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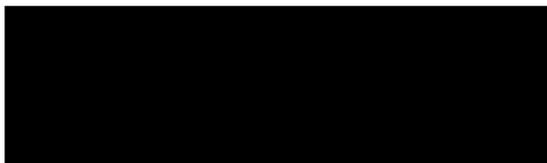
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

JAN 20 2011

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The director, Texas Service Center, denied the preference visa petition. The petitioner filed a motion to reopen/reconsider indicating that the I-290B was also filed as an appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting and solutions company. It seeks to employ the beneficiary permanently in the United States as a web developer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the instant I-140 petition could not be approved because a valid labor certification no longer supported the petition. The director denied the petition accordingly.

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

As set forth in the director's September 17, 2007 denial, the single issue in this case is whether or not a valid labor certification existed to support the petitioner's substitution of the instant beneficiary on a I-140 petition. The AAO will also briefly examine whether the petitioner established that the instant petition was approvable in terms of the petitioner's ability to pay the proffered wage as of the 2003 priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

On appeal, counsel asserts that the present I-140 petition satisfies the general requirements for the substitution process as outlined in a Memorandum of Understanding between legacy INS and the Department of Labor (DOL). Counsel submits AILA-InfoNet documents that include copies of a DOL Field Memorandum No. 37-95, *Interim Procedures for Substituting Alien Beneficiaries on Approved Labor Certifications*, written by Barbara Ann Farmer; and a legacy INS memorandum, *Substitution of Labor Certification Beneficiaries*, dated March 7, 1996 written by Michael Straus. (Straus Memo). Counsel also references an inter-office memorandum written by William R. Yates, former United States Citizenship and Immigration Services (USCIS) Deputy Director<sup>2</sup> (Yates Memo) and submits excerpts from the USCIS I-140 National SOP I-140 Petition for Alien Worker, and the updated Chapter 22.2 INS Adjudicator's Field manual (AFM), updated as of June 2006, that refers to employment-based immigrant visa petitioners (Form I-140.)

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<sup>1</sup> 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).

<sup>2</sup> Memorandum from William R. Yates, Associate Director For Operations, *Continuing Validity of Form I-140 Petition in accordance with Section 106 (c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)*, HQBCIS 70/6.2.8-P, August 4, 2003.

Counsel also submits a letter dated October 4, 2005 written to the USCIS Nebraska Service Center advising that the petitioner no longer employed [REDACTED] and that the petitioner withdrew the beneficiary's pending I-140 application. The petitioner also submits a Form I-797 Notice of Action dated March 24, 2005 that indicates [REDACTED] I-140 petition was received by the Nebraska Service Center on June 21, 2004 and was approved on March 24, 2005.<sup>3</sup>

Counsel also submits a copy of an USCIS Case Status Search response that indicates that on July 21, 2007, the USCIS mailed an approval notice for the Receipt Number [REDACTED] (The beneficiary's I-485 application).<sup>4</sup> Finally counsel submits an interoffice Memorandum, written by Michael Aytes, USCIS Acting Director of Domestic Operations, dated December 27, 2005.<sup>5</sup>

In reference to the Straus memo, counsel notes that the substitution of a labor certification beneficiary is permitted where the labor certification has not already been applied to a previous beneficiary's LPR status, and the employer submits an I-140 petition on behalf of the substituted beneficiary, along with evidence that the substituted beneficiary meets all of the minimum education, training or experience requirements stated in Part A of the original ETA 750, along with a new Part B of ETA form 750 signed by the substituted beneficiary. Counsel notes that the petitioner must also submit a copy of the original ETA 750, a photocopy of the DOL certification, a copy of any notice of approval of the prior I-140 petition, and written notice of withdrawal of the prior I-140 petition.

The petitioner notes that it submitted a written request to withdraw the approved I-140 petition on behalf of [REDACTED] to the Nebraska Service Center on October 5, 2005, and then filed the second I-140 petition based on the labor certification filed on behalf of [REDACTED] with a copy of that withdrawal request on behalf of the instant beneficiary. Counsel notes that the original beneficiary was not approved for lawful permanent resident until July 21, 2007, seven months after the petitioner filed its second I-140 petition and substitution request.

The petitioner states that under 8 C.F.R. § 205.1(a)(3)(iii)(C), upon its written notice of withdrawal, the initial I-140 approved for [REDACTED] was automatically revoked as of the approval date of the petition, namely March 24, 2005. The petitioner asserts that based on this regulation, the petition could not have been used to accord lawful permanent resident status to [REDACTED] on July 21, 2007.

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<sup>3</sup> There is no indication in USCIS records that the I-140 petition for [REDACTED] was revoked.

<sup>4</sup> USCIS records indicate the I-485 application was approved on July 18, 2007, with the approval notice sent on July 21, 2007.

<sup>5</sup> Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, Interim guidance for processing I-140 employment-based immigrant petitions and I-485 and H-1B petitions affected by the American Competitiveness in the Twentieth-First Century Act of 2000 (AC21) (Public Law 106-313), HQPRD 70/6.2.8-P, December 27, 2005.

The petitioner then references issues of substitution of beneficiaries and portability of an approved I-140 petition as set out in the *American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313)*. Counsel refers to the Yates Memo and claims that USCIS crafted a policy whereby the I-140 petition remains valid for portability purposes only, even after withdrawal by the petitioner, when the withdrawal request is made after the initial beneficiary's I-485 application has been pending for 180 days. Counsel states that USCIS has created a legal fiction to benefit the original beneficiary and carry out the intent of Congress in AC21, but that it would frustrate Congress's intent to create a labor certification process for employers to permanently hire foreign workers if a withdrawn petition were not considered revoked for all purposes. Counsel asserts that since portability and substitution are separate and distinct policy issues, there is no basis to decide that Congress intended through AC21 to eliminate the employer's ability to substitute a beneficiary. Counsel also states that there is no basis to determine that the policy of portability trumps both the policy of substitution and the clear language of 8 C.F.R. § 205.1(a)(3)(iii)(C).

Section 245(a) of the Act provides that:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

### **Procedural History**

In the instant matter, the labor certification application was filed on November 12, 2003 and the Department of Labor (DOL) certified it on December 8, 2003. The petition's priority date is the date the labor certification application was accepted by DOL. *See* 8 C.F.R. § 204.5(d). Based on USCIS records, based on the certification of the Form ETA 750, the petitioner filed a Form I-140 petition on June 21, 2004 and it was approved on March 24, 2005. The original beneficiary of the Form I-140 concurrently filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on June 21, 2004. The petitioner submitted a request to withdraw the petition on October 4, 2005. The Service Center did not issue a notice that the petition was automatically revoked and/or noting that the petitioner wanted to substitute a new alien into the proffered position utilizing the certified labor certification pursuant to a new petition. The record reveals that the labor certification was, in fact, substituted for a new alien in support of a new Form I-140, that was denied on September 17, 2007, because the original beneficiary's adjustment of status was approved, based on the underlying labor certification. Thus, no valid labor certification exists to support the instant I-140 petition. .

### **Law**

Section 204(a)(1)(F) of the Act provides that: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 1153(b)(1)(B), 1153(b)(1)(C),

1153(b)(2), or 1153(b)(3) of this title may file a petition with the Attorney General for such classification.”

Once an alien has an approved petition, section 245(a) of the Act, 8 U.S.C. § 1255, allows the beneficiary to adjust status to an alien lawfully admitted for permanent residence:

(a) The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the [Secretary of Homeland Security], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if

- (1) the alien makes an application for such adjustment,
- (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (3) an immigrant visa is immediately available to him at the time his application is filed.

Section 106(c) of AC21 amended section 204 of the Act by adding the following provision, codified as section 204(j) of the Act, 8 U.S.C. § 1154(j):

*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.

### **History of AC21**

To understand the law underlying this case, it is helpful to examine section 106(c) of AC21 and its relation to the long standing adjustment-of-status process provided for at section 245(a) of the Act. *See generally Lee v. USCIS*, 592 F.3d 612, 614 (4th Cir., 2010) (discussing the history of the adjustment of status process and its interplay with other statutory provisions).

At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if USCIS did not process the adjustment application within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at \*10, \*23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's immigrant visa petition for an alien worker has been filed and remains adjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien 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." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

### **Significance of Policy Memoranda**

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

In this matter, the 2003 and 2005 memoranda do not cover the factual situation before us. The Form I-140 was not simply withdrawn as discussed in the 2005 memorandum on which counsel relies. Rather the petitioner utilized the labor certification in support of a new Form I-140 in behalf of a substituted alien. Significantly, the language in the 2005 memorandum on which counsel relies discusses whether the *Form I-140* remains valid pursuant to section 204(j) of the Act. At issue in this matter is whether the underlying labor certification remains valid, a separate issue under section 212(a)(5)(A)(iv) of the Act. Thus, the Act and any pertinent regulations are controlling in this matter.

### Legal Analysis

#### A. Validity of I-140

The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification “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; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition must be “valid” to begin with if it is to “*remain* valid with respect to a new job.” Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, we are to 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) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (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)(3) . . . 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>6</sup>

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 provisions of AC21 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.

The portability provisions of AC21 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).

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.<sup>7</sup>

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<sup>6</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 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>7</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

The enactment of the job flexibility 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.

As stated above, we acknowledge that in this matter, the initial approved I-140 petition had been withdrawn prior to filing the instant petition and the issue is whether the labor certification remains valid. Under the portability provisions of AC21, the initial alien's decision to port to a new employer after an adjustment application has been pending for 180 days does not by itself invalidate the labor certification. Nevertheless, the labor certification must still remain valid under other relevant provisions.

#### B. Validity of the Labor Certification

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the USCIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition.

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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.

See generally Department of Labor Proposed Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 71 Fed. Reg. 7656 (February 13, 2006).

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the approval of an I-140 petition based on a labor certification that formed the basis for another alien's admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility and for I-140 approval. To construe section 212(a)(5)(A)(iv) 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. at 340 .

Significantly, USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. See *Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm. 1986).<sup>8</sup> When Congress enacted the job flexibility provision of section 204(j) of the Act, Congress made no correlative amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two or more aliens.<sup>9</sup> We must assume that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." Counsel provides no legal authority, and we know of none, that would allow USCIS to rely on the labor certification of an adjusted alien to adjust a second alien.

Section 204(j) of the Act does not "dictate" that USCIS must adjust the status of any beneficiary of a valid petition who switches employers after having an adjustment application pending 180 days or more. Rather, the plain language of sections 204(j) and 212(a)(5)(A)(iv) of the Act merely states that where the beneficiary switches employers after the adjustment application has been pending 180 days or more, the visa petition and labor certification will remain valid with "respect to a new job." Other admissibility and visa availability issues may arise, as acknowledged by the federal court in *Matovski v. Gonzales*, 492 F. 3d 722, 737 (6<sup>th</sup> Cir. 2007) (remanding matter to the Immigration Judge to make a determination under section 204(j) of the Act in removal proceedings).

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<sup>8</sup> While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. See *Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

<sup>9</sup> Conceivably, a substituted alien could also "port" to a new employer under AC21, allowing the employer to once again legitimately substitute a new beneficiary, resulting in a theoretically unlimited number of aliens adjusting status pursuant to a single labor certification.

Significantly, Congress knows how to exempt aliens from the normal adjustment requirements. For example, the Immigration Nursing Relief Act of 1989, Public Law 101-238(a), exempted certain nurses from the numerical limitations for immigrants. Nothing in sections 204(j) or 212(a)(5)(A)(iv) of the Act suggests that Congress intended to exempt aliens from USCIS' longstanding tradition of requiring an unused labor certification to adjust status.

Counsel has not explained what basis USCIS might have to rescind the original beneficiary's status. The attempt to rely on the labor certification pursuant to section 204(j) of the Act in no way suggests that the original beneficiary was "not in fact eligible" for adjustment of status.

In justifying its proposal to eliminate substitution of beneficiaries, DOL stated:

The DOL acknowledges that concerns have been expressed that substitution is unfair to other aliens waiting in queue for visas because, under existing practices, the substituted alien obtains a priority date [footnote omitted] based on an application filed for a different alien and the date is often years earlier than the substituted alien would receive if named in a newly filed application.

*Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 71 Fed. Reg. 7656, 7659 (proposed February 13, 2006) (enacted 72 Fed. Reg. 27904 (May 17, 2007)).

While the inherent unfairness of permitting employers to substitute beneficiary has now been eliminated by DOL, it remains that the original beneficiary who adjusted status based on the underlying labor certification the petitioner now seeks to use did so legitimately. USCIS has no basis to rescind that beneficiary's status.

### **Conclusion**

Section 245(a) of the Act states that the Secretary of Homeland Security may adjust the status of an alien as a matter of discretion. Here, the applicant has not established that he has a valid labor certification. Accordingly, he is inadmissible under section 212(a)(5)(A)(i) of the Act. Section 245(a) of the Act requires an alien to be admissible to the United States, therefore a favorable exercise of discretion is not warranted.

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 with regard to the director's denial of the instant petition.

### **Ability to Pay**

Beyond the decision of the director, the AAO notes that the petitioner provided scant evidence with regard to its ability to pay the proffered wage as of the October 23, 2003 priority date.<sup>10</sup> An

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<sup>10</sup> Thus, even if the original beneficiary had not adjusted his status, the petitioner may not have

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*, 299 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). For illustrative purposes, the AAO will briefly examine the issue of the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, 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 Form ETA 750 was accepted on November 12, 2003. The proffered wage as stated on the Form ETA 750 is \$60,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in Engg, CIS, CompSci, Math, Bus, Sci or Equiv." The word Bachelor's has an asterisk that is explained in Section 15, as "Bachelor's degree or Equivalent through any combination education, training and/or experience." The petitioner also required one year in the proffered position or one year of work experience. In Section 15, Other Special Requirements, the petitioner also requires thorough knowledge of design and development of data warehousing systems. And at least one year of work experience with RDBMS (Oracle Or SQL Server) for data warehousing applications.

With the instant petition, the petitioner submitted a document entitled [REDACTED] Ended March 31, 2003" and the petitioner's Financial Statements as of March 31, 2004. Both documents contain accountant's reports prepared by [REDACTED]

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established that the instant petition was approvable.

state the documents are compilations of the petitioner's balance sheet and related statements of income, retained earnings, and cash flow. The petitioner also submitted a document entitled "Financial Statements, March 31, 2006 and 2005 with Independent Auditors' Report." This document is prepared by [REDACTED]. The AAO notes that the auditors indicate that they audited the petitioner's financial statement for the year ending on March 31, 2006, and that the 2005 statements of income, retained earnings and cash flow were reviewed rather than audited.

The AAO notes that in a cover letter dated January 2, 2007, [REDACTED] notes that the petitioner's 2002 sales were almost \$7,400,000, that in 2003, the petitioner's revenue exceeded \$18,000,000, and in 2004, the revenue exceeded \$38,000,000<sup>11</sup> and that for 2005, the petitioner's revenue was \$56,000,000. However, the petitioner submits no evidence, such as federal tax returns, to further substantiate these assertions. The petitioner's general counsel repeats these figures in a cover letter that accompanies the I-140 petition. The AAO notes that the assertions of the petitioner or of counsel, do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the audited financial statement for 2006, as of 2006, the petitioner is structured as an S corporation. Its business structure from 2003 through 2005 is not established in the record. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 670 workers. The petitioner claims a gross annual income of \$56,000,000 on the I-140 petition. On the Form ETA 750B, signed by the beneficiary on December 28 2006, the beneficiary does not identify the petitioner at Section 15, work experience.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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<sup>11</sup> The AAO notes that the petitioner's compiled financial statement for 2004 indicates revenue of \$18,051,236, with a net income of -\$169,069 for fiscal year 2004.

The petitioner submitted its financial statements for 2003, 2004, 2005, and 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO notes that the petitioner's 2006 financial statement is audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements.

However, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's reports that accompanied the 2003 and 2004 financial statements make clear that this report were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The auditors' report that accompanied the 2005 balance sheets and statements makes clear that the 2005 financial report was produced pursuant to a review. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. In either case, the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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. The petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$60,000 during any relevant timeframe including the period from the priority date in 2003 or subsequently. Therefore the petitioner would have to establish its ability to pay the entire proffered wage in tax years 2003 to 2006.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income.

The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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 record before the director closed on September 17, 2007 with the director's decision. At this time, the petitioner's 2006 tax return could have been available. However, the director did not discuss the petitioner's ability to pay the proffered wage, and no further evidence, such as the evidence described at 8 C.F.R. § 204.5(g)(2) was requested from the petitioner with regard to this issue prior to the denial of the petition.

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.<sup>12</sup> 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

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<sup>12</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

As previously noted, the only evidence submitted to the record with regard to the petitioner's ability to pay the proffered wage is its audited financial statement for 2006, its reviewed financial statement for 2005, and its compiled financial statements for 2003 and 2004. As previously discussed, the petitioner's reviewed and compiled financial statements are not considered sufficient to establish its ability to pay the difference between any wages paid to the beneficiary and the proffered wage in 2004 and 2005. Based on the lack of further evidence described at 8 C.F.R. § 204.5(g)(2), the AAO cannot further examine the petitioner's net income or net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2003 priority date or subsequently through tax year 2005. With regard to tax year 2006, the petitioner's audited financial statement indicates a net income was \$3,450,931. Thus the petitioner had sufficient net income in 2006 to pay the proffered wage of \$60,000.

However, the AAO notes that the petitioner has filed multiple employment-based petitions. USCIS computer records indicate that the petitioner had filed some 3,681 petitions, predominantly I-129 H-1B petitions as of July 2010. In 2010 alone, the petitioner had filed 203 petitions, while in tax year 2009, the petitioner filed some 353 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

With regard to the 353 new petitions filed in 2009, if all I-129 or I-140 beneficiaries were paid wages similar to those proffered to the beneficiary, the petitioner would require an additional \$21,180,000 in new income to pay for these new employees. With regard to the additional new 203 petitions filed from January to July 2010, the petitioner would require an additional \$12,180,000 in new revenue to pay wages similar to the \$60,000 salary offered to the beneficiary.<sup>13</sup> The record does not establish that the petitioner has the ability to pay the proffered wages for all pending beneficiaries in tax year 2006 or any other time during the relevant period of time in question. Thus, the petitioner has not established its ability to pay the proffered wage.

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

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<sup>13</sup> This sum represents approximately 203 new petitions filed in 2010 multiplied by the proffered wage of \$60,000.

clients included [REDACTED] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has significant gross revenue based on the audited financial statements during tax year 2006. However, the record is devoid of any other evidence as to the petitioner's ability to pay the proffered wage in any other year during the period of time from 2003 to the present. Beyond the petitioner's 2006 audited financial statement and the assertions of counsel and the petitioner's officer with regard to the petitioner's earlier gross profits, the record contains no further evidence or information on any other aspect of the petitioner's financial viability. The record contains no further discussion or information on issues such as officer compensation, longevity of business, and/or the petitioner's reputation within the IT business community. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage as of 2003 and onward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.

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