



U.S. Citizenship
and Immigration
Services

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DATE: JAN 04 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 petition¹ 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 convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager-evening shift pursuant to Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), 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 and continuing to the present. The director also determined that portability under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) (Public Law 106-313) and section 204(j) of the Act, 8 U.S.C. §1154(j) did not apply when adjudicating the petition. Accordingly the petition was denied.

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 May 13, 2010 denial, the primary 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 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.

I. Application of AC21 Section 204(j)

In response to the director's notice of intent to deny (NOID) issued on May 21, 2009 and on appeal, counsel asserts that the beneficiary in the instant case meets the requirements of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Public Law 106-313), section 204(j) of the Act. As a result, counsel claims that the beneficiary can commence employment with his new employer [REDACTED] and obtain lawful permanent resident status based on the labor certification and the Form I-140 petition filed by the original employer. Counsel further asserts that eligibility under section 204(j) of the Act, in part, hinges solely on the new employer's ability to demonstrate the ability to pay the proffered wage from the date of new employment, June 17, 2009, to the present. The

¹ The record shows that the petitioner filed an I-140 immigrant petition [REDACTED] on January 16, 2007 for the beneficiary in the same proffered position based on the underlying labor certification (D-04293-17451) and the petition was denied by the Nebraska Service Center director on April 29, 2008.

ability to pay of the original petitioner from the priority date to the date of new employment, counsel maintains, is no longer a relevant consideration.

Counsel cites to a Memorandum from Michael Aytes, Acting Director of Domestic Operations, *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))*, HQPRD 70/6.2.8-P, December 27, 2005 (Aytes December 27, 2005 memo),² and calls it an I-140 Standard Operating Procedure. Although the document is not easily identifiable, counsel also submits a February 2003 Immigration Business and News comment on the interplay between ability to pay and section 204(j), and two unpublished AAO decisions to support her position.³

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

³ 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, unpublished decisions are not similarly binding.

As will be discussed in greater detail below, counsel's assertions regarding what constitutes a valid I-140 petition for section 204(j) purposes are incorrect. Furthermore, the AAO notes that although it is not bound by any of the sources cited by counsel, the sources only support the proposition that the new employer must demonstrate ability to pay the proffered wage from the date of the new job offer until the beneficiary obtains lawful permanent resident status.⁴ The sources in no way undermine the statutory and regulatory requirements that the original employer demonstrate the ability to pay the proffered wage from the priority date until the new offer of employment is made or that an approved I-140 is required before a beneficiary can obtain lawful permanent resident status.

In the instant case, the crucial inquiry, then, must focus on whether the initial petitioner demonstrated ability to pay the proffered wage from the priority date until June 17, 2009.

AC21

Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*⁵ 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. A plain reading of the phrase "will remain valid" suggests that the

Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

⁴ See 8 C.F.R. § 204.5(g)(2).

⁵ The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable," then the adjustment application may be adjudicated under the terms of AC21. See *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)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Validity of the Form 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).⁶

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

Therefore, to be considered “valid” in harmony with the portability provisions of AC21 and with the statute as a whole, an immigrant visa petition must have been filed for an alien that is entitled to the requested classification and that petition must have been approved by USCIS pursuant to the agency’s authority under the Act. *See generally* section 204 of the Act, 8 U.S.C. § 1154. A petition is not validated merely through the act of filing the petition with USCIS or through the passage of 180 days.

The portability provisions of AC21 cannot be interpreted as allowing the adjustment of status of an alien based on an unapproved visa petition when section 245(a) of the Act explicitly requires an approved petition (or eligibility for an immediately available immigrant visa) in order to grant adjustment of status. To construe section 204(j) of the Act in that manner would violate the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain adjudicated for 180 days.⁷

⁶ 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).

⁷ 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

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.

Legislative history behind AC21

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 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.

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

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.

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.

Legal Analysis – Validity of I-140

In the instant matter, the labor certification application was filed on March 26, 2001 and DOL certified it on November 4, 2006. The petition's priority date is the date the labor certification application was accepted by DOL. See 8 C.F.R. § 204.5(d). Based on the certification of the Form ETA 750, the petitioner filed a Form I-140 petition [REDACTED] on January 16, 2007 and it was denied on April 29, 2008. After the previously filed I-140 petition was denied, the petitioner filed the instant petition on July 11, 2008 upon the underlying labor certification. On May 21, 2009, the director issued the NOID and in response to the NOID which the director received on June 22, 2009, counsel submitted a job offer letter dated June 17, 2009 from [REDACTED] offering the beneficiary the same position as the proffered position under the same conditions of the certified Form ETA 750 and requested porting the beneficiary's job to the new employer. The petition was denied on May 13, 2010. A subsequent appeal was filed and is currently pending with the AAO requesting that the beneficiary's job be ported to the new employer under AC21.

As the record shows, the underlying Form I-140 in this matter was denied because the original petitioner could not prove the ability to pay the proffered wage from the priority date of March 26, 2001 to June 17, 2009. The petitioner failed to provide any evidence on appeal to overcome the ground of denial. The beneficiary would therefore not have a valid immigrant visa petition approved on his 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). Furthermore, the petitioner has not established that the beneficiary has a valid I-140 petition to port to the new employer under the portability provisions of AC21 after an adjustment application has been pending for 180 days. The portability provisions of AC21 simply do not apply to this case because the petition was denied.

As will be discussed below, the original petitioner failed to comply with the regulatory requirements that it prove the ability to pay the proffered wage from the priority date forwards. Thus, section 204(j) of the Act cannot be invoked in the instant matter because the I-140 was properly denied.

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

Here, the Form ETA 750 was accepted on March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$33,079 per year. On the petition, the petitioner claimed to have been established on May 24, 1990, and to currently employ one employee. On the Form ETA 750B, signed by the beneficiary on March 10, 2001, the beneficiary did not claim to have worked for the petitioner.

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.⁸

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any documentary evidence showing that the petitioner hired and paid the beneficiary any compensation during the relevant years from the priority date to the present. Therefore, the petitioner failed to establish

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

the continuing ability to pay the proffered wage through an examination of wages actually paid to the beneficiary.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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).

In response to the director's May 21, 2009 NOID, counsel asserts that depreciation must be added back to net income and considered in determining the petitioner's ability to pay the proffered wage based on an accountant's letter. Counsel's assertion is misplaced. 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2006. According to the tax returns in the record, the petitioner's fiscal year ran based on a calendar year. These tax returns demonstrate the petitioner's net income as shown in the table below.

- In 2001, the Form 1120 stated net income⁹ of \$6,060.
- In 2002, the Form 1120 stated net income of \$23,940.
- In 2003, the Form 1120 stated net income of \$6,043.
- In 2004, the Form 1120 stated net income of \$34,685.
- In 2005, the Form 1120 stated net income of \$12,493.
- In 2006, the Form 1120 stated net income of \$19,404.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net income to pay the full proffered wage of \$33,079 per year except for 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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 through 2003, 2005 and 2006 as shown in the table below.

⁹ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

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 1120 stated net current assets of (\$55,573).
- In 2002, the Form 1120 stated net current assets of (\$3,740).
- In 2003, the Form 1120 stated net current assets of (\$72,423).
- In 2005, the Form 1120 stated net current assets of \$74,193.
- In 2006, the Form 1120 stated net current assets of \$21,338.

While the petitioner had sufficient net current assets to pay the beneficiary the full proffered wage for 2005, the petitioner did not have sufficient net current assets to pay the proffered wage for 2001 through 2003 and 2006.

The record does not contain regulatory-prescribed evidence, such as an annual report, tax return or audited financial statements, for 2007. The record before the director closed on June 22, 2009 with the receipt by the director of the petitioner's submissions in response to the NOID. Counsel did not submit the petitioner's tax return for 2007 as it was not available by that time because the petitioner filed an automatic extension for filing its 2007 tax return. Further, the instant appeal was filed on June 15, 2010. As of that date the petitioner's annual report, federal tax return or audited financial statements for 2007 and even for 2008 and 2009 should have been available. However, the petitioner did not submit these documents for any of these years, nor did counsel explain whether these documents were unavailable or why they were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The annual reports, tax returns or audited financial statements would have demonstrated the amounts of net income and net current assets the petitioner reported to the IRS and further revealed its ability to pay the proffered wage. Without these documents for 2007, 2008 and 2009, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in these years. The petitioner failed to establish its ability to pay the proffered wage for these years because it failed to submit these documents.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets to the present except for 2004 and 2005.

In response to the director's NOID, counsel advocated combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage for 2001 through 2003 and 2006. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage-one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net

total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel submitted the petitioner's tax returns for several years prior to the priority date as evidence that the petitioner established its continuing ability to pay the proffered wage if assessing the totality of the circumstances. These tax returns show that the petitioner had net income of \$55,449 in 1991, \$29,190 in 1992, \$62,170 in 1993, \$16,026 in 1997 and \$33,610 in 2000. The AAO notes that the petitioner has been in business for a long time, and had profits which would be sufficient to pay the proffered wage in 1991, 1993 and 2000. However, taking the petitioner's financial records as a whole, it is also noted that the petitioner did not yield sufficient profits to hire a new employee and to pay him an annual salary of \$33,079 for twelve out of the sixteen relevant years (1991 through 2006) for which the petitioner submitted its tax returns. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all twelve years from 1991 to 2006 except for 1991, 1993, 2000 and 2004 were uncharacteristically unprofitable years for the petitioner. 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.¹¹

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 and continuing. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Since the beneficiary left for a new job offer, no valid job offer exists because neither the petitioner nor the beneficiary intends to enter into the position. Accordingly, the petition cannot be approved and the director's decision must be affirmed.

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.

¹¹ The AAO notes that the record contains a job offer letter dated June 17, 2009 from [REDACTED] and its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2006 through 2009. However, this evidence is irrelevant because no relationship between [REDACTED] and the petitioner is established and this would only be considered during the I-485 adjudication with a valid (approved) I-140.