

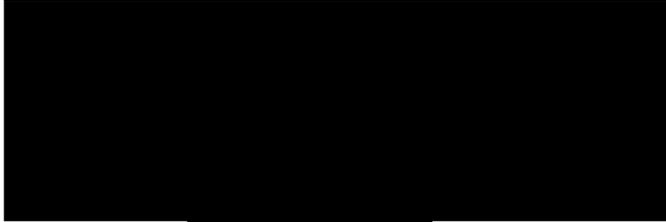


U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

B6



FILE:

WAC-02-191-53780

Office: CALIFORNIA SERVICE CENTER

Date: APR 05 2010

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:

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 concerning your case 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, California Service Center (CSC) on March 8, 2004 based on the decision of the Administrative Appeals Office (AAO). Based on a site visit check report from California Fraud Detection Operations (CFDO) office at the CSC, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on September 15, 2008. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the AAO on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a production manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted sufficient evidence in rebuttal to the NOIR and had not overcome the grounds for revocation. The director revoked the approval of the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

As set forth in the director's April 14, 2009 NOR, the primary issue in this case is whether the petitioner has overcome the grounds of revocation in the director's NOIR dated December 15, 2008 and whether the director has good and sufficient cause to revoke the approval of the instant petition. On appeal, counsel asserts that [REDACTED] is the same business entity as the petitioner and request porting the beneficiary's job to [REDACTED] or to another company named [REDACTED] under section 204(j) of the Immigration and Nationality Act (the Act).

Section 205 of 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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by

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

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).

On November 18, 2008, the CFDO office conducted a site visit at [REDACTED] and found that the petitioner is no longer actively engaged in the business and instead, at the same address, another company named [REDACTED] is conducting an import and export business specializing in handbags, purses and costume jewelry. On December 15, 2008, the director issued a NOIR affording the petitioner 30 days to rebut the grounds of eligibility.

Counsel responded to the NOID on the petitioner's behalf claiming that the petitioner had simply transferred the business and the operation to an affiliate corporation named [REDACTED] which is located at the same address and occupies the same commercial space and therefore, [REDACTED] is one and the same petitioning corporation for immigration purpose.

The record of proceeding contains corporate documents of [REDACTED]. The documents show that [REDACTED] was established on May 12, 2005 as an S corporation at [REDACTED] filing its tax returns on Form 1120S, U.S. Income Tax Return for an S Corporation. The record contains no evidence showing that [REDACTED] is the same corporation as the petitioner. The AAO notes that the two corporations located for a certain period of time at the same address and that [REDACTED] is a shareholder for both corporations. However, the fact that a corporation is doing business at the same location as the petitioner and the two corporations have a common shareholder does not establish that the corporation is the same corporation as the petitioner. The AAO concurs with the director's determination that the petitioner failed to establish that [REDACTED] is the same business entity as the petitioner. It is an elementary rule that a corporation is a separate and distinct legal entity from its shareholders and other corporations. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. The petitioner must establish its ability to pay the proffered wage with its own net income or net current assets.

The record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, contrary to counsel's assertion that the petitioner had simply transferred its business to [REDACTED] the petitioner did not submit any documentary evidence to support counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22

I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner failed to establish that [REDACTED] qualifies as a successor-in-interest to the petitioner in this case, and therefore, must establish its ability to pay the proffered wage with its net income or net current assets.

In response to the director's NOIR, counsel requested that the beneficiary be ported to [REDACTED] in a same or similar capacity as the initial job under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21"). On appeal, counsel also provides a letter dated May 21, 2009 from [REDACTED] offering the beneficiary a job in a same or similar capacity as the initial job, and asserts that the beneficiary should be allowed to port under the AC 21 to the new entity, [REDACTED].

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).

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 U.S. Citizenship and Immigration Services (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).²

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).

² 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 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).

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 adjudicated for 180 days.³

The AAO notes that the approval of the petition in this case was revoked by the director on April 14, 2009 as of the date of approval, and therefore, the petitioner has never had an approved petition in the instant processing. Section 204(j) provides that, for the purposes of an adjustment application that has been pending for more than 180 days, an approved Form I-140 petition remains valid even if the adjustment applicant changes jobs, so long as the new job is in the same or similar occupational classification. However, the petitioner did not provide and did not have the requisite approval of the I-140 immigrant petition for the beneficiary to port his job to a new employer under the AC 21.

³ 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 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th 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 (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.

Therefore, the petitioner failed to establish that the beneficiary in the instant petition is eligible to change his employer in the same or similar position under the AC 21.

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 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$3,200 per month (\$38,400 per year). On the petition the petitioner claims that it has been established in 1994, to have a gross annual income of \$2,202,232, to have a net annual income of \$563,057, and to currently employ nine workers.

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. In the instant case, the petitioner submitted that the California form DE-6 Quarterly Reports filed by the petitioner and [REDACTED], and the beneficiary's W-2 forms issued by the petitioner and [REDACTED] as evidence that the petitioner employed and paid the beneficiary the proffered wage. However, as previously discussed, since the petitioner failed to establish that [REDACTED] is the same business entity as the petitioner or qualifies as the successor-in-interest to the petitioner, the wages paid to the beneficiary by [REDACTED] cannot be considered in determining the petitioner's ability to pay the proffered wage in the instant case. The petitioner's quarterly reports show that the petitioner paid

the beneficiary totally \$38,400 in 2004.⁴ Therefore, the petitioner demonstrated that it paid the beneficiary the full proffered wage of \$38,400 in 2004, but failed to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary in 2001 through 2003, and 2005 through the present.

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. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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

⁴ Although the beneficiary's W-2 form issued by the petitioner shows that the beneficiary's compensation from the petitioner in 2004 was \$35,200, we will take the figure of \$38,400 reflected on the petitioner's quarterly reports for that year as the wages actually paid to the beneficiary.

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).

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.⁵ 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 to be able to pay the proffered wage using those net current assets.

The record of proceeding contains the petitioner’s tax returns for 2000, 2001, 2003 and 2005. The evidence in the record shows that the petitioner was structured as a C corporation in 2000 and 2001 with a fiscal year from July 1 to June 30, but later changed to an S corporation with fiscal year based on a calendar year. The priority date in this case is April 30, 2001, and therefore, the petitioner’s tax return covering the period from July 1, 2000 to June 30, 2001 is the tax return for the year of the priority date. The petitioner’s tax returns in the record demonstrate its net income and net current assets for relevant years as shown in the table below.

- In the fiscal year 2000 (7/1/00-6/30/01), the Form 1120 stated net income⁶ of \$23,586 and net current assets of \$20,224.
- In the fiscal year 2001 (7/1/01-6/30/02), the Form 1120 stated net income of \$24,211 and net current assets of \$134,861.
- In the year 2003 (7/1/03-12/31/03), the Form 1120 stated net income of \$22,786 and net current assets of \$228,666.
- In the calendar year 2005, the Form 1120S stated net income⁷ of (\$701,867) and net current assets of (\$194,913).

⁵ 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.

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

⁷ Where an S corporation’s income is exclusively from a trade or business, 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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade

For the fiscal year 2000 (7/1/00-6/30/01), the year of the priority date, the petitioner had neither sufficient net income nor sufficient net current assets to pay the proffered wage of \$38,400. The petitioner did not submit any evidence showing that it paid the beneficiary the full proffered wage that fiscal year. The record does not contain any other regulatory-prescribed evidence, such as annual reports or audited financial statements for the fiscal year 2000 to show the petitioner had sufficient funds to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the proffered wage in the year of the priority date.

For the fiscal year 2001 (7/1/01-6/30/02), the petitioner had sufficient net current assets to pay the proffered wage of \$38,400 and therefore, established its ability to pay the proffered wage.

The record does not contain any regulatory-prescribed documentary evidence, such as tax returns, annual reports, audited financial statements or the beneficiary's payroll records for the fiscal year 2002 (7/1/02-6/30/03). Without the evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the full proffered wage of \$38,400. Therefore, the petitioner failed to establish its ability to pay the proffered wage because it failed to submit required evidence. The record contains the petitioner's tax return for a period of 7/1/03-12/31/03. While it is noted that the petitioner not only had sufficient net income or net current assets to pay the beneficiary the portion of the proffered wage for the half a year, but also had sufficient net current assets to pay the full proffered wage for the whole calendar year of 2003, the petitioner still failed to submit regulatory-prescribed evidence to demonstrate that it had sufficient funds to pay the proffered wage for the period from July 1, 2002 to December 31, 2002.

As previously discussed, the petitioner established the ability to pay the proffered wage in the calendar year of 2004 through the examination of wages actually paid to the beneficiary. However, the petitioner's tax return for the calendar year of 2005 shows that the petitioner's net income and net current assets were negative, and the record does not contain any other evidence showing the petitioner had sufficient funds to pay the proffered wage that year. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2005.

The record before the director closed on January 14, 2009 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's 2007 federal income tax return should have been available already. Furthermore, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the 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. The instant petition is pending with the AAO on appeal and the beneficiary

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) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

has not obtained the lawful permanent residence yet. The petitioner must demonstrate that it had the ability to pay the proffered wage as of the priority date and continues to have such ability to the present. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). However, the petitioner failed to submit any evidence to establish this ability for 2006 through the present.

For the years 2001, 2002 and 2005 through the present, the petitioner had insufficient net income or net current assets to pay the instant beneficiary the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the instant beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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, the record shows that the petitioner is no longer actively engaged in the business. The petitioner 2005 tax return shows that both its net income and net current assets were negative. Given the record as a whole, the AAO concludes that the petitioner has not established the continuing ability to pay the proffered wage upon assessing the totality of the circumstances.

The evidence in the record shows that the petitioner was no longer actively engaged the business and it failed to establish its ability to pay the proffered wage even before the petitioner claimed that the beneficiary is eligible to port his job to a new employer. The official record shows that the petitioner

is still legally active,⁸ however, the fact the petitioner is still legally active does not automatically establish the petitioner's continuing ability to pay the proffered wage from the priority date to the present. The evidence in the record shows that the petitioner had no sufficient net income or net current assets in 2005 and even earlier in its fiscal year of 2000 and 2002. The AAO concurs with the director's findings that the petition was initially approved in error and the director has good and sufficient cause to issue the NOIR; and the petitioner failed to rebut the ground of eligibility in the NOIR.

Counsel's assertions on appeal cannot overcome the grounds of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition's approval based on the insufficient evidence to support factual assertions presented by the petitioner concerning its ability to pay the proffered wage.

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 on April 14, 2009 is affirmed and the approval of the petition remains revoked.

⁸ See California Secretary of State official website at <http://kepler.sos.ca.gov/cbs.aspx> (accessed on March 28, 2010).