Operations, Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) (December 27, 2005). The Yates Memo is available online at http://www.uscis.gov under Policy Memoranda (last accessed May 16, 2013).

Keisler, 505 F.3d 372, 374 (5th Cir. 2007).[9] In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's Form I-485 took 180 days or more to process. It does not say anything about USCIS' inability to revoke the approval of the petition after the beneficiary successfully ports to another employer.

In addition, the AAO notes that where the approval of the Form I-140 petition has been revoked for good and sufficient cause, which is the case here, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9th Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start).[10]

We also find that nowhere in the Yates Memo referred by counsel above does it state that only by fraud would the beneficiary be unable to avail himself of the benefits of AC21.[11] Therefore, we find counsel's analysis of section 204(j) of the Act to be erroneous.

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[9] It is also important to note here that section 204(j) of the Act does not apply to the adjudication of the preference visa petition. It only applies to the adjudication of the beneficiary's adjustment of status, once the preference visa petition has been approved.

[10] Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days. In a case pertaining to the revocation of a Form I-140 petition, 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. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). 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.

[11] Question 11 and answer of the Yates Memo state:

> When is an I-140 no longer valid for porting purposes?
> An I-140 is no longer valid for porting purposes when:
> A. an I-140 is withdrawn before the alien's I-485 has been pending 180 days, or
> B. an I-140 is denied or revoked at any time *except* when it is revoked based on a

As noted above, where the petitioner is not eligible for the classification sought, the director may seek to revoke his approval of the petition pursuant to section 205 of the Act, 8 U.S.C. § 1155, for good and sufficient cause. We agree with the director that the initial decision to approve the petition was erroneous, that the petitioner did not have the continuing ability to pay the proffered wage from the priority date.

In summary, the AAO finds that the director had good and sufficient cause to reopen the matter and to revoke the approval of the petition. Notwithstanding the USCIS burden to show good and sufficient cause in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Beyond the decision of the director, we find that that the approval of the petition may also be revoked in accordance with 8 C.F.R. § 205.1. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if one of the following circumstances occurs: (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) the petitioner is no longer in business.

In this case, the petitioning corporation has been sold and dissolved and is no longer in business as of July 10, 2009. Where the petitioning company is no longer an active business, the petition is subject to automatic revocation, pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

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

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

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withdrawal that was submitted after an I-485 has been pending for 180 days).