



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: JUL 17 2013

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On January 29, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner.<sup>1</sup> The employment-based immigrant visa petition was initially approved by the VSC director on February 28, 2002. The director of the Texas Service Center (“the director”), however, revoked the approval of the immigrant petition on February 18, 2009, and the AAO dismissed the subsequent appeal on July 31, 2012. Upon further review, on May 28, 2013, the AAO reopened the case on its own motion and requested evidence (SMTR/RFE). On June 26, 2013, the AAO received a response from counsel.<sup>2</sup> The appeal will be dismissed and the petition will remain revoked.

<sup>1</sup> The original petitioner in this case is [REDACTED]. On May 9, 2012, the AAO sent a Notice of Intent to Dismiss and Derogatory Information to the petitioner noting that [REDACTED] was no longer an active organization according to the Massachusetts Secretary of the Commonwealth and, as such, no bona fide job offer would exist rendering the petition and appeal moot. In response, counsel submitted documents establishing that the three partners who originally formed [REDACTED] had ceased doing business under [REDACTED] and that each partner had taken over a restaurant formerly operated by [REDACTED]. Counsel maintains that any one of the three partners would qualify as a successor-in-interest to the petitioner as each assumed the assets and liabilities of one restaurant formerly operated by [REDACTED]. Specifically, however, counsel asserts that [REDACTED] would be the applicable successor-in-interest as that entity currently operates the restaurant named as the work location in the Form ETA 750 under the same name.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The documents submitted establish that [REDACTED] assumed the relevant rights and duties of the original petitioner, that it continues to operate the same business, and that the job offer is the same as originally offered on the labor certification. Therefore, the AAO concludes that [REDACTED] is the successor-in-interest to [REDACTED]. In this decision [REDACTED] and [REDACTED] will be referred to as “the petitioner” or by name.

<sup>2</sup> As the representative of [REDACTED] submitted a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with the response to the AAO’s SMTR/RFE. In this decision, she will be referred to as “counsel.” All other counsels will be referred to by name.

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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by her 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).<sup>3</sup> As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification.<sup>4</sup> As stated earlier, this petition was approved on February 28, 2002 by the VSC, but that approval was revoked on February 18, 2009. The director determined that the beneficiary did not have the requisite work experience in the job offered before the priority date. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

On appeal, the AAO concluded that the director had properly revoked the approval of the petition for good and sufficient cause, because the petitioner failed to demonstrate that the beneficiary had two years of experience in the job offered on the priority date as required by the terms of the labor certification.<sup>5</sup> The AAO further noted that the beneficiary could not invoke portability under the provisions of American Competitiveness in the Twenty-First Century Act of 2000 (AC21), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue of having ported to the same or similar job. Beyond the director’s decision, the AAO concluded that the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage from the priority date onwards.

Upon review, the AAO noted that it did not request evidence from the petitioner to demonstrate its continuing ability to pay the proffered wage prior to its July 31, 2012 decision. Therefore, the AAO reopened the case on its own motion allowing the petitioner to submit evidence

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<sup>3</sup> 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.

<sup>4</sup> 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 since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>5</sup> 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).

demonstrating its ability to pay the proffered wage from 2001 onwards. The AAO also informed the petitioner that the evidence in the record was not sufficient to demonstrate that the beneficiary had the requisite two years of work experience as a cook in Brazil before the priority date.

In response, the petitioner, through its counsel, submits its tax returns from 2007 to 2012. However, counsel asserts that due to the length of time since the petition was filed, the petitioner was unable to obtain tax documentation from prior to 2007. Counsel also asserts that the beneficiary's advance notice of employment termination from [REDACTED] is "independent objective evidence" demonstrating the beneficiary's employment as a cook at [REDACTED] from February 1997 to August 2000.

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.<sup>6</sup>

As noted above, the Secretary of Homeland Security has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. The regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

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<sup>6</sup> 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. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

In this case, the AAO finds that the director adequately advised the petitioner of the basis for revocation of approval of the petition. In the October 3, 2008 notice of intent to revoke (NOIR), the director stated that the CNPJ number<sup>7</sup> provided for [REDACTED], the beneficiary's former employer in Brazil, was actually assigned to a different company, [REDACTED], and that this second company did not exist before November 1999, which was almost three years after the time that the beneficiary claimed to have begun working at [REDACTED]. Based on this information, the director stated that it would have been impossible for the beneficiary to have worked for [REDACTED] for the full time period claimed on the Form ETA 750. The director concluded that the beneficiary did not have the requisite two years of experience, and therefore, was not qualified for the position.

Consistent with *Matter of Wing's Tea House*, the petitioner must demonstrate, among other things, that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 27, 2001. The name of the job title or the position for which the petitioner seeks to hire is "cook." Under section 14 of the Form ETA 750A, the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered. On the Form

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<sup>7</sup> Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States. The U.S. Department of State has determined that the CNPJ provides reliable verification with respect to the adjudication of employment-based petitions in comparing an individual's stated hire and working dates with a Brazilian-based company to that Brazilian company's registered creation date.

ETA 750B, signed by the beneficiary on January 23, 2002 under penalty of perjury, the beneficiary stated that he worked for [REDACTED] from February 25, 1997 to August 15, 2000.

With the petition, the petitioner submitted a declaration on [REDACTED] letterhead, dated January 10, 2002, from [REDACTED] stating that the beneficiary worked at [REDACTED] from February 25, 1997 to August 15, 2000. The CNPJ number provided on the letterhead for the establishment is [REDACTED]

The director's October 3, 2008 NOIR stated that the name of the establishment with the CNPJ number of [REDACTED] is [REDACTED]. The CNPJ records also indicated that this business did not begin operations until November 5, 1999.

Responding to the NOIR, the petitioner submitted an October 29, 2008 declaration of [REDACTED], owner of [REDACTED], stating that the beneficiary worked for [REDACTED], CNPJ no. [REDACTED] owned by his father, [REDACTED] and his brother, [REDACTED] which was located at the same address as [REDACTED]. [REDACTED] stated that from November 8, 1999 to August 15, 2000, the beneficiary continued to work as a cook for his company ' [REDACTED], registered at the CNPJ under no. [REDACTED] doing business as ' [REDACTED]'. [REDACTED] further stated that on September 9, 2003, his company, [REDACTED], changed from doing business as [REDACTED] to doing business as " [REDACTED]" and on June 27, 2007, changed again to doing business as ' [REDACTED]'. The petitioner also submitted a statement, dated October 28, 2008, from the beneficiary affirming his employment with [REDACTED] and [REDACTED] a death certificate for [REDACTED] indicating a date of death of October 8, 1998; and printouts of two webpages from the Brazilian CNPJ for [REDACTED] and [REDACTED].<sup>8</sup>

The director stated in the notice of revocation (NOR) that the evidence submitted in response to the NOIR did not establish that [REDACTED] preceded the second business named [REDACTED]. The director specifically noted that the businesses have different addresses in the CNPJ system.

On appeal, [REDACTED], the petitioner's previous counsel, stated that the CNPJ database reflects current information including amendments made to CNPJ numbers and the associated companies. Specifically, [REDACTED] stated that the company for which the beneficiary worked changed names after the business owner died and left the business to his son, [REDACTED]. [REDACTED] further stated that [REDACTED] subsequently sold his business in 2005 and opened a new business with a new address, using the same CNPJ number.

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<sup>8</sup> These two printouts are submitted without English translations. According to 8 C.F.R. § 103.2(b)(3): "Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

In support of these assertions, the petitioner submitted a March 20, 2009 affidavit of [REDACTED] stating that he worked as the manager for his father and his brother at [REDACTED] starting in 1995. [REDACTED] states that after his father died in 1998, he took over the business as the owner, changing the name of the restaurant in 1999 to '[REDACTED]', doing business as '[REDACTED]' and registering the business under his own CNPJ number [REDACTED]. [REDACTED] further stated that he changed the business name on October 8, 2003<sup>9</sup> to '[REDACTED]'. He then sold<sup>10</sup> the business to [REDACTED] in 2005, who changed the name of the restaurant to '[REDACTED]' and registering the business under her own CNPJ number.<sup>11</sup> [REDACTED] then stated that he started a new business in 2007 called '[REDACTED]' using his existing CNPJ number [REDACTED].

The petitioner submitted printouts from the CNPJ database showing that [REDACTED] operated from June 23, 1993 until February 10, 2004 at the same address as [REDACTED]. The record contains "Limited Responsibility Partnership Agreement" (the partnership agreement), dated June 22, 1993, between [REDACTED] and [REDACTED] ([REDACTED]) for [REDACTED]. The petitioner also submitted a document called "Statement of Individual Mercantile Company," dated July 17, 2001, describing the business activities of '[REDACTED]' (CNPJ number [REDACTED]) as "hotel with a restaurant." This document indicates that [REDACTED] business activities began on November 8, 1999. Another document titled "Entrepreneur Application," for the business named "[REDACTED]" signed by [REDACTED] on September 9, 2003, indicates "data alteration (**except business name**)" (emphasis added) made to CNPJ number [REDACTED] and describes the business activities as:

Retail liquor business, dancehalls/night club, and similar production of rodeo shows, vaquejada (folk festival including games on bull riding), and similar services of sound equipment rental and other activities related to the management of concert halls.

A second document titled "Entrepreneur Application," for the business named "[REDACTED]" signed by [REDACTED] on June 27, 2007, indicates "data alteration and **business name**" (emphasis added) made to CNPJ number [REDACTED] and describes the business activities as:

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<sup>9</sup> In the October 29, 2008 letter, [REDACTED] stated that he changed the business name to [REDACTED] on September 9, 2003, which is different than the date he stated in his 2009 letter.

<sup>10</sup> The AAO notes that in the October 29, 2008 letter, [REDACTED] did not state that he sold his business in 2005. Rather, he stated that he changed the business name on September 9, 2003 and again on June 27, 2007, without mentioning any change of ownership to his business.

<sup>11</sup> [REDACTED] indicated that [REDACTED] CNPJ is [REDACTED]

Import and export of retail and wholesale products of computer products and it's [sic] supplies, equipments of audio and video, and electronic devices of personal/domestic use.

Although this document indicated that alteration in the business name was made, the document shows "[REDACTED]" as the business name and no other business name is identified on the document. The address of the business on this document is "[REDACTED]" which is different than the address of [REDACTED].

The record also contains a document that lists approval numbers, approval dates, type, act/event codes, and act/event descriptions. Although no business names are identified, [REDACTED] on this document is linked to [REDACTED] when compared to the registry number indicated on the other documents contained in the record.<sup>12</sup>

In response to the AAO's SMTR/RFE, the petitioner submits two documents related to the beneficiary's termination of employment at [REDACTED]. The document titled "Terms of Employment Contract Termination" indicates the employer as "[REDACTED]" with CNPJ no [REDACTED] at "[REDACTED]" and the employee as "[REDACTED]". The "Contract Data" section indicates "Admission Date" as "February 25, 1997" and "Removal Date" as "August 15, 2000." The second document indicates that the termination notice was handed to the beneficiary in person on July 15, 2000.

Upon review of the evidence in the record, the AAO concludes that the information submitted does not establish that the beneficiary worked for [REDACTED] from February 25, 1997 to August 15, 2000 as he stated under penalty of perjury on the Form ETA 750B. First, the record does not establish [REDACTED] existence prior to November 8, 1999. Second, although evidence of record demonstrates that [REDACTED] and [REDACTED] had the same business address, there is nothing in the record indicating that [REDACTED] operated the same business as [REDACTED].<sup>13</sup> Sharing an address with another business does not establish the same identity of each business. Furthermore, the record does not contain independent and objective evidence demonstrating that [REDACTED] the owner of [REDACTED], was ever employed by [REDACTED]. We find [REDACTED]'s statements are inconsistent and insufficient to establish that he was the manager at [REDACTED] at any time. Contrary to [REDACTED] assertion, the partnership agreement indicates that [REDACTED], the brother of [REDACTED], was the managing partner for [REDACTED]. Similarly, the record contains no independent and objective evidence supporting [REDACTED] assertion that he took over the ownership of [REDACTED] upon his father's death in 1998. Although the petitioner submitted evidence demonstrating the demise of [REDACTED] it

<sup>12</sup> It is unclear whether all of the data on this document is related to [REDACTED] business.

<sup>13</sup> As noted above, the record demonstrates that [REDACTED] was a hotel with restaurant. The record does not indicate that [REDACTED] operated a hotel or restaurant before November, 1999 when [REDACTED] opened.

submitted no evidence to explain how [REDACTED] became the operator of [REDACTED] as opposed to the managing partner, [REDACTED]. In addition, the evidence of record demonstrates that [REDACTED] was in operation until October 2, 2004, which is in conflict with [REDACTED] March 20, 2009 statement that he changed [REDACTED] name to "[REDACTED] with DBA name '[REDACTED]'" on "November 5, 1999." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The AAO finds the termination letter submitted in response to the AAO's SMRT/RFE insufficient to establish that the beneficiary was employed by [REDACTED] from February 25, 1997 until August 15, 2000 as indicated on the labor certification, because the employment of the beneficiary as shown on the termination letter is inconsistent with the other evidence submitted by the petitioner demonstrating that [REDACTED] was not established as a business until November 8, 1999. Furthermore, the information on the termination letter also is inconsistent with both [REDACTED] and the beneficiary's statements that the beneficiary began working for [REDACTED] on February 25, 1997.<sup>14</sup> The petitioner has failed to resolve the inconsistencies in the record by independent objective evidence. *See Matter of Ho* at 591. As stated above, no evidence of record establishes that [REDACTED] operated the same business as [REDACTED], nor does the evidence demonstrate that [REDACTED] ever worked for [REDACTED] in any official capacity. The evidence submitted by the petitioner establishes that [REDACTED] did not exist until November 8, 1999, which was 33 months after the beneficiary claims to have begun working for [REDACTED]. As a result, it was impossible for the beneficiary to have worked for that establishment from February 25, 1997, his indicated start date, to November 1999, the date of [REDACTED] establishment.

The petitioner submitted no independent objective evidence to establish any business relationship between [REDACTED] and [REDACTED]. The evidence demonstrates that the businesses had owners with a family relationship and that they operated with the same business address, however, that evidence is insufficient to demonstrate that the companies were related or that the beneficiary worked as a cook at [REDACTED] or at [REDACTED] from February 25, 1997 to November 8, 1999 when [REDACTED] first opened. Without such evidence, [REDACTED] cannot establish work experience by the beneficiary as a cook for [REDACTED]. Further, the beneficiary did not state on the Form ETA 750 that he worked for [REDACTED] and the original letter submitted from [REDACTED] does not mention [REDACTED] or any work done by the beneficiary for that company. The Board's dicta in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

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<sup>14</sup> See [REDACTED] (the beneficiary) declaration, dated October 28, 2008; and [REDACTED] declaration, dated October 29, 2008, stating that [REDACTED] worked for [REDACTED] from February 25, 1997 to November 7, 1999.

Furthermore, the petitioner submitted no evidence to support the claims that the name of the business associated with CNPJ number [REDACTED] was changed at any point. The evidence submitted on appeal states that "alterations" were made to the registration, but the evidence does not indicate what type of alteration was made, therefore, the petitioner has failed to corroborate [REDACTED] statements about changing the name of the business associated with the CNPJ number. Furthermore, in contrary to [REDACTED] assertion, the "Entrepreneur Application," signed by [REDACTED] on September 9, 2003, specifically states that no alteration was done to the business name, which is inconsistent with [REDACTED] October 29, 2008 statement that he changed the business name from [REDACTED] to [REDACTED] on September 9, 2003. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner has failed to demonstrate that the beneficiary possessed two years of experience in the job offered before the priority date as indicated on the labor certification. As a result, the director's decision to revoke the approval of the petition is upheld.

With respect to the beneficiary's current employment status, the record indicates that the beneficiary is no longer with the petitioning employer, and that he has ported to a different employer doing the same or a similar job pursuant to AC21.

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

Where the approval of the Form I-140 petition is revoked for good and sufficient cause, the beneficiary cannot invoke the portability provision of section 204(j), because there would not be a valid, approved petition underlying the request to adjust status to permanent residence by virtue

of having ported to the same or similar job. *See Herrera v. USCIS*, 571 F.3d 881 (9<sup>th</sup> Cir. July 6, 2009) (the Ninth Circuit held that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start). Here, the petition is revoked for good and sufficient cause; therefore, a valid and approved petition is not available to the beneficiary under which he can port to a different employer pursuant to AC21.

The petitioner has also failed to establish its ability to pay the proffered wage either prior to the date of the petition's approval in February 2002 or since. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on April 27, 2001, the priority date, which is the date the Form ETA 750 was accepted for processing by the DOL. *See* 8 C.F.R. §§ 204.5(d).<sup>15</sup> The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, or \$22,877.40 per year based on a 35 hour work per week.<sup>16</sup> The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

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 record contains an Internal Revenue Service (IRS) Form W-2 issued to the beneficiary by [REDACTED] indicating that it paid the beneficiary \$12,080 in 2003.<sup>17</sup> The beneficiary's October 8, 2004 pay stub from [REDACTED] shows that the petitioner paid the beneficiary \$2,178 for the year 2004. The payments the beneficiary received from the petitioner in 2003 and 2004 are \$10,797.40 and \$20,699.40 less than the proffered wage respectively. The record does not demonstrate that the petitioner paid the beneficiary an amount at least equal to or great than the proffered wage from 2001 onward.

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<sup>15</sup> The director's decision to approve the petition in 2002 was erroneous, and USCIS has good and sufficient cause to revoke the petition's approval as of the date the director approved the petition. No evidence of record indicates that the petitioner had the ability to pay the proffered wage in 2001.

<sup>16</sup> The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. For Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

<sup>17</sup> The record also contains the beneficiary's IRS Forms W-2 for 2004-2011 from [REDACTED], the beneficiary's current employer.

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 (1<sup>st</sup> 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).

The evidence in the record shows that both the original petitioner and the successor-in-interest are structured as S corporations. On the petition, the petitioner claimed to have been established in 1999; however, it is unknown how many workers the petitioner employs. In support of its ability to pay the proffered wage, the petitioner submits its corporate tax returns for 2007-2012. However, the petitioner states that it is unable to obtain tax documents prior to 2007. [REDACTED], Certified Public Accountant, the petitioner's current accountant, states until June 2011, [REDACTED] was the petitioner's accountant and after his death in June 2011, he purchased [REDACTED] business. [REDACTED] states that when he took over the business, he only retained two years of paper files and the computers he retained had only five years of prior tax returns for [REDACTED] and [REDACTED]. [REDACTED] stated that the older tax returns can be requested from the IRS, but in his experience, such requests are "not honored for at least six months if at all."

The following income figures are shown on the tax returns:

Year	Net Income <sup>18</sup>
2001	Not provided
2002	Not provided
2003	Not provided
2004	Not provided
2005	Not provided

<sup>18</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 13, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

(b)(6)

2006	Not provided
2007	\$104,377
2008	\$28,498
2009	\$-13,359
2010	\$-9,518
2011	\$45,254
2012	\$81,973

Thus, with the exception of 2007-2008 and 2011-2012, the petitioner failed to demonstrate that it had sufficient net income to pay the proffered wage of \$22,877.40.<sup>19</sup>

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.<sup>20</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 following figures reflect the petitioner's net current assets for the relevant years:

Year	Year-end Current Assets	Year-end Current Liabilities	Net Current Assets
2001	Data not provided		
2002	Data not provided		
2003	Data not provided		
2004	Data not provided		
2005	Data not provided		
2006	Data not provided		
2009	\$150,394	\$201,286	\$-50,892
2010	\$145,956	\$216,462	\$-70,507

<sup>19</sup> Because the petitioner failed to submit evidence establishing its ability to pay the proffered wage in 2001-2006, the AAO concludes that the petitioner did not have the net income to pay the proffered wage in 2001-2006.

<sup>20</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner did not have sufficient net current assets to pay the proffered wage of \$22,877.40 in 2001-2006<sup>21</sup> and 2009-2010.

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

Furthermore, the shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

Unlike *Sonogawa*, the petitioner in the instant case has failed to demonstrate its ability to pay the proffered wage for several years. Furthermore, the evidence in the record does not demonstrate the petitioner's historical growth since its inception or since [REDACTED] became the successor-in-interest; nor does it demonstrate its reputation in the industry. In addition, the record is silent regarding whether the shareholders would forego their officer compensations in order to pay the proffered wage. Considering the totality of the circumstances, the petitioner

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<sup>21</sup> Because the petitioner failed to submit evidence establishing its ability to pay the proffered wage in 2001-2006, the AAO concludes that the petitioner did not have sufficient net current assets to pay the proffered wage in 2001-2006.

fails to demonstrate that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for revocation of approval of the petition. 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. The approval of the petition remains revoked.