



U.S. Citizenship
and Immigration
Services

(b)(1)



DATE: JUN 27 2013 OFFICE: TEXAS SERVICE CENTER



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:
[Redacted]

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

The petitioner was the owner/operator of gas stations and convenience stores. It sought to employ the beneficiary permanently in the United States as a "Manager, Retail Store." 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, [REDACTED] had not established that the business entity, [REDACTED], was a valid successor-in-interest. The director further determined that the petitioner, The [REDACTED] failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. 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.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On appeal, counsel asserts that the beneficiary should be allowed to port from the petitioner, [REDACTED] to the business entity, [REDACTED], pursuant to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Counsel contends that United States Citizenship and Immigration Services (USCIS) failed to follow its own guidance as outlined in two separate USCIS Interoffice Memoranda issued on December 27, 2005, and May 30, 2008, respectively. Counsel states that the guidance contained in these memorandum allows portability in those cases where the Form I-140 petition would have been approvable had it been adjudicated within 180 days from the date the Form I-140 petition was filed. Counsel notes that memorandum specifically enumerate an ability to pay issue as the exact type of post-filing issue that should not preclude the approval of the Form I-140 petition. Counsel declares that the Form I-140 petition in the instant case was approvable when filed on August 4, 2004, as the petitioner's inability to pay the proffered wage from 2010 onwards was the sole basis of denial cited by the director in the Notice of Denial issued on October 24, 2012. Counsel asserts that an examination of whether the business entity, [REDACTED] is a valid successor-in-interest to the petitioner, [REDACTED] is irrelevant in the current proceedings. The petitioner did not submit any additional evidence on appeal.

Counsel's declaration that the Form I-140 petition in the instant case was approvable when filed on August 4, 2004 is not persuasive. A review of the record reveals that the Form I-140 petition was filed with supporting documents including an undated letter containing an illegible signature by an individual who listed their position as manager of the [REDACTED]. This individual states that the beneficiary had worked at this establishment first as a store clerk then as a shift manager from April 23, 1997 to June 16, 2000. Although the individual who drafted the letter also provided a description of the beneficiary's duties as a shift manager, this individual did not specify the exact dates the beneficiary worked as a shift manager. The Form ETA 750 in the instant case requires

aliens seeking employment to possess two years of experience in the offered job of “Manager, Retail Store” or two years of experience in the alternate occupation of “Manager/Supervisory Job.” As the letter does not specify the exact dates the beneficiary worked as a shift manager, it could not be determined whether the beneficiary possessed the experience required by the labor certification. It must be noted that the issue of whether the beneficiary possessed two years of experience in the offered job of manager, retail store or two years of experience in the alternate occupation of “Manager/Supervisory Job” remained unresolved until June 19, 2012, when counsel provided a new employment letter that specified the exact dates the beneficiary worked as a shift manager at the [REDACTED] [REDACTED] in response to the director’s Notice of Intent to Deny issued on May 17, 2012.

Although section 204(j) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(j), provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary’s application for adjustment of status has been filed and remained adjudicated for 180 days, the petition must have been “valid” to begin with if it is to “remain valid with respect to a new job.” *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). To be considered valid in harmony with related provisions and with the statute as a whole, the petition must have been filed for an alien who is entitled to the requested classification and that petition must have been approved by a USCIS officer pursuant to his or her authority under the Act. An adjudicated immigrant visa petition is not made “valid” merely through the act of filing the petition with USCIS or through the passage of 180 days. *Id.*

In addition, counsel’s reliance upon guidance contained in two separate USCIS Interoffice Memoranda issued on December 27, 2005, and May 30, 2008, respectively, is misplaced. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding “Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service,” dated February 3, 2006. The memorandum addresses, “the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices.” The memo states that, “policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to ‘inform rather than control.’” CRS at p.3 citing to *American Trucking Ass’n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm’n*, 506 F.2d 33 (D.C. Cir. 1974), “A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the

agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 *Duke L.J.* 1311 (1992).

Counsel’s assertion that the beneficiary should be allowed to port from the petitioner, [REDACTED] to the business entity, [REDACTED] pursuant to the terms of AC21 is not persuasive. The operative language in section 204(j) and section 212(a)(5)(A)(iv) of the Act states that the petition or labor certification “shall remain valid” with respect to a new job if the individual changes jobs or employers. The term “valid” is not defined by the statute, nor does the congressional record provide any guidance as to its meaning. *See* S. Rep. 106-260; *see also* H.R. Rep. 106-1048. Critical to the pertinent provisions of AC21, the labor certification and petition must be “valid” to begin with if it is to “*remain* valid with respect to a new job.” Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). We are expected to give the words used in the statute their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Furthermore, we are to construe the language in question in harmony with the thrust of related provisions and with the statute as a whole. *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

With regard to the overall design of the nation’s immigration laws, section 204 of the Act provides the basic statutory framework for the granting of immigrant status. Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that “[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(3) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification.” (Emphasis added.)

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

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

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

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

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

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

We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain adjudicated for 180 days.²

¹ 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).

² 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) . . .

The enactment of the job flexibility provision at section 204(j) of the Act did not repeal or modify sections 204(b) and 245(a) of the Act, which require USCIS to approve an immigrant visa petition prior to granting adjustment of status.

Therefore, the AAO agrees with the director, as articulated in his October 24, 2012 denial, that the primary issue in this case is whether or not the business entity, [REDACTED], is a valid successor-in-interest to the petitioner, [REDACTED].

The original employer identified in the Form ETA 750 filed on April 27, 2001 was the petitioner, Sugar Bear, a domestic corporation incorporated in the state of Georgia. The Form ETA 750 listed the business address of the petitioner, [REDACTED].

The record contains the Forms 1120, U.S. Corporation Tax Return, of the petitioner, [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009. These Form 1120 tax returns list the Federal Employee Identification Number (FEIN) of the petitioner, [REDACTED].

The Form 1120 tax returns of the petitioner, [REDACTED] was the petitioner's majority owner throughout the period from 2001 to 2009. A review of the official website of the Secretary of State of Georgia at <http://corp.sos.state.Ga.us/corp> (accessed on May 23, 2013), reveals that the petitioner, [REDACTED] had been dissolved on December 28, 2012. This same website reflects that the business entity, [REDACTED] is a separate and distinct limited liability company incorporated in Georgia on September 11, 1997 with a business address of [REDACTED].

The record contains the jointly-filed Forms 1040, U.S. Individual Income Returns, of [REDACTED] and his wife for 2009 and 2010. The Schedule C of [REDACTED] Form 1040 tax returns for 2009 and 2010 reflect that [REDACTED] is the sole proprietor/owner of the business entity, [REDACTED].

Here, the Form ETA 750 was accepted for processing by the DOL on April 27, 2001. The proffered wage is listed as \$36,700.00 per year based upon a 40 hour week on the Form ETA 750. The Form I-140 petition in the instant case was subsequently filed on August 30, 2004.

The only way for a different business entity to be able to use a labor certification approved for a particular petitioner as the employer is if that business entity establishes that it is a successor-in-interest to that petitioning predecessor and employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). A labor certification is only valid for the particular job opportunity and area of intended employment described therein. 20 C.F.R. § 656.30(c)(2).

A successor business entity may establish a valid successor relationship to the petitioning predecessor for immigration purposes if it satisfies three conditions. First, the successor business entity must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor petitioner and employer. Second, the successor business must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the

provides relief to the alien who changes jobs after his visa petition has been approved"). Hence, the requisite approval of the underlying visa petition is explicit in each of these decisions.

successor business entity must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the successor to the petitioning predecessor must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage to the beneficiary. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership from the petitioning predecessor forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

It must be determined whether the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). Consequently, the only way for the business entity, [REDACTED] to be able to use the Form ETA 750 approved for the petitioner is if it establishes that it is a successor-in-interest to the petitioner. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481.

In the instant case, the record contains a letter dated June 15, 2012 and signed by [REDACTED] who listed his position as "CEO" of the petitioner. In this letter, [REDACTED] stated in pertinent part:

...Formerly, [REDACTED] and its business operations were housed in leased business store locations owned by [REDACTED] are owned by the undersigned, [REDACTED]. From the mid-1990s until October 2009, [REDACTED] paid "rent" to [REDACTED] for the use of the real property owned by [REDACTED] while retaining all income generated from within the business premises itself. [REDACTED] [the beneficiary] was employed by [REDACTED] from 2004 until October 2009, at which time her payroll, along with that of all Sugar Bear employees, was switched to [REDACTED] where she continues to be employed today. In November 2009, [REDACTED] transferred all retail income and real estate income [REDACTED]. As such, [REDACTED] now owns both the property on which the business operations sit and also the retail stores themselves.

However, the record is absent any independent objective evidence that the business entity, [REDACTED] is a valid successor-in-interest to the petitioner, The [REDACTED]. While it is evident that [REDACTED] was a majority owner of the petitioner and wholly owned the business entity, [REDACTED] the record does not contain any documentation demonstrating that the business entity, [REDACTED] assumed the rights, duties, obligations and assets of the petitioner. Without such independent objective evidence, the unsupported assertions of [REDACTED] cannot be considered as sufficient to establish that the petitioner

had been succeeded by the business entity, [REDACTED]. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO concludes that the petitioner has failed to establish that [REDACTED] is a successor-in-interest. Moreover, the petitioner has failed to establish the continuing ability to pay the proffered wage from the priority date onwards.

Concerning the ability to pay, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). As previously noted, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$36,700.00 per year based upon a 40 hour week. The record closed in September 2012, with the receipt of the petitioner's response to the director's Notice of Intent to Deny.

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, 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. The record contains the Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner as follows:

- 2001 – No IRS Form W-2 statement provided.
- 2002 – No IRS Form W-2 statement provided.
- 2003 – No IRS Form W-2 statement provided.
- 2004 – No IRS Form W-2 statement provided.
- 2005 – No IRS Form W-2 statement provided.
- 2006 – \$36,000.00 (\$700.00 less than the proffered wage of \$36,700.00).
- 2007 – \$36,000.00 (\$700.00 less than the proffered wage of \$36,700.00).
- 2008 – \$33,000.00 (\$3,700.00 less than the proffered wage of \$36,700.00).
- 2009 – No IRS Form W-2 statement provided by the petitioner.
- 2010 – IRS Form W-2 statement issued by [REDACTED] listed \$36,000.00 (\$700.00 less than the proffered wage of \$36,700.00).
- 2011 – IRS Form W-2 statement issued by [REDACTED] listed \$36,000.00 (\$700.00 less than the proffered wage of \$36,700.00).

The record contains IRS Forms W-2 statements that were issued to the beneficiary by the business entity, [REDACTED] in 2010 and 2011, as well as paychecks issued to the beneficiary by [REDACTED] in 2012. However, as [REDACTED] has not been shown to be the successor-in-interest to the petitioner, [REDACTED], these documents are not probative evidence establishing that the petitioner had the continuing ability to pay the proffered wage of \$36,700.00 to the beneficiary in 2010, 2011, and 2012. Even if [REDACTED] was considered to be a valid successor-in-interest to the petitioner, the IRS Form W-2 statements issued by [REDACTED] in 2010 and 2011 do not demonstrate the ability to pay the full proffered wage of \$36,700.00. Furthermore, as the record does not contain the federal tax returns of [REDACTED] for 2010 and 2011, it is not possible to determine whether [REDACTED] had the ability to pay the difference between wages paid in each year and the full proffered wage through an examination of [REDACTED] net income and net current assets in 2010 and 2011.

The evidence in the record does not establish that the petitioner paid the beneficiary the full proffered wage in 2006, 2007, and 2008. Furthermore, the record contains no evidence that the petitioner paid the beneficiary any wages in 2001, 2002, 2003, 2004, 2005, 2009, 2010, and 2011. Although the petitioner must demonstrate the ability to pay the full proffered wage from 2001 to 2011, it must be noted that the petitioner is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in 2006, 2007, and 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The petitioner's IRS Forms 1120, U.S. Corporation Tax Return, list its net income as shown in the table below.

- In 2001, the IRS Form 1120 stated net income⁴ of \$52,491.00.
- In 2002, the IRS Form 1120 stated net income of \$75,189.00.
- In 2003, the IRS Form 1120 stated net income of \$60,480.00.

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

- In 2004, the IRS Form 1120 stated net income of \$70,270.00.
- In 2005, the IRS Form 1120 stated net income of \$75,823.00.
- In 2006, the IRS Form 1120 stated net income of \$46,870.00.
- In 2007, the IRS Form 1120 stated net income of \$50,600.00.
- In 2008, the IRS Form 1120 stated net income of \$47,234.00.
- In 2009, the IRS Form 1120 stated net income of \$42,275.00.
- The petitioner did not provide its IRS Form 1120 tax return for 2010.
- The petitioner did not provide its IRS Form 1120 tax return for 2011.⁵

The petitioner did have sufficient net income to pay the full proffered wage of \$36,700.00 to the beneficiary in 2001, 2002, 2003, 2004, 2005, and 2009. In addition, the petitioner did have sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage in 2006, 2007, and 2008. However, the petitioner failed to provide any evidence that it possessed sufficient net income to pay the full proffered wage to the beneficiary in 2010 and 2011.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity's current assets and current liabilities.⁶ 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 corporation is expected to be able to pay the proffered wage using those net current assets. However, as noted above, the petitioner has failed to provide its IRS Form 1120 tax returns for 2010 and 2011, and therefore, it cannot be determined whether the petitioner possessed sufficient net current assets to pay the proffered wage of \$36,700.00.⁷

Although the record contains sufficient evidence establishing the petitioner's ability to pay the proffered wage to the beneficiary from 2001 to 2009, the record does contain any evidence that the petitioner had the ability to pay the proffered wage in 2010 and 2011 through an examination of wages paid, its net income, or its net current assets. As noted above, the record contains IRS Form W-2 statements that were issued by the business entity, [REDACTED] to the beneficiary in 2010 and

⁵ As previously noted in the text of this decision, it is not possible to determine whether [REDACTED] had the ability to pay the difference between wages paid in 2010 and 2011 and the full proffered wage through an examination of [REDACTED] net income because the record does not contain the federal tax returns of [REDACTED] for either year.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ As discussed above, it is not possible to determine whether [REDACTED] had the ability to pay the difference between wages paid in 2010 and 2011 and the full proffered wage through an examination of [REDACTED] net current assets because the record does not contain the federal tax returns of [REDACTED] for either year.

2011; however, such employment is irrelevant in determining the petitioner's, ability to pay the proffered wage in these years as the business entity, [REDACTED], has not established that it is a valid successor-in-interest to the petitioner. Further, as previously discussed, the evidence in the record of proceeding and information from the official website of the Secretary of State of Georgia confirms that the petitioner with [REDACTED] is a separate and distinct corporate entity from the business entity, [REDACTED]. 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. 1980). 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."

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 \$100,000.00. 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 this matter, the petitioner failed to demonstrate that it had the ability pay the proffered wage in 2010 and 2011 through an examination of wages paid, its net income, and its net current assets. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary from the priority date in 2001 onwards.

Beyond the decision of the director, a review of the official website of the Secretary of State of Georgia reveals the petitioner was dissolved on December 28, 2012. Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the

position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case. Only a petitioner desiring and intending to employ the beneficiary may maintain a petition seeking to classify the beneficiary as a professional or skilled worker. 8 C.F.R. § 204.5(c).

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*, 299 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) (AAO's *de novo* authority is well recognized by the federal courts).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.

ORDER: The appeal is dismissed.