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



PUBLIC COPY

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Date:

Office: TEXAS SERVICE CENTER

File:



MAR 13 2012

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a maintenance carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date onward. The director denied the petition accordingly.

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

As set forth in the director's June 5, 2008 denial, the primary issue in this case is whether or not the petitioner is able to pay the proffered wage as of the priority date onward. In addition, the director noted that the petitioner on the Form I-140 is different than that on the Form ETA 750, and that no explanation was provided to explain the discrepancy. On appeal, we have identified an additional ground of ineligibility: whether the petitioner established that the beneficiary had the experience required by the terms of the labor certification.

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

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The Immigrant Petition for Alien Worker (Form I-140) was filed on July 27, 2007.

The original labor certification was approved with R and R Construction as the employer. The regulation at 20 C.F.R. § 656.2 defines an "employer" as "a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be

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

referred for employment . . . or the authorized representative of such a person, association, firm, or corporation.” In general, a change in employers requires a new application for certification by the new employer unless the same job opportunity and the same area of intended employment are preserved. A change in employers does not necessarily require the filing of a new application where the alien is working in the exact same position, performing the same duties, and in the same area of intended employment for the same salary or wage. See *International Contractors, Inc., and Technical Programming Services, Inc.*, 89-INA-278 (BALCA 1990); *Matter of American Chick Sexing Association and ACCU-CO*, 89-INA-320 (BALCA 1991). In *American Chick Sexing Association*, BALCA determined that 20 C.F.R. § 656.30(c)(2) is not violated where one company timely transfers its interests in labor certification applications to another company, and the successor company preserves the particular job opportunities and area of intended employment. Here, the petitioner states that it is the same entity as R & R Construction and that “R & R Construction” is an alias of the petitioner’s.

The Form ETA 750 states the labor certification applicant as R & R Construction, with an address of [REDACTED]. The Form I-140, filed July 27, 2007, states the petitioner’s name as [REDACTED] Employer Identification Number (EIN) [REDACTED] and an address of [REDACTED]; the petitioner also submitted a 2006 federal tax return for this entity. The 2001-2005 tax returns submitted to the record are for Renaissance Restoration, Inc. with an EIN of [REDACTED] and an address of [REDACTED]. The original labor certification application initially listed an address of [REDACTED]. This address was subsequently changed, with the corrections approved by the DOL, prior to the approval of the Form ETA 750, to [REDACTED].

On October 11, 2011, the AAO issued a Notice of Derogatory Information and Request for Evidence (NDI) to the petitioner noting that the relationship between [REDACTED] had not been established and that [REDACTED] exists as a registered entity in both New York and Connecticut with similar shareholders, different addresses, and different FEINs. The NDI requested that the petitioner demonstrate that a successor-in-interest relationship exists between these entities and that the petitioner remained a viable business so as to be able to provide a bona fide job opportunity for the beneficiary. In its response, received on November 10, 2011, the petitioner stated that [REDACTED] is a trade name of [REDACTED]. In support of this trade name claim, the petitioner submitted a Certificate issued by the State of Connecticut with both [REDACTED] name on the document. Counsel claims that this evidence was accepted by the DOL to determine that [REDACTED] are the same entity. The petitioner provides no explanation of the relationship between the [REDACTED] registered in the State of Connecticut and the [REDACTED] registered with the State of New York. The original labor certification states the amended address of the employer as [REDACTED]. The president of [REDACTED] submitted a letter dated June 14, 2007 where he also listed the address as [REDACTED].

The AAO finds that the petitioner is [REDACTED] initially with an address in New York and an FEIN number of [REDACTED] and subsequently with the Connecticut address and an FEIN number of [REDACTED]. The Form ETA 750 does not request an FEIN number but does require the address of the petitioner. The change of address from New York to Connecticut was approved by the DOL and the addresses are reflected in the returns for both FEIN numbers of [REDACTED] one in New York and the other in Connecticut. The AAO also finds by a preponderance of the evidence that [REDACTED] does business as [REDACTED]. Therefore, the [REDACTED] tax returns from 2001 through 2006 will be considered in the determination of whether the petitioner has established the ability to pay the proffered wage.

Regarding the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28,267 per year. The Form ETA 750 states that the position requires a worker to have completed grade school and high school and to have two years of experience in the position offered as a maintenance carpenter.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner indicated that it was established in 1998 and currently employs two workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner provided a 2001 Form 1099 issued by [REDACTED] stating that it paid the beneficiary \$37,476. This 1099 is sufficient to establish the petitioner's ability to pay the proffered wage in that year alone. The petitioner also submitted checks made out to the beneficiary from [REDACTED]. All checks dated April 12, 2002 or later were made out to [REDACTED] not to the beneficiary. The petitioner submitted a document showing that [REDACTED] is a business conducted by the beneficiary, however, payments made to a business are insufficient to demonstrate payments made to the beneficiary. These payments represent gross income to [REDACTED]. The record does not reflect that the gross income of [REDACTED] is the wage paid to the beneficiary, individually, without deductions by [REDACTED] such as for equipment, tools, insurance, and other costs of doing business as a carpentry company. Similarly, the petitioner provided bank statements demonstrating that the amounts represented were deposited, however, the bank account on the statement is the business account of [REDACTED] not a personal checking account of the beneficiary.

In addition, the checks dated December 27, 2002 onward were written from the account of [REDACTED] and not from the petitioner. On appeal, the petitioner states that the shareholders of the petitioner and of [REDACTED] are the same and that the two companies do the same work; the petitioner states that whichever company has the contract pays the beneficiary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." As the companies are separate and distinct, none of the checks from [REDACTED] may be considered as evidence of payments made to the beneficiary by the petitioner to show its ability to pay the proffered wage.

In response to the director's request for evidence, the petitioner stated that payments made by [REDACTED] to the beneficiary should be considered as evidence of the ability to pay the proffered wage because the payments were made "at the behest of the petitioner . . . that this payment structure

was established for legitimate business reasons and consistent with normal business practices in the real estate industry." Counsel cites *Matter of Pozzoli*, 14 I&N Dec. 569 (BIA 1974), wherein the Regional Commissioner concluded that the use of a foreign qualifying entity's funds could also be used to support a beneficiary's wage in the context of the nonimmigrant petition. In that case, the petitioner filed for an intercompany transferee visa, or L visa. The petitioner demonstrated that its foreign affiliate would continue to pay the beneficiary while the beneficiary worked for its affiliate in the United States. No such affiliate relationship was demonstrated here. Instead, no relationship has been demonstrated between the companies. Any remuneration received by the beneficiary from [REDACTED] would be for work done for that company, not for the petitioner and would come from funds available to that company and not from the petitioner. Thus, any remuneration received by the beneficiary from [REDACTED] cannot be considered in determining the petitioner's ability to pay the proffered wage.

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*, 696 F. Supp. 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the receipt by the director of the petitioner's response to the Request for Evidence on May 20, 2008. As of that date, it is unclear whether the petitioner's 2007 tax return would have been available. The 2001 through 2005 tax returns submitted were for [REDACTED] and the 2006 tax return submitted was for [REDACTED]

[REDACTED] The tax returns reflect the following net income:

- In 2001, [REDACTED] Form 1120S stated net income of \$7,838.
- In 2002, [REDACTED] Form 1120S stated net income of \$2,789.
- In 2003, [REDACTED] Form 1120S stated net income of \$1,952.
- In 2004, [REDACTED] Form 1120S stated net income of \$9,295.
- In 2005, [REDACTED] Form 1120S stated net income of -\$14,372.
- In 2006, [REDACTED] Form 1120S stated net income of \$34,716.

Therefore, for 2001, 2002, 2003, 2004, and 2005, [REDACTED] did not have sufficient net income to pay the proffered wage. [REDACTED] net income in 2006 is sufficient to demonstrate its ability to pay the proffered wage in that year alone.

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.² 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

²According 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.

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 tax returns of [REDACTED] and [REDACTED] demonstrate end-of-year net current assets for 2001 through 2006, as shown in the table below.

- In 2001, [REDACTED] Form 1120S stated net current assets of \$13,564.
- In 2002, [REDACTED] Form 1120S stated net current assets of \$14,981.
- In 2003, [REDACTED] Form 1120S stated net current assets of \$533.
- In 2004, [REDACTED] Form 1120S stated net current assets of \$9,828.
- In 2005, [REDACTED] Form 1120S stated net current assets of -\$4,544.
- In 2006, [REDACTED] Form 1120S stated net current assets of \$37,216.

Therefore, for 2001, 2002, 2003, 2004, and 2005, [REDACTED] did not have sufficient net current assets to pay the proffered wage. [REDACTED] net current assets in 2006 are sufficient to demonstrate the petitioner's ability to pay the proffered wage in that year alone.

The petitioner has paid the beneficiary in excess of the proffered wage in 2001 and has sufficient net income and net current assets to pay the proffered wage in 2006. Therefore, the petitioner did not demonstrate its ability to pay the proffered wage from the date of the labor certification onward through an examination of wages paid to the beneficiary, the petitioner's net income or net current assets.

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

In the instant case, the petitioner established its ability to pay the proffered wage in only two years: in 2001 through wages paid to the beneficiary and in 2006 through either the net income or net current assets of [REDACTED]. The petitioner made no payments in salaries or wages, but instead only made payments in "nonemployee compensation" in each year, so it is unclear that the offer of employment was ever bona fide as [REDACTED] does not appear to employ workers directly. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. 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.

On appeal, the petitioner states that because the beneficiary ported to new employment under the American Competitiveness in the Twenty-First Century Act of 2000 ("AC 21") that USCIS should not consider the ability to pay of the petitioner past the date that the alien ported to new employment. Evidence in the record shows that the beneficiary incorporated [REDACTED] on February 15, 2002; he began employment with [REDACTED] at that time supplying carpentry work for the petitioner.

As discussed above, the director denied the petition based on the petitioner's failure to demonstrate that it could pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. Porting is not allowed from an unapproved petition.

Counsel cites to the May 12, 2005, William R. Yates, Associate Director for Operations United States Citizenship and Immigration Services, Department of Homeland Security Memo, "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)." That Memo states in pertinent part:

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

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

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

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

Counsel cites the above provisions and asserts that we may only examine the petitioner's ability to pay the proffered wage through 180 days subsequent to the date of filing of the I-140 petition. Notably, counsel does not actually state that the petition was approvable. Counsel asserts that the beneficiary's adjustment of status was pending for over 180 days as required, that the position is in the same Metropolitan Statistical Area in terms of wage, that the job offer is legitimate, and that the new petitioner can establish its ability to pay the proffered wage, and therefore, the beneficiary should be allowed to port to new employment.

However, as addressed above, the Form I-140 petition was not approved because the petitioner failed to establish its ability to pay. Documentation submitted on appeal does not overcome this deficiency.

The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act,³ codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

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

Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with

³ It should be noted that at the time AC21 came into effect, legacy INS regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. See 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification.

respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

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

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

After enactment of the portability provisions of AC21, on July 31, 2002, USCIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485, whereby an employer may file an employment-based immigrant visa petition and an application for adjustment of status for the alien beneficiary at the same time without the need to wait for an approved I-140. See 8 C.F.R. § 245.2(a)(2)(B)(2004); see also 67 Fed. Reg. 49561 (July 31, 2002). The beneficiary in the instant matter filed the Form I-485 on August 10, 2007, based on the petitioner's pending Form I-140.

USCIS implemented concurrent filing as a convenience for aliens and their U.S. employers. Because section 204(j) of the Act applies only in adjustment proceedings, USCIS never suggested that concurrent filing would make the portability provision relevant to the adjudication of the underlying visa petition. Rather, the statute and regulations prescribe that aliens seeking employment-based preference classification must have an immigrant visa petition approved on their behalf before they are even eligible for adjustment of status. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

Section 204(j) of the Act prescribes that "A petition . . . shall remain valid with respect to a new job if the individual changes jobs or employers." The term "valid" is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. See S. Rep. 106-260, 2000 WL 622763 (Apr. 11, 2000); see also H.R. Rep. 106-1048, 2001 WL 67919 (Jan. 2, 2001). However, the statutory language and framework for granting immigrant status, along with recent decisions of three federal circuit courts of appeals, clearly show that the term "valid," as used in section 204(j) of the Act, refers to an approved visa petition.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of

the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

In addition, we are expected to give the words used their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K' Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

With regard to the overall design of the nation's immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 204(b) of the Act, 8 U.S.C. § 1154(b), governs USCIS's authority to approve an immigrant visa petition before immigrant status is granted:

After an investigation of the facts in each case . . . the Attorney General [now Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).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

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).

petition; an alien may not adjust status or be granted immigrant status by the Department of State until USCIS approves the petition.

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

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

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's Form I-485 took 180 days or more to process. Section 106(c) of AC21 does not mention the rights of a subsequent employer and does not provide other employers with the ability to take over already adjudicated immigrant petitions.⁵

⁵ *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), a precedent decision: "Section 106(c) of AC21 does not repeal or modify section 204(b) or section 245 of the [Immigration and Nationality] Act, which require[s] USCIS to approve a petition prior to granting immigrant status or adjustment of status."

Moreover, every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge's jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien's application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when "an *approved* immigration petition will remain valid for the purpose of an application of adjustment of status." *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a "previously approved I-140 Petition for Alien Worker"); *Perez-Vargas*, 478 F.3d at 193 (stating that "[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved"). In a case pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 2009 WL 1911596 (9th Cir. July 6, 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in

In the case at hand, the Form I-140 petition was denied. The petitioner failed to provide evidence on appeal to overcome the basis for denial. The beneficiary would therefore not have a valid immigrant visa petition approved on 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).

The enactment of the portability provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status. Accordingly, as this petition was denied, it cannot be deemed valid by invoking section 204(j) of the Act.

Additionally, the petitioner failed to establish that the beneficiary had the experience required by the terms of the labor certification. 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). USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

(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.

order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs. Under the plaintiff's interpretation, an applicant would have a very large incentive to change jobs in order to guarantee that the approval of an I-140 petition could not be revoked. *Id.* Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

The Form ETA 750 requires two years of experience before the April 30, 2001 priority date as a construction maintenance carpenter.⁶ On the Form ETA 750B, the beneficiary stated that he worked for [REDACTED], Cachoeiras de Macacu, Brazil from May 1995 to March 1998 as a construction carpenter. On the Form G-325 Biographic Information sheet, the beneficiary indicated that he last worked as a trader for [REDACTED] Sao Goncalo, RJ, Brazil from January 1993 to May 1998. As noted in the AAO's NDI, these forms indicate that the beneficiary was working at two different places at the same time and, therefore, conflict. In response to the AAO's request to resolve the discrepancy, the beneficiary indicated that no conflict existed and stated that he listed only the Astrogilda position because it was his "last occupation abroad" and the form did not require any position other than the latest held position. The beneficiary also states that Astrogilda is a company owned by his father and that it is not listed in his Brazilian workbook. In response to the AAO's NDI, the beneficiary submitted a letter on Busquet Irmaos letterhead signed by [REDACTED], general partner, stating that the beneficiary worked full-time from March 1, 1995 to March 31, 1998 as a carpenter and a handwritten letter from his father stating that the beneficiary worked part-time as an apprentice carpenter from January 1993 to May 1998. He provided no explanation regarding how he might be employed at two companies located in different cities at the same time.⁷ "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO's NDI specifically stated that "independent, objective evidence of [the beneficiary's] prior employment" must be submitted and that such evidence should be in the form of "pay stubs, tax documents, financial statements or other evidence of payments made to you by your previous employers during periods of employment that precede the priority date." No such evidence was provided.

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.

⁶ The AAO's October 11, 2011 NDI noted that the beneficiary listed several secondary schools on the ETA Form 750B and requested evidence to resolve the discrepancy. In response, the beneficiary submitted a copy of his high school diploma issued by the Republic of Brazil stating that he graduated from Colegio Estadual Maria Zulmira Torres in December 23, 1994. The accompanying transcript indicates that the beneficiary completed "1st Grade" in 1990 at Sociedade Educacional California, another institution listed on the ETA Form 750B. The accompanying response from the beneficiary indicates that this education is equivalent to middle school in the United States. As the diploma was provided, there is no issue with the beneficiary's education.

⁷ We note that Cachoeiras de Macacu and Sao Goncalo, Rio de Janeiro, Brazil are located approximately 77 kilometers apart.