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File: [Redacted] Office: TEXAS SERVICE CENTER Date: NOV 02 2009  
SRC 07 123 50157

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

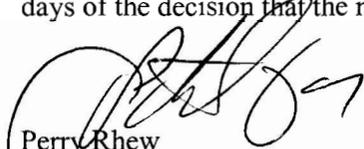
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  
[Redacted]

**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner makes structural miscellaneous iron work. It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, counsel asserts that the preference petition should be approved pursuant to the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21") under section 204(j) of the Immigration and Nationality Act (the Act).

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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.

Although the sole issue raised on appeal is the applicability of AC21, the AAO will initially review of the petitioner's ability to pay the proffered wage, the basis for the director's denial. For the reasons explained below, the AAO concurs with the director's decision in this respect.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 established that the priority date is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 per year. Part B of the ETA 750, signed by the beneficiary on April 17, 2001, indicates that the petitioner, "Willow Iron Works," has employed him from 1999 to the present (date of signing).

Part 5 of the Immigrant Petition for Alien Worker (Form I-140) indicates that the petitioner was established on July 1, 1998, claims a gross annual income of \$301,315, a net annual income of -0-, and currently employs nine workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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 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). USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In support of its continuing financial ability to pay the certified wage of \$31,200 per year and in response to the director's request for evidence issued on August 16, 2007, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2002, 2003, 2004 and 2005. They reflect that the petitioner was incorporated on June 27, 1988, holds a federal employer identification number (FEIN) of [REDACTED], and reports its taxable income using a fiscal year running from July 1<sup>st</sup> to June 30<sup>th</sup> of the following year. For 2002, the petitioner's fiscal year is indicated as beginning on July 1, 2002 and ending on June 30, 2003. The petitioner's tax returns cumulatively represent the petitioner's financial data from July 1, 2002 through June 30, 2006. They contain the following information:

Year	2002	2003	2004	2005
Net Income <sup>1</sup>	\$9,645	-\$3,047	\$10,823	\$1,076

<sup>1</sup> The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). U.S. Citizenship and

Current Assets	\$ 986	\$ 2,408	\$25,043	\$ 874
Current Liabilities	\$13,700	\$15,403	\$15,464	\$12,010
Net Current Assets	-\$12,714	-\$12,995	\$ 9,579	-\$11,136

Besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, USCIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>2</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner’s year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>3</sup>

The petitioner also provided copies of Wage and Tax Statements (W-2s) reflecting wages paid to the beneficiary by the petitioner for the following years and amounts:

Year	Wages	(Difference from Proffered Wage of \$31,200)
2001	\$31,241.20	+\$41.20
2002	\$25,168.80	-\$6,031.20
2003	\$13,616.08	-\$17,583.92

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Immigration Services (USCIS) uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

<sup>2</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>3</sup> A petitioner’s total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

The petitioner also provided copies of W-2s that were issued by an employer identified as “[REDACTED]” for 2003, 2004, 2005 and 2006. The FEIN for [REDACTED] Inc. is [REDACTED]. [REDACTED] one of the principal shareholders of the petitioning corporation explains in a letter that occasionally work contracts are payable to [REDACTED] and not [REDACTED] and therefore the beneficiary is paid from either company.

The director denied the petition on November 29, 2007, determining that petitioner had failed to demonstrate its continuing financial ability to pay the proffered wage as of the priority date. The director noted that as the W-2s from [REDACTED] were not generated by the petitioning business, they could not be considered in the review of the petitioner’s ability to pay the certified wage.

The AAO concurs with the director’s decision to omit consideration of payment of wages by [REDACTED]. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation’s ability to pay the proffered wage. As the petitioner, [REDACTED] and [REDACTED] are structured as two distinct corporations with different FEINs, only the petitioner’s W-2s issued to the beneficiary will be considered.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner’s ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner’s net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the calculation may not be exact as the W-2s are based on calendar year earnings and the tax returns are based on fiscal years running from July 1<sup>st</sup> to June 30<sup>th</sup> of the following year. Nevertheless, the record indicates that the petitioner paid the beneficiary wages of \$31,241.20 or slightly more than the proffered wage in 2001, establishing its ability to pay in this calendar year. In 2002, payment of wages according to the W-2 was \$25,168.80 or \$6,031.20 less than the proffered wage; in 2004 payment of \$13,616.08 in wages or \$17,583.92 less than the proffered wage. No record of payment of wages by the petitioning corporation is contained in the record for 2004, 2005, or 2006. Therefore, the petitioner cannot establish its continuing ability to pay the proffered wage based on wage payment alone.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next 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 (1<sup>st</sup> Cir. 2009). 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.

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 116. "[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).

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable in determining a petitioner's ability to pay a proffered wage where other factors may overcome evidence of small profits. Such circumstances as the expectations of increasing business or the overall magnitude of a petitioner's business activities may be examined. Other factors may include the number of years that

a 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, or the petitioner's reputation within its industry. The petitioner in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, the petitioner's tax returns indicate that its gross receipts reached a high of approximately \$556,000 in 2002 and declined to approximately \$454,000 in 2005. As shown above, its reported net income did not exceed approximately \$11,000 claimed in 2004 and its net current assets were shown to be net losses except in 2004 when they reached approximately \$10,000. Based on the submission of the 2002-2005 income tax returns, it may not be concluded that this represents the kind of framework of profitability such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonegawa*.

As set forth above, the petitioner established its ability to pay the proffered wage in 2001 based on the payment of the full proffered salary in this year, but not in any other year.

In 2002, the petitioner failed to demonstrate its ability to pay the proffered wage because the petitioner did not submit a copy of its 2001 federal income tax return that would have shown its income for the fiscal year beginning July 1, 2001 and ending June 30, 2002. Thus the first six months of the petitioner's income for 2002 is not shown in the record. The last six months of the petitioner's net income for 2002 is reflected on its 2002 tax return. Based on a monthly calculation it would represent or \$4,822.50 for six months (\$9,645 divided by 2). Similarly, its net current assets for this part of the year would be -\$6,357. Neither amount is sufficient to cover the shortfall of -\$6,031.20 that results when comparing the wages paid to the beneficiary and the proffered wage.

The difference between the wages paid by the petitioner to the beneficiary and the proffered wage of \$31,200 in calendar year 2003 was -\$17,583.92. The first six months of the petitioner's net income in 2003 is reflected on its 2002 federal income tax return as \$4,822.50 (\$9,645 divided by 2). The last six months of its 2003 net income is shown on its 2003 tax return as -\$1,523.50 (-\$3,047 divided by 2). Combined, the petitioner's net income for calendar year 2003 was \$3,299. Similarly its net current assets were -\$6,357 for the first six months of 2003 and -\$5,497.50 for the remaining six

months. Together they represent -\$11,854.50 in net current assets. Neither its net income of \$3,299 nor its net current assets of -\$11,854.50 were sufficient to cover the -\$17,583.92 shortfall resulting from the comparison of the wages actually paid to the beneficiary by the petitioner in 2003 and the proffered wage of \$31,200. The petitioner failed to establish its ability to pay the proffered wage in 2003.

There were no wages shown to be paid to the beneficiary by the petitioning corporation in 2004, 2005, or 2006. As set forth above, beginning on July 1, 2004 and ending on June 30, 2005, as reflected on the 2004 federal tax return, neither the petitioner's net income of \$10,823 nor its net current assets of \$9,579 was sufficient to pay the proffered wage of \$31,200 or demonstrate its continuing ability to pay the certified salary in this fiscal year.

Similarly, as shown on the 2005 federal tax return reflecting the period beginning July 1, 2005 and ending on June 30, 2006, the petitioner's net income of \$1,076 was insufficient to cover the proffered wage. Additionally, its net current assets of -\$11,136 was not enough to pay the proffered wage of \$31,200. The petitioner failed to demonstrate its ability to pay during this fiscal year. Further, as noted above, the petitioner filed the I-140 on March 13, 2007. Although it furnished the 2002-2005 tax returns that covered the period ending on June 30, 2006, no financial information required by the regulation at 8 C.F.R. § 204.5(g)(2) was provided for the remainder of 2006 as requested by the director in his request for evidence issued on August 16, 2007. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period. Based on a review of the record, the petitioner failed to demonstrate its ability to pay the proffered wage in 2003, 2004, 2005, and 2006.

On appeal, for the first time, counsel asserts that because the beneficiary was employed by [REDACTED] [REDACTED] as shown by the 2004-2006 W-2s, issued by this corporation, in a same or similar capacity as his job with [REDACTED] then the beneficiary should be allowed to continue processing or "port" under the provisions of AC21.

The initial petition was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. Counsel did not provide any further documentation on appeal to demonstrate the petitioner's ability to pay. As the initial petition was denied, the beneficiary seeks portability based on an unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

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

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the petition.

An immigrant visa is immediately available to an alien seeking employment-based preference classification under section 203(b) of the Act (such as the beneficiary in this case) when the alien's visa petition has been approved and his or her priority date is current. 8 C.F.R. § 245.1(g)(1), (2). Hence, adjustment of status may only be granted "by virtue of a valid visa petition approved in [the alien's] behalf." 8 C.F.R. § 245.1(g)(2).

After enactment of the portability provisions of AC21, on July 31, 2002, USCIS published an interim rule allowing for the concurrent filing of Form I-140 petitions and Form I-485 petitions, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140 petition. *See* 8 C.F.R. § 245.2(a)(2)(B)(2004); *see also* 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter filed his Form I-485 petition on May 8, 2007, but the petitioner filed the Form I-140 petition on March 13, 2007.

USCIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, USCIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their

behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Section 204(j) of the Act prescribes that “A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers.” The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); *see also* H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term “valid,” as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Hughey v. U.S.*, 495 U.S. 411, 415 (1990). We are expected to give the words used in the statute their ordinary meaning. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citing *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984)). We must also construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). *See also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561, 573 (1989); *Matter of W-F-*, 21 I&N Dec. 503, 506 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS’s authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).<sup>4</sup>

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<sup>4</sup> We note that the Act contains at least one provision that does apply to pending petitions; in that instance, Congress specifically used the word “pending.” *See* Section 101(a)(15)(V) of the Act, 8

Pursuant to the statutory framework for the granting of immigrant status, any United States employer desiring and intending to employ an alien “entitled” to immigrant classification under the Act “may file” a petition for classification. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). However, section 204(b) of the Act mandates that USCIS approve that petition only after investigating the facts in each case, determining that the facts stated in the petition are true and that the alien is eligible for the requested classification. Section 204(b) of the Act, 8 U.S.C. § 1154(b). Hence, Congress specifically granted USCIS the sole authority to approve an immigrant visa petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

Therefore, to be considered “valid” in harmony with the portability provision of section 204(j) of the Act and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

Section 204(j) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Accordingly, 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.<sup>5</sup>

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U.S.C. § 1101(a)(15)(V) (establishing a nonimmigrant visa for aliens with family-based petitions that have been pending three years or more).

<sup>5</sup> Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5<sup>th</sup> Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6<sup>th</sup> Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4<sup>th</sup> Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at \*1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193

In the case at hand, the I-140 petition was denied. The petitioner failed to provide any evidence on appeal to overcome the basis for denial. The beneficiary would therefore not have a valid immigrant visa petition approved on his behalf to be eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.<sup>6</sup>

Further, counsel did not provide any evidence that [REDACTED] would qualify as the successor-in-interest to the initial petitioner in order to validly continue processing under the initial labor certification. To show that the new entity would qualify as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Accordingly, the petitioner has failed to demonstrate that the beneficiary can validly continue to utilize the labor certification initially filed by [REDACTED]

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition

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(stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

<sup>6</sup>Counsel relies upon an *Interoffice Memorandum by Michael Aytes, Acting Director of Domestic Operations*, “Interim guidance for processing I-140 employment-based immigrant petitions and I-1485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313),” HQOPRD 70/6.2.8-P (December 27, 2005) in asserting that AC21 is applicable where the underlying I-140 has not been approved. With regard to the Aytes Memorandum, it is noted that this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance. *See Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968). Counsel’s interpretation is overly broad and does not comport with the statutory and regulatory framework of AC21 as set forth above. Section 204(j) of the Act may not be construed to permit the adjustment of status of a beneficiary based on an unapproved visa petition. To allow otherwise ineligible beneficiaries gain immigrant status based on an unapproved visa petitions would usurp the statutory and regulatory scheme of U.S. immigration laws by interoffice guidance without binding legal effect.

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.