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



U.S. Citizenship
and Immigration
Services

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FILE:

Office: TEXAS SERVICE CENTER

Date **MAR 09 2010**

EAC 01 281 53359

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 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 employment-based preference visa petition was initially denied by the Director, Vermont Service Center, and following the petitioner's Motion to Reopen or Reconsider, was subsequently approved on July 18, 2002. On July 21, 2008, the Director, Texas Service Center, served the petitioner with notice of intent to revoke the approval of the petition (NOIR).¹ In a Notice of Revocation (NOR) dated September 2, 2008, the director revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The director determined that the work experience letter submitted to establish the beneficiary's prior experience was fraudulent and, therefore, that the evidence did not establish that the beneficiary had the requisite work experience required for the job offered. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

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 he deems to be good and sufficient cause, revoke the approval of any petition approved by him 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). The AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director revoked the petition's approval accordingly.

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

As set forth in the director's September 2, 2008 NOR, the primary issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

¹ The NOIR noted that a supporting letter submitted with the petition written by [REDACTED] indicated that the beneficiary worked for them as a cook from January 1993 to December 1998. Pursuant to public records, United States Citizenship and Immigration Services (USCIS) determined that [REDACTED] did not exist until June 20, 1997. As noted in the NOIR, the U.S. Embassy in Brazil contacted [REDACTED] who stated that he did not write the experience letter submitted with the petitioner's Form I-140, but that he knew the beneficiary. The report from the U.S. Embassy in Brazil states "[REDACTED] told us the beneficiary was working for him for approximately five years, but unregistered. The restaurant never signed off on his "work booklet"-where all previous employments for an individual would be signed off."

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). Here, the labor certification application was accepted on February 16, 2001.

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.² On appeal, regarding the beneficiary's prior employment in Brazil, counsel submits an affidavit dated August 14, 2008 from the beneficiary;³ a "Rectifying Statement" dated July 23, 2008 from [REDACTED] the owner of [REDACTED] and [REDACTED] in Brazil, together with English translation; an affidavit dated August 15, 2008 from [REDACTED] together with English translation;⁴ Certificate of State Registration for [REDACTED], together with English translation; a Business Contract dated August 21, 1989 between [REDACTED] and [REDACTED] regarding [REDACTED]⁵ together with English translation; Certificate of State Registration for [REDACTED], together with English translation;⁶ a Business Contract

² 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).

³ An affidavit from the beneficiary is not independent, objective evidence of the beneficiary's former employment in Brazil. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, affidavits must be sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999).

⁴ In his affidavit, [REDACTED] states that the beneficiary worked for him as a cook at [REDACTED] from 1993 through 1998; that his accountant prepared the original experience letter submitted with the petitioner's I-140 petition; that the accountant incorrectly listed the beneficiary's employer on the original employment letter as [REDACTED] that he did not recognize the beneficiary's name when asked by the U.S. Embassy to confirm the beneficiary's employment; and that he knew the beneficiary by his nickname [REDACTED] rather than his proper name. The affidavit does not confirm the beneficiary's full-time employment with [REDACTED]

⁵ The Business Contract does not list an assumed name for [REDACTED]

⁶ The Certificate of State Registration lists the assumed name for [REDACTED] as [REDACTED]

dated June 6, 1997 between [REDACTED] and [REDACTED] regarding [REDACTED] affidavit of [REDACTED] dated August 15, 2008;⁷ a copy of a letter dated April 20, 2007 from [REDACTED] to [REDACTED] regarding the beneficiary and his wife;⁸ pictures of [REDACTED];⁹ and documentation of [REDACTED] trip to Brazil. Other relevant evidence in the record includes a letter dated January 9, 2001, from [REDACTED] in Brazil, stating that the beneficiary was employed as a cook from January 1993 to December 1998.¹⁰ The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the petitioner has provided independent, objective evidence of the beneficiary's prior work experience. Counsel states that the beneficiary's prior employer in Brazil existed at the time he worked there, but was incorrectly named in the work verification letter submitted with the petition through "simple human error." He also states that [REDACTED] made a mistake when he told the Embassy that he did not recall the beneficiary working for him. He asserts that [REDACTED] affidavit satisfies the requirements of 8 C.F.R. § 204.5(g)(1).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered or two years of experience in the related occupation of cook (any).

⁷ The affidavit states that [REDACTED] knew the beneficiary when he worked at [REDACTED] and remembered that he was a cook there from 1993 to 1998. The affidavit does not indicate how [REDACTED] obtained such knowledge, other than the fact that they grew up together in Brazil. For example, the affidavit does not indicate that [REDACTED] worked with the beneficiary at [REDACTED] during the relevant five year period such that he would be able to verify his full-time employment during that period.

⁸ This letter does not address the beneficiary's previous employment in Brazil and does not indicate that the letter writer personally knew the beneficiary.

⁹ The pictures show a "[REDACTED]" According to the affidavit submitted by [REDACTED], he owns two restaurants with the same name. It is not clear if the pictures submitted show [REDACTED] or [REDACTED]

¹⁰ The letter does not confirm the beneficiary's full-time employment and does not list the beneficiary's duties as a cook.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked 40 hours per week as a cook for "██████████" in Brazil from January 1993 to December 1998. He further represented that he worked 30 hours per week as a cook for ██████████ in Haverhill, MA from June 1999 to the date he signed the Form ETA 750B, and that he worked full-time as a cook for the petitioner from March 2000 to the date he signed the Form ETA 750B. He does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet, submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, he left blank a section eliciting information about his last occupation abroad, above a warning for knowingly and willfully falsifying or concealing a material fact.

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

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO sent a Notice of Derogatory Information (NDI) to the petitioner on November 24, 2008. The AAO stated that the evidence does not sufficiently establish that the beneficiary worked full-time as a cook at ██████████ in Brazil from January 1993 to December 1998. Because the initial work experience letter provided by ██████████ was suspected to be fraudulent, the AAO stated that the petitioner must provide independent, objective evidence of the beneficiary's former employment in Brazil. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO asked the petitioner to submit additional evidence to establish that the beneficiary was employed full-time as a cook at ██████████ in Brazil from January 1993 to December 1998, noting that such evidence may include pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by ██████████ during his period of employment. Further, the AAO noted that the Certificate of State Registration for ██████████ does not list an assumed name. The AAO asked the petitioner to provide evidence that the assumed name of ██████████ is ██████████

Further, the AAO noted in its NDI the beneficiary's claims of prior employment with [REDACTED] from June 1999 through 2001 and with the petitioner in 2000 and 2001. The AAO asked the petitioner to provide letters of experience relating to this employment consistent with the regulation at 8 C.F.R. § 204.5(l)(3).¹¹

In response to the NDI, the petitioner submitted a declaration from [REDACTED] the accountant for [REDACTED], dated December 19, 2008; previously submitted photographs of [REDACTED]; tax documentation for [REDACTED] for 2003, 2004, 2005, 2006 and 2007; salary receipts signed by the beneficiary for various periods in 1993, 1994, 1995, 1996 and 1997 and 1998; a letter dated December 16, 2008, from [REDACTED], together with various pay stubs evidencing the beneficiary's employment with [REDACTED] the beneficiary's IRS Forms W-2 issued by [REDACTED] in 2000 and 2001; payroll and financial information for [REDACTED] in Stoneham, Massachusetts; the beneficiary's IRS Forms W-2 issued by the petitioner in 2000 and 2001; annual reports for the petitioner for 2002, 2003, 2004, 2005 and 2006; and a letter dated December 16, 2008, from [REDACTED] together with a menu from the restaurant.

The declaration from [REDACTED], the accountant for [REDACTED], dated December 19, 2008, states that [REDACTED] opened for business on September 9, 1989, and does business as [REDACTED]. The tax documentation for [REDACTED] for 2003, 2004, 2005, 2006 and 2007 indicates that the business operated in those years. However, the tax documentation does not indicate that [REDACTED] operates as [REDACTED].

Further, the salary receipts submitted in response to the NDI were signed by the beneficiary for various periods in 1993, 1994, 1995, 1996 and 1997 and 1998. The receipts are not dated, they do not indicate that they were issued by [REDACTED] and no representative of [REDACTED] signed the receipts. The receipts appear to have been created by the beneficiary. Therefore, the receipts are not independent, objective evidence of the beneficiary's former employment with [REDACTED].

The director determined that the "work experience letter written and used in the approval of the I-140 is now known to be fraudulent." The director's fraud finding has not been overcome by the

¹¹ As set forth on Form ETA 750B, the AAO noted that the beneficiary appears to have worked two jobs simultaneously for approximately one year, working 70 hours per week from March 2000 to 2001. Based on the addresses of the beneficiary's two employers during this period, it appears that the beneficiary's jobs were over 100 miles apart. Therefore, the AAO asked the petitioner to detail the beneficiary's weekly work schedule during this period. In response to the NDI, counsel states that the beneficiary worked for [REDACTED] from 6:30 a.m. to 3:30 p.m. Monday through Friday, and that he worked for [REDACTED] from 4 p.m. to 11 p.m. Monday through Friday and 6 a.m. to 4 p.m. on Saturday. He states that the two employers are no more than 20 miles apart by highway.

petitioner.¹² The director had good and sufficient cause to revoke the approval of the petition. The petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. Therefore, the revocation will be sustained.

In response to the AAO's NDI,¹³ counsel provides that the beneficiary is now employed by [REDACTED] in a same or similar capacity as the initial job, and that the beneficiary should be allowed to continue processing or "port" under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") to the new entity. Counsel provides a letter dated December 16, 2008, from [REDACTED] in West Palm Beach, Florida, confirming the beneficiary's current employment, together with a menu from [REDACTED]. As the initial petition's approval was revoked, the beneficiary seeks portability based on a revoked, and unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

The pertinent section of AC21, 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 adjudicated 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.

¹² 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). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

¹³ The AAO noted in its NDI that the beneficiary had moved to [REDACTED]. The AAO asked the petitioner to how the beneficiary intends to work full-time in Massachusetts while living in Florida if the I-140 petition is approved.

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).

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 and Form I-485, 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. *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 on August 10, 2002.

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).¹⁴

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

¹⁴ 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).

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.¹⁵

In the case at hand, the I-140 petition’s approval was revoked for good and sufficient cause as the petitioner had failed to establish that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The petitioner failed to provide sufficient evidence on appeal to overcome the basis for revocation. The beneficiary would therefore not have a valid immigrant visa petition approved on their 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’s approval was revoked, it cannot be deemed valid by improper invocation of section 204(j) of the Act.¹⁶

¹⁵ 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.

¹⁶ In *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009), the Ninth Circuit Court of Appeals determined that the government’s authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff’s argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the

Further, counsel did not provide any evidence that the new employer, [REDACTED] would qualify as the successor-in-interest to the initial petitioner in order to validly continue processing under the initial labor certification. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *See Matter of Dial Auto Repair Shop*, 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 the petitioner.

Finally, beyond the decision of the director, the AAO noted in its NDI dated November 24, 2008, that 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).¹⁷ Here, the Form ETA 750 was accepted on February 16, 2001. The proffered wage as stated on the Form ETA 750 is \$12.80 per hour (\$26,624.00 per year). The AAO asked the petitioner to provide evidence required by 8 C.F.R. § 204.5(g)(2) of its ability to pay the proffered wage from the priority date in 2001 through the present.

In response, the petitioner submitted the beneficiary's IRS Forms W-2 issued by the petitioner in 2000 and 2001;¹⁸ the petitioner's payroll records for the beneficiary for January and February of 2003; an earnings history for the beneficiary issued by the petitioner; and the annual reports for [REDACTED] for 2002, 2003, 2004, 2005 and 2006.

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.

plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.*

¹⁷ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

¹⁸ The petitioner paid the beneficiary \$10,916.38 in 2000 and \$25,626.62 in 2001.

The petitioner is [REDACTED]. However, on appeal, counsel notes that the location is run by [REDACTED]. The record contains a Form W-2 issued to the beneficiary by [REDACTED] in 2001. If [REDACTED] location where the beneficiary will work is owned and operated by a franchisee, the franchisee must establish its ability to pay the proffered wage for all relevant years.¹⁹ The record does not contain evidence that [REDACTED] had the ability to pay the proffered wage in any relevant year. However, if [REDACTED] owns and operates the location where the beneficiary will work, [REDACTED] must establish its ability to pay the proffered wage in each relevant year. We will review the ability of [REDACTED] to pay the proffered wage below.

On the petition, the petitioner claimed to have been established in 1935, to have a gross annual income of "\$1 million+," and to currently employ 27 workers. On the Form ETA 750B, signed by the beneficiary on January 30, 2001, the beneficiary claimed to have worked full-time as a cook for the petitioner from March 2000 to the date he signed the Form ETA 750B.

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, 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 Sonogawa*, 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. In the instant case, the petitioner has established that it employed and paid the beneficiary \$25,626.62 in 2001. Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2001. Since the proffered wage is \$26,624.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$997.38 in

¹⁹ The petitioner's annual report for 2006 states that as of December 31, 2006, the petitioner operated 316 full-service restaurants and franchised 198 full-service restaurants and seven non-traditional units.

²¹ The petitioner's 2004 annual report shows that its net income for 2002 was restated to \$5,660,000.

2001. The petitioner must establish that it can pay the full proffered wage in 2002, 2003, 2004, 2005, 2006, and 2007.

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 (1st 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).

The petitioner’s annual reports demonstrate its net income for 2002, 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2002, the annual report stated net income of \$6,187,000.²¹
- In 2003, the annual report stated net income of \$10,186,000.²²
- In 2004, the annual report stated net income of -\$3,417,000.
- In 2005, the annual report stated net income of -\$27,259,000.
- In 2006, the annual report stated net income of \$4,946,000.

Therefore, for the years 2002, 2003 and 2006, the petitioner had sufficient net income to pay the proffered wage. For the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner did not submit its annual report for 2001 or 2007, however its 2002 annual report contains audited financial documentation for 2001. In 2001, the petitioner’s net income was \$3,667,000. For the years 2001, the petitioner had sufficient net income to pay the proffered wage. For 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage.²³

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.²⁴ 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 petitioner’s annual reports demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the annual report stated net current assets of -\$13,703,000.
- In 2005, the annual report stated net current assets of -\$14,241,000.

²² The petitioner’s 2004 annual report shows that its net income for 2003 was restated to \$9,503,000.

²³ The petitioner submitted no documentation required by 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage in 2007.

²⁴ 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.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the 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, except for 2001, 2002, 2003 and 2006.

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 [REDACTED]. 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.

If [REDACTED] owns and operates the location where the beneficiary will work, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage for each relevant year except 2007. It had significant gross receipts, it paid significant wages, and it has been in business since 1935. However, it has not established its ability to pay the proffered wage in 2007, as it submitted no documentation required by 8 C.F.R. § 204.5(g)(2) for 2007. Therefore, the petitioner has not established its continuing ability to pay the proffered wage.²⁵

Accordingly, the petition's approval was properly revoked with good and sufficient cause based on the petitioner's failure to establish that the beneficiary is qualified to perform the duties of the proffered

²⁵ If the petitioner pursues this matter further, it must provide evidence regarding the ownership of the location where the beneficiary will work.

position with two years of qualifying employment experience. 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 petition's approval remains revoked.