



U.S. Citizenship
and Immigration
Services

(b)(6)

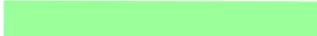


Date: **APR 25 2012**

Office: TEXAS SERVICE CENTER

FILE: 

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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).¹ The director determined that the petition is not approvable because the certified labor certification has already been used by its original beneficiary, [REDACTED] who adjusted to lawful permanent resident status on January 5, 2007. The director also determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on April 30, 2001, 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 herein.

As set forth in the director's May 8, 2008 denial, one of the issues in this case is whether or not the labor certification can be used by the beneficiary.

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 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.²

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). Although the filing of the instant petition predates the final rule, another beneficiary has been issued lawful permanent residence based on the labor certification. In the instant case, the offer of employment contained in the certified Form ETA 750 was originally made to [REDACTED] as shown on Part A of Form ETA 750. On May 20, 2005, the petitioner filed a petition for alien worker on behalf of [REDACTED] based on the instant labor certification [EAC 05 171 50635]. That petition was approved and is the basis of [REDACTED]'s lawful permanent resident status. The petitioner then filed the instant I-140 petition requesting the substitution of the original alien, [REDACTED] for the current beneficiary, [REDACTED].

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The

Procedural History

In the instant matter, the labor certification application was filed on April 30, 2001 and the Department of Labor (DOL) certified it on July 23, 2004. The petition's priority date is the date the labor certification application was accepted by DOL. *See* 8 C.F.R. § 204.5(d). The petitioner filed a Form I-140 petition [EAC 05 171 50635] on behalf of [REDACTED] on May 20, 2005, based on the instant labor certification. That petition was approved on August 28, 2005. Mr. [REDACTED] filed a concurrent Form I-485, Application to Register Permanent Residence or Adjust Status, with the Form I-140.

On July 17, 2006, the attorney of record notified United States Citizenship and Immigration Services (USCIS) of a change of employer for Mr. [REDACTED] from Seaport Café, Inc. to Universal Baking Company, Inc. d/b/a All About Food (All About Food), under the provisions of AC21, the American Competitiveness in the Twenty-First Century Act.³ The attorney of record submitted a letter dated July 5, 2006, signed by Anwarali Razwani, in the capacity of Officer on All About Food's leatherhead. Per the terms of this letter, All About Food offered Mr. [REDACTED] a permanent full-time position of food service manager. On the same date, July 17, 2006, the petitioner submitted a request to cancel the approved petition for Mr. [REDACTED]. In response, the Service Center revoked the I-140 petition on August 17, 2006. On January 5, 2007, the I-485 application filed by Mr. [REDACTED] was approved based upon the prior approved I-140 and the certification labor certification in his name filed by the petitioner. Therefore, the petitioner could not substitute a new alien into the proffered position utilizing the labor certification already used by Mr. [REDACTED].

On July 13, 2007, the petitioner filed the current Form I-140 on behalf of the instant beneficiary, [REDACTED]. On January 25, 2008, the beneficiary filed Form I-485, Application to Register Permanent Resident or Adjust Status, using the instant petition as its basis. The beneficiary's Form I-485 was denied on May 8, 2008.

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."

record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ AC21 allows an *application for adjustment of status* to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job.

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 unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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

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.

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 unadjudicated 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.

In the instant case, and with regard to [REDACTED] the service center director accepted that the conditions of AC21 were met, and that Mr. [REDACTED] was entitled to adjust his status to that of lawful permanent resident under AC21.

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).⁴

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.

⁴ 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).

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.⁵

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.

Under the portability provisions of AC21, the 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.

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

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. *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 adjustment of status of an alien 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. 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'r 1986).⁶ 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.⁷ The AAO 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 the AAO knows of none, that would allow USCIS to rely on the labor certification of an adjusted alien to adjust a second alien.

The portability provisions *American Competitiveness in the Twenty-First Century Act of 2000* cannot be interpreted to permit one labor certification to serve as the basis for lawful permanent residence for multiple aliens. The labor certification on which this petition is based already served as the basis of admissibility of the original beneficiary. *See* § 212(a)(5)(A) of the Act. For the reasons stated above, this petition cannot be approved.

Analysis of the Petitioner's Ability to Pay

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

⁶ 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).

⁷ 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.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$27.21 per hour (\$56,596.80 per year, based on forty hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered as a food service manager or two years of experience as a manager, catering supervisor or related experience.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on February 25, 1997 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on July 10, 2007, the beneficiary did not claim to have worked 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 onwards.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner filed this Form I-140 on July 13, 2007. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's federal tax returns (Forms 1120S) demonstrate its net income for 2001, 2002, 2003, 2004, 2005, and 2006,⁸ as shown in the table below.

⁸ Although the petitioner submitted its 2000 tax return, the AAO will not analyze petitioner's ability to pay the proffered wage preceding the priority date.

- In 2001, the Form 1120S stated net income⁹ of \$(65,779).
- In 2002, the Form 1120S stated net income of \$(17,622).
- In 2003, the Form 1120S stated net income of \$(70,815).
- In 2004, the Form 1120S stated net income of \$45,904.
- In 2005, the Form 1120S stated net income of \$40,524.
- In 2006, the Form 1120S stated net income of \$59,891.

Therefore, for the years 2001, 2002, 2003, 2004, and 2005, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage of \$56,596.80 per year. Although it appears that the petitioner had sufficient funds to pay the beneficiary the proffered wage in 2006, USCIS databases show that the petitioner has submitted at least eleven additional immigrant petitions for alien workers with the same or similar priority dates. It is the petitioner's burden to demonstrate that it has sufficient funds to pay the proffered wage to the beneficiary and all the additional sponsored beneficiaries from their respective priority date and continuing until each sponsored beneficiary obtains lawful permanent resident status. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

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.¹⁰ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, and 2006 as shown in the table below.

⁹ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 31, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner's net income is found on Schedule K of its tax returns.

¹⁰ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2001, the Form 1120S stated net current assets of \$(7,840).
- In 2002, the Form 1120S stated net current assets of \$47,105.
- In 2003, the Form 1120S stated net current assets of \$39,662.
- In 2004, the Form 1120S stated net current assets of \$(18,150).
- In 2005, the Form 1120S stated net current assets of \$(17,253).
- In 2006, the Form 1120S stated net current assets of \$(1,470).

Therefore, for the years 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage of \$56,596.80 per year, and the proffered wages to the additional sponsored beneficiary with the same or similar priority dates.

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

On appeal, counsel claims that the petitioner suffered losses due to the September 11, 2001 tragedy and that some of the additional sponsored beneficiaries were never employed, while others have left the job.¹¹

The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. Further, the petitioner's 2000 federal tax returns show that the petitioner was not able to pay the proffered wage even before the events of September 11, 2001.¹² The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The fact that the petitioner sponsored several other beneficiaries in immigrant petitions

¹¹ Counsel submitted evidence on appeal to demonstrate that four other beneficiaries of immigrant petitions either left the petitioner's employment or were never employed by the petitioner. This evidence does not address the at least seven other beneficiaries of immigrant petitions filed by the instant petitioner.

¹² The petitioner's 2000 Form 1120S shows net income of \$38,098 and net current assets of \$(8,273).

requires that the petitioner demonstrate that it has sufficient funds to pay the proffered wage to the beneficiary and all the additional sponsored beneficiaries from their respective priority date and continuing until each sponsored beneficiary obtains lawful permanent resident status. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

Counsel claims that there should be a positive determination regarding the petitioner's ability to pay the beneficiary the proffered wage per the criteria established by the May 4, 2004 Yates Memo, entitled "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)."

Regarding the determination of ability to pay (Yates Memorandum), it should be emphasized that the AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Neither the petitioner's net income nor net current assets for years 2001, 2002, 2003, 2004, and 2005 are equal or greater than the proffered wage. Furthermore, in the instant case, the petitioner did not demonstrate by credible verifiable evidence that it employed (or is employing) and paid (or is paying) the beneficiary at least the proffered wage.

Counsel also recommends the use of retained earnings to pay the proffered wage. Counsel asserts that the petitioner has established its ability to pay based on its undistributed balance of retained earnings (Schedule M-2 of Form 1120S – undistributed taxable income previously taxed), compensation to officers, net profit, and the totality of the circumstances. Retained earnings are a company's accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

In addition, counsel asserts that in these matters compensation to officers is routinely considered as a possible source of funds, and because it is discretionally distributed to the officer shareholders they

can decide to retain it to pay wages. The petitioner's IRS Forms 1120S for 2001 and 2006 show that the petitioner paid officer compensation in then amount of \$51,000 and \$76,191, respectively for those years. The petitioner failed to submit evidence to show that officer compensation payments for those years were not fixed by contract or otherwise and the record does not contain any statements from the officers that they could forgo officer compensation. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 (Reg'l Comm'r 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 petitioner's tax returns indicate it was incorporated on February 25, 1997. The petitioner submitted its tax returns for years 2001, 2002, 2003, 2004, 2005, and 2006. The figures on its tax returns could not demonstrate the petitioner's ability to pay the beneficiary the proffered wage of \$56,596.80 per year and the proffered wages to all additional sponsored beneficiaries with the same or similar priority dates. The petitioner's gross receipts/sales ranged from \$883,039 in 2001 to \$1,287,466 in 2006. While the gross receipts for these years reflect the petitioner's growth in sales, no evidence was submitted to establish a basis for expected continued growth. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during those years. Although the petitioner has been in business since at least 1997, no evidence was

provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. 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.

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

Analysis of the Beneficiary's Qualifying Experience

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

(ii) *Other documentation*—

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

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

(b)(6)

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a food service manager or two years of experience as a manager, catering supervisor or related experience. On the labor certification, the beneficiary claimed to qualify for the offered position based on the following experience: (i) full-time deputy manager with [REDACTED] located at [REDACTED] from January 1999 to February 2001; and (ii) full-time manager with [REDACTED] from January 2007 to present.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) The record contains a letter written on [REDACTED] letterhead, located at the [REDACTED]. This letter states that [REDACTED]³ worked with [REDACTED] as a deputy manager from January 1999 to February 2001. His duties included supervision, oversight of restaurant operation, management of staff, including absorbing and removing workers, order from suppliers, and supervision of budget. This letter does not contain the title and signature of its writer, and does not state the number of hours that the beneficiary worked per week. The letter does not comply with the requirements of the regulation and therefore cannot be accepted.

It is noted that on the labor certification, the beneficiary listed that he obtained his high school diploma from [REDACTED] Israel, which he attended from September 1995 to June 1999. Therefore, it can be inferred that from January 1999 to June 1999, the beneficiary was completing his high school studies. It is unclear how the beneficiary could be completing his high school studies while also working at the same time as a full-time manager at [REDACTED]. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In all cases, the burden of proof is on the petitioner, to establish the beneficiary's eligibility by a preponderance of the evidence. [See Section 291 INA; *Matter of Sun*, 12 I. & N. Dec. 800, Interim Decision (BIA) 1885 (1968)]. A "preponderance of the evidence" is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not". [Black's Law Dictionary 1064 (5th ed. 1979)] See I.D. 3112 (BIA 1989).

In addition, on Form G-325A, Biographic Information, signed by the beneficiary on December 30, 2007, filed in conjunction with his Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary states that he has been working or worked for [REDACTED]

¹³ The beneficiary's name listed on Form I-140 and Part B of ETA 750 is [REDACTED]. The beneficiary's birth certificate shows his name as [REDACTED]. On the beneficiary's passport his name appears as [REDACTED].

(b)(6)

Page 18

located at [REDACTED] from September 2005 to present.¹⁴ This cannot be reconciled with the dates of employment the beneficiary listed on the Form ETA 750B.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Conclusion

Based on the above, the AAO determines the petitioner failed to establish eligibility for the benefit sought. 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.

¹⁴ The AAO will consider the beneficiary's employment with Papyrus Color Printing LLC to be at least until the date that the beneficiary signed Form G-325A, on December 30, 2007.