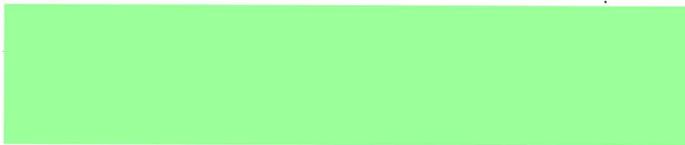


(b)(6)

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

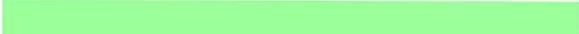


U.S. Citizenship
and Immigration
Services



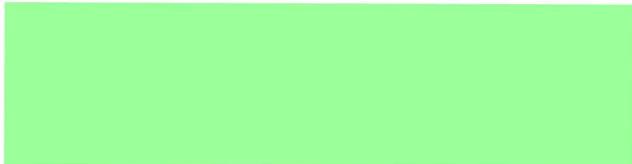
DATE: **FEB 27 2013** OFFICE: NEBRASKA SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director). The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The petitioner filed a motion to reopen and reconsider. On June 16, 2010, the director granted the motion and affirmed the previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a labor contractor provider. It seeks to employ the beneficiary permanently in the United States as a welder. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director revoked the approval of 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 16, 2010 decision, at 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 and whether the petitioner was able to make a *bona fide* offer of permanent, full-time employment.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on September 9, 2005. The proffered wage as stated on the ETA Form 9089 is \$18.81 per hour (\$39,124.80 per year). The ETA Form 9089 states that the position requires 24 months of experience as a welder.

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

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). As the filing of the instant petition predates the final rule, and another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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 in 1997 and to currently employ 199 workers.² According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 2, 2007, the beneficiary did not claim to have worked for the petitioner.

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

² The AAO notes that in his brief dated August 12, 2009, counsel stated that the petitioner listed \$219,984 for salary and wages in its 2007 tax returns for 38 employees. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'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 2005 or subsequently.

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 record before the director closed on April 17, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income³ for 2005, 2006, and 2007, as shown in the table below.

- In 2005, the Form 1120S stated net income of \$1,010,689.
- In 2006, the Form 1120S stated net income of \$182,023.
- In 2007, the Form 1120S stated net income of (\$148,313) (loss).

The petitioner established its ability to pay the proffered wage in 2005 and 2006, however, for 2007 the petitioner did not have sufficient net income to pay the proffered wage.

³ 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 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 29, 2013) (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 deductions shown on its Schedule K for 2005, 2006, and 2007, the petitioner’s net income is found on Schedule K of its 2005, 2006, and 2007 tax returns.

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.⁴ 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 2007.

- In 2007, the Form 1120S stated net current assets of \$10,809.

For the years 2007, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, from the date the ETA Form 9089 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.

In addition, on appeal, counsel states that the petitioner is sponsoring approximately 75 other individuals.⁵ The petitioner must produce evidence that its job offers to each beneficiary are realistic, and that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *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).

Counsel asserts on appeal that that the director did not give proper weight to the petitioner's 2005, 2006, and 2007 tax returns and Internal Revenue Service (IRS) Forms W-2/W-3. Counsel states that the 2005, 2006, and 2007 tax returns and IRS Forms W-2/W-3 are also evidence of the petitioner's ability to pay the beneficiaries of approximately 75 other petitions.

The petitioner's 2005, 2006, and 2007 IRS Forms W-2/W-3 list salary and wages of \$6,087,065.92, \$3,093,196.80, \$219,984.00 respectively. Although counsel argues that this is evidence of the petitioner's ability to pay the beneficiary as well as approximately 75 other beneficiaries, counsel does not explain how salaries paid to other employees are evidence of its ability to pay the additional salaries and wages for all of the beneficiaries. Counsel has not stated that the beneficiaries will replace the

⁴According 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.

⁵ USCIS records indicate that the petitioner filed 191 Form I-140 petitions in the years 2007 and 2008.

workers paid in 2005, 2006, and 2007.⁶ The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as stated by counsel in his August 12, 2009 brief, the petitioner only employed 38 people in 2007.

Counsel also asserts that the petitioner's gross receipts for 2005, 2006, and 2007 are evidence of its ability to pay the proffered wages for all of the beneficiaries. As stated above, in *K.C.P. Food Co., Inc. v. Sava*, 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. Therefore, the AAO will not consider the petitioner's gross receipts in determining its ability to pay.

On appeal, counsel refers to a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum). See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, Determination of Ability to Pay under 8 CFR 204.5(g)(2), at 2, (May 4, 2004). The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay, in the context of the beneficiary's employment. The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, in this case, as indicated in the labor certification, the petitioner has not employed the beneficiary.

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 ETA Form 9089 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

⁶ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

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.

On appeal, counsel states that the petitioner's case should be considered under a totality of the circumstances test. In the instant case, the petitioner has not established its continuing ability to pay the proffered wage through wages earned, net income, or net current assets. The petitioner also has not established its historical growth since it was established in 1997 or the occurrence of any uncharacteristic business expenditures or losses. The AAO notes that the record contains some evidence of the petitioner's ability to pay the proffered wage in 2005 and 2006. However, the record does not establish that the petitioner had the ability to pay the proffered wage in 2007 and no facts paralleling those in *Sonegawa* are present to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee or of its ability to pay the beneficiaries of approximately 75 other petitions. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

As noted in the director's decision, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. On May 14, 2009, the director issued a NOIR indicating that the record was "devoid of evidence that the petitioner was able to make a *bona fide* offer of permanent full-time employment to the beneficiary at the time the petition was filed." The director specifically requested that the petitioner submit:

- An explanation of why the beneficiary's presence in the U.S. was not disclosed at the time the petition was filed;
- An explanation as to why what appears to be a residential address is listed in Part 6 of the petition as the address at which the alien will work, supported by documentary evidence as appropriate;
- Copies of all current contract(s) with clients as of the date the application for employment certification was filed, as evidence of the petitioner's ability to offer a permanent, full-time job to the beneficiary at that time. If the contracts do not list the intended work location, please also submit supplemental evidence of the actual location where workers provided under these contracts would be performing services;
- A copy of the notice of filing that was posted in conjunction with the job offer, as well as information about the dates and location(s) of posting;

- The contract with the beneficiary that outlines the terms of his employment with the petitioner;
- A copy of the petitioner's 2006 and 2007 federal tax returns, with all schedules and attachments;
- Copies of all forms W-3 and 1096 issued by the petitioner in 2005, 2006, and 2007; and
- If the beneficiary is or was employed by the petitioner, please submit a copy of his Form W-2 or Form 1099-MISC for each complete year he has been [sic] employed, as well as a copy of his most recent paystub.

In the NOIR, the director noted that:

[T]he deficiencies in the record cannot be overcome by submitting evidence that the beneficiary has found new employment, as appears to be the case. A petition cannot remain valid for the purposes of porting to new employment under Section 204(j) of the Act if the record does not establish that the original job offer was *bona fide*. (italics added)

In response, the petitioner submitted the following:

- A letter from the petitioner stating that the petitioner did not file non-immigrant temporary visas or H-2B petitions on behalf of I-140 beneficiaries and was therefore unaware that some beneficiaries were in the United States on non-immigrant temporary visas. The petitioner also stated that its office in San Diego at that time was the appropriate address to list on the ETA Form 9089 because beneficiaries were going to be assigned employment at shipyards in the San Diego metropolitan area. Further, the petitioner did not have an employment contract with its main client [REDACTED] and instead received purchase orders. The petitioner stated that it does not have employment contracts between itself and the beneficiaries and that the beneficiaries have not worked for the petitioner. Finally, the petitioner states that the notice of filings were posted in its San Diego office from March 13, 2005 to March 28, 2005;
- Copies of the petitioner's Internal Revenue Service (IRS) Form 1120S for 2006 and 2007;
- Copies of the petitioner's IRS Forms W-2/W-3 for 2005, 2006, and 2007;
- A copy of the petitioner's notice of filing with a copies of the prevailing wage request and newspaper advertisements; and
- A copy of a [REDACTED] purchase order dated July 22, 2002.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See*

Clackamas, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence submitted in response to the NOIR and in the record is not sufficient to establish that the petitioner will be the beneficiary's actual employer. The record contains no employment contracts or agreements between the petitioner and its clients or between the petitioner and the beneficiary. The only evidence submitted is one purchase order from [REDACTED] \$105,200 and it is not clear that the beneficiary would work under that purchase order given that the petitioner must also employ 75 other beneficiaries. Therefore, the petitioner has not demonstrated that it has a position to offer the beneficiary and it has failed to establish that it will actually employ the beneficiary.

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The record contains a letter dated November 3, 2006 from the petitioner stating that it supplies a "labor force to various shipbuilding companies." Thus, the AAO agrees with the director's decision that the record contains no credible evidence that the petitioner is the intending employer or evidence such as work orders from shipbuilding companies for welders listing the number of welders needed and the length of employment.

Therefore, the approval of the petition must also be revoked because the petitioner failed to establish that it will actually employ the beneficiary.

Beyond the decision of the director, the AAO notes that the record contains a request by the beneficiary's counsel, [REDACTED] to allow the beneficiary to port to new employment pursuant to the American Competitiveness in the Twenty-First Century Act (AC21). The request includes a letter on [REDACTED] letterhead dated March 31, 2009 and signed by [REDACTED] managing director, stating that [REDACTED] would like to hire the beneficiary as a welder for \$21.00 per hour "as permitted by the 'portability' clause contained in AC21. Alien beneficiaries do not normally have standing in administrative proceedings. See *Matter of Sano*, 19 I&N Dec. 299, 300 (BIA 1985). Neither the beneficiary or the beneficiary's counsel are considered affected parties in this proceeding. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. See *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. See *Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); see also *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment.").

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*⁷ 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 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). As the petition's approval is revoked, the underlying petition was not approvable and the beneficiary is not allowed to port. As the beneficiary no longer intends to work for the petitioner, and may not port, the petition is moot. For this additional reason, the petitioner's approval may not be reinstated.

Therefore, it appears that the labor certification would not be valid even if [REDACTED] Services established that it was able to make a *bona fide* offer of permanent, full-time employment.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

⁷ 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.

(b)(6)

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ORDER: The appeal is dismissed. The approval of the petition remains revoked.