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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

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAR 29 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a drycleaners. It seeks to employ the beneficiary permanently in the United States as an alterations tailor. 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 petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa 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 January 10, 2007 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 April 1, 2003. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000 per year). The Form ETA 750 states that the position requires two years experience in the proffered position.

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.¹

The evidence in the record of proceeding shows that the petitioner, [REDACTED] was structured as a sole proprietorship.² On the petition, the petitioner claimed to have been established in 1986 and to then employ one worker. On the Form ETA 750B, signed by the beneficiary on March 19, 2003, the beneficiary did not claim to work for the petitioner.

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).

As previously stated, the priority date is April 1, 2003. The record in this proceeding closed on January 4, 2007 with the receipt by the director of petitioner's response to the director's request for evidence.³ As of that date, the petitioner's 2006 taxes were not yet due, and the most recent tax returns available would have been 2005.

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

² The record of proceeding shows that the petitioner, [REDACTED] was, at one time, a corporation. According to the records of the Illinois Secretary of State (<http://www.ilsos.gov/corporatellc/CorporateLlcController>), (accessed March 11, 2011), [REDACTED] was involuntarily dissolved by the State of Illinois on [REDACTED] 2009. The petitioner, however, had filed its 2002, 2003, 2004 and 2005 tax return on Form 1040, with attached Schedules C showing business income for [REDACTED]. Those filings show that the petitioner operated as a sole proprietor.

³ Counsel for the petitioner requested that the director grant additional time for the filing of a response to the director's request for evidence (RFE), noting that a firm employee had just left and more time was needed to file a response. On appeal, counsel states that the discharged employee

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, W-2 Forms submitted by the initial petitioner show wages paid to the beneficiary as follows:

- 2003 - no W-2 submitted
- 2004 - \$26,400
- 2005 - \$26,400
- 2006 - \$15,400

Thus, the petitioner has established the ability to pay the proffered wage in 2004 and 2005 based upon wages paid to the beneficiary which exceed the proffered wage of \$26,000. There is no evidence indicating that the beneficiary worked for the petitioner in 2003, the year of the priority

had filed a response to the RFE and counsel was unaware of the contents of the response. The director noted the RFE in his January 10, 2007 decision, and stated that counsel had been informed in the RFE that requests for additional time to respond would not be granted. 8 C.F.R. § 103.2(b)(8)(iv) states that the maximum time period for response to a request for evidence is twelve weeks, "additional time to respond to a request for evidence . . . may not be granted." The director made no mention in his decision of the RFE response that counsel states the terminated firm employee submitted. Counsel submitted that RFE response on appeal, which he states was received by USCIS on January 4, 2007. The response which counsel submitted a copy of contained the following documents sent on appeal: a letter from the beneficiary dated January 2, 2006 informing USCIS that the beneficiary had become self-employed under AC21; an I-485 receipt notice; an I-140 receipt notice; a copy of a labor certification receipt notice from the Illinois Department of Employment Security; the beneficiary's 2005 Form 1040; the beneficiary's 2005 W-2 Form from [REDACTED] the beneficiary's 2006 Form 1040; the beneficiary's 2006 W-2 Form from [REDACTED] bank records from Foster Bank for [REDACTED] from August 31, 2005 through November 15, 2006; an Assignment of Leasehold Interest dated November 10, 2006 between [REDACTED] (assignor) and [REDACTED] and the beneficiary as assignees; a Landlord's Consent to Tenant's Assignment of Lease; a Purchase and Sale Agreement dated August 9, 2005 between [REDACTED] and [REDACTED] dba [REDACTED] and [REDACTED] as buyer; a business license for [REDACTED] from the City of North Chicago, IL dated May 1, 2006; an Assumed Business Name Application for [REDACTED] dated November 21, 2006; a copy of a Corporation Detail Report from the Illinois Secretary of State's web site [REDACTED] indicating that in 2007 [REDACTED] was in good standing; a copy of Forms 1040 for years 2003, 2004 and 2005 for [REDACTED] with attached Schedules C for [REDACTED] [REDACTED] and copies of various bills and bank statements for [REDACTED]. The statements and bills were, however, not accompanied by any documentation describing the purpose of the submissions or any explanation of what the statements and bills represent.

date. Thus, it would be necessary for the petitioner to establish the ability to pay the full proffered wage in that year. Wages paid to the beneficiary in 2006 do not equal or exceed the proffered wage of \$26,000. The beneficiary states, however, that he ceased working for the petitioner in 2006 and ported employment to self-employment under the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21). The exact date that the beneficiary left the petitioner's employment is unclear from the record. This issue will be addressed later in this decision.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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).

According to the petitioner's Form 1040 tax returns, [REDACTED] operated as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor's 2003 Form 1040 shows that the sole proprietor supports a family of two. The proprietor's 2003 return reflects an adjusted gross income (Form 1040, Line 34) of \$69,667.⁴ That sum would be sufficient to pay the proffered wage, however, as previously noted,

⁴ The record additionally contains the sole proprietor's 2002 Form 1040, which reflects an AGI of \$48,495. As this tax return is for a time period before the priority date, it will be considered only

the sole proprietor must not only establish the ability to pay the proffered wage but the ability to pay his regular recurring expenses and those of any dependents. The record contains a copy of a mortgage statement dated August 11, 2006 showing a monthly payment of \$4,574.99. The record contains other sample utility bills also dated in 2006, but the petitioner did not submit a comprehensive list in response to the director's request for evidence of the sole proprietor's monthly expenses. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The RFE specifically asked for a list of monthly recurring expenses to include mortgage or rent, automobile payments, installment loans, credit card payments and household expenses. Without a full list of sole proprietor's monthly household expenses, the petitioner's ability to pay cannot be determined. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Again, as previously noted, the documentation supplied by the sole proprietor is insufficient to establish the sole proprietor's regular recurring expenses. Considering the mortgage expenses alone would result in an amount of \$54,888 per year without consideration of any other expenses. From this evidence alone, it would not appear that the sole proprietor had the ability to pay both the proffered wage and household expenses in 2003. Thus, it cannot be determined that the sole proprietor had sufficient adjusted gross income to pay the proffered wage plus personal expenses in that year. The sole proprietor also provided copies of his 2004 and 2005 Forms 1040. As noted above, however, the ability to pay the proffered wage was established in those years by payment of wages to the beneficiary which exceed the proffered wage. The record does not contain the petitioner's 2006 tax return,⁵ so that the petitioner's ability to pay cannot be determined in that year.

On appeal, counsel asserts that the petitioner established the ability to pay the proffered wage from the priority date.

The record additionally contains some of the petitioner's business bank account statements. The statements covering the Hawthorn Bank account for April 2003 to August 2003, as well as the State Financial Bank and Associated Bank for some, but not all months, in 2004, 2005, and 2006, list the petitioner's business name, and the funds are located in the sole proprietorship's business checking account. Therefore, these funds are likely reflected on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

generally.

⁵ The sole proprietor's 2006 Form 1040 would not have been available at the time of the petitioner's RFE response. The petitioner did not submit the 2006 Form 1040 on appeal. Whether it was available at the time of appeal, or when counsel submitted additional information subsequent to filing the appeal is unclear. Counsel did, however, submit the beneficiary's 2006 Form 1040 with the additional documentation on appeal.

The sole proprietor submitted a personal money market account statement from Foster Bank which indicated he had a balance of \$32,117.67 as of April 30, 2006. As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Here, nothing shows the sole proprietor paid the beneficiary any wages in 2003, or that the money market account was held in 2003. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary. No documentation is provided to show personal money market account balances in any other month than April 2006 or that the funds were available from the 2003 priority date onward. The sole proprietor submitted a personal checking account statement which showed a balance of \$5,038.17 on October 11, 2006. Checking account statements were not provided for any other month from the priority date onward. Thus, the referenced accounts will not establish, when considered singularly or in conjunction with other evidence, the ability to pay the proffered wage from the priority date onward.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the sole proprietor did not establish the ability to pay the full proffered wage plus regularly recurring personal expenses for 2003 or 2006.⁶ The record does not establish that the sole

⁶ As the record does not contain the sole proprietor's monthly requested expenses, or the sole proprietor's 2006 Form 1040, we cannot determine whether the petitioner can establish its ability to

proprietor's reputation in the industry is such that it is more likely than not that he had the continuing ability to pay the proffered wage from the priority date onward. There is insufficient evidence to establish that the sole proprietor had sufficient liquefiable personal assets to pay the proffered wage plus necessary recurring expenses, which the sole proprietor has not sufficiently established from the priority date onward. Based on the evidence in the record, the funds in the sole proprietorship's business bank account would likely be included on the Schedule C to IRS Form 1040 had the sole proprietor submitted its 2006 tax return. The net profit (or loss) would be carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI. The petitioner states on Form I-140 that it only employs one individual and the sole proprietor's Schedule C for both 2002, the year before the priority date, and 2003 only show total wages paid in the amount of \$13,760, which is approximately half of the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the sole proprietor has not established that he had the continuing ability to pay the proffered wage from the priority date.

On appeal, an additional issue presented is whether the beneficiary is able to continue processing or "port" under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21") to the new employer, [REDACTED]. In 2006, the beneficiary left the petitioner's employment and began working at [REDACTED] a business purchased by the beneficiary's spouse pursuant to the terms of a purchase and sale agreement dated August 9, 2005.⁷ From documents contained in the record, namely tax returns filed by the beneficiary and his spouse, it appears that [REDACTED] has been operated as a sole proprietorship since that time. An assumed business name application dated November 21, 2006⁸ states that [REDACTED] is a dry cleaning business located at [REDACTED] North Chicago, IL, and that the owners of the business are the beneficiary and his spouse. The beneficiary, therefore, seeks to port his employment to that of a self-employed individual at [REDACTED] where counsel states that the beneficiary will continue to work in the position of an alteration tailor.

pay in this year despite the partial wages paid to the beneficiary and the sole proprietor's 2006 money market funds.

⁷ Counsel states in his brief at one point that the beneficiary purchased the business in August 2006, and at another point states that the beneficiary began employment with [REDACTED] in November 2006. The beneficiary's prepared statement, dated January 2006 [although, this may be a typographical error since an attached Fed Ex slip is dated January 2007], states that he was self-employed at that point. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁸ The petitioner submitted a Form I-907 on October 6, 2006 to convert the I-140 petition to premium processing. Counsel's brief on appeal states that the director's RFE "oddly treated the case as if it were a premium processing case."

The petition was denied based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. As the petition was denied, the beneficiary would seek portability based on an unapproved I-140 petition. No related statute or regulation would render the beneficiary portable under these facts.

Counsel cites to the May 12, 2005, William R. Yates, Associate Director for Operations United States Citizenship and Immigration Services, Department of Homeland Security Memo,⁹ "*Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).*"

Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?

⁹ USCIS memoranda merely articulate internal guidelines for USCIS; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

See also Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "*Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service*," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). See also *Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:

A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.

B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

Counsel asserts that the petition was approvable, and that the director received the second prepared RFE response regarding the beneficiary's portability prior to his decision.¹⁰ Counsel cites to case law including a Board of Alien Labor Certification Appeals (BALCA) case, *Matter of Bloom*, 1988-INA-152 (October 13, 1989), where a labor certification was denied based on a lack of response to a Notice of Findings. Counsel summarizes that the Board looked to other courts that have drawn a distinction between statutory time limits, which are subject to waiver and those that are not subject

¹⁰ The documents submitted on appeal show that the beneficiary signed a letter, dated January 2, 2006 addressed to the director, in which he requested "AC 21 portability." Nothing stated that the letter was in response to a RFE. The letter referenced Form I-140, the receipt number, and attached a copy of the I-485 receipt. 8 C.F.R. § 103.2(a)(3) *Representation* states:

An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter. A beneficiary of a petition is not a recognized party in such a proceeding. An application or petition presented in person by someone who is not the applicant or petitioner, or his or her representative as defined in this paragraph, shall be treated as if received through the mail, and the person advised that the applicant or petitioner, and his or her representative, will be notified of the decision. Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted.

As the beneficiary is not a recognized party to an I-140 petition, it is unclear whether the director received or considered the response.

to waiver. Counsel quotes the Board, “the procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion.”¹¹ *Id.* However, contrary to counsel’s assertions, the response time for an RFE is set by regulation, and is more than a procedural rule. *See* 8 C.F.R. § 103.2(b)(8).¹²

Counsel asserts that the beneficiary’s adjustment of status was pending for over 180 days as required, that the position is in the same Metropolitan Statistical Area in terms of wage, that the job offer is legitimate, and that the new petitioner can establish its ability to pay the proffered wage, and therefore, the beneficiary should be allowed to port to new employment.

However, as addressed above, the I-140 petition, even in consideration of the documents sent on appeal, was not approved because the petitioner failed to establish its ability to pay. Documentation submitted on appeal does not overcome this deficiency, whether the beneficiary’s “portability response” and documentation are considered or not.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act,¹³ codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall

¹¹ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

¹² A final rule effective June 16, 2007 gave USCIS flexibility in determining the length of time to set for a petitioner to respond to an RFE, although the maximum allowed time for response was set at twelve weeks. *See* 8 C.F.R. § 103.2(b)(8)(iv). The prior regulation set the response time as twelve weeks: “Additional time may not be granted.” *See* 8 C.F.R. § 103.2(b)(8) [2006]. The director issued the RFE on October 13, 2006 and allowed a response time of twelve weeks until January 5, 2007 in accordance with the regulations.

¹³ It should be noted that at the time AC21 came into effect, legacy 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 was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; third, if the adjustment application was not processed 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.

remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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

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

Section 204(a)(1)(F) of the Act includes the immigrant classification for individuals holding baccalaureate degrees who are members of the professions and skilled workers under section 203(b)(3) of the Act, the classification sought in the [underlying (if a 485 certification)] petition.

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

After enactment of the portability provisions of AC21, on July 31, 2002, USCIS published an interim rule allowing for the concurrent filing of Form I-140 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 had filed his Form I-485 on September 27, 2003, concurrently with the petitioner's filing of Form I-140.

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. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 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)(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

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

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

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

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

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.¹⁵

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).

¹⁵ *See* Matter of Al Wazzan, 25 I&N Dec. 359 (AAO 2010), a precedent decision: "Section 106(c) of AC21 does not repeal or modify section 204(b) or section 245 of the [Immigration and Nationality] Act, which require[s] USCIS to approve a petition prior to granting immigrant status or adjustment of status."

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-*

In the case at hand, the I-140 petition was denied. The petitioner failed to provide evidence on appeal to overcome the basis for denial. 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 was denied, it cannot be deemed valid by improper invocation of section 204(j) of the Act.

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.

Considering *Matter of Dial Auto*, 19 I&N Dec. 481 (Comm. 1986), and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

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

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. Accordingly, the petitioner has failed to demonstrate that the beneficiary can validly continue to utilize the labor certification initially filed Lakewood Cleaners.

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