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**U.S. Citizenship
and Immigration
Services**

BL

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **OCT 04 2007**
WAC 02 081 51841

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, The Director, California Service Center, initially approved the employment-based preference visa petition. Based on the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485) interview and further review of the initial petition, on October 19, 2005, the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR) dated March 28, 2006, the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) and denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a garment sample maker.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 director in his Notice of Revocation (NOR) decision stated that the petitioner had not provided sufficient evidence that the beneficiary had the requisite two years of work experience, based on the lack of evidentiary documentation of his previous employment as an alteration tailor from November 1993 to February 1996 with Classic Cleaners, Alameda, California. The director also stated that the petitioner had submitted a fraudulent document to CIS in order to obtain benefits for the beneficiary, which was in clear violation of the law.

Section 205 of the Act, 8 U.S.C. 1155, states 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).

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

¹ According to a Citizenship and Immigration Services (CIS) memo contained in the file, at his adjustment of status interview, the beneficiary stated that the petitioner, [REDACTED] and Orange Corporation are the same entity and the Orange Corporation operated at 1019 South Maple Street and 1420 Grand Vista Avenue, Los Angeles until December 2003, when it ceased business operations and the corporation dissolved.

Matter of Ho, 19 I &N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In order to properly revoke a petition's approval on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

On December 1, 2006, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner stating that the I-140 petition was approved in error. The director stated that the service center received a revocation referral memorandum from the Los Angeles District Office recommending revocation of the approved petition.² The director then stated that the petitioner had submitted a certificate of work experience that stated in part that the beneficiary was employed by Classic Cleaners located in Alameda, California as an alteration tailor from November 1993 to February 1996; however Social Security records, obtained by CIS, indicated that the beneficiary did not have any reported earnings from 1992 to 1998.³ The director also noted that the instant petitioner ceased business operations in 2003 and that the beneficiary began full-time employment with another business, S.K. Apparel Inc., in December 2003. The director further noted that the beneficiary after his adjustment of status interview provided a written statement that explained the beneficiary's current employer had no business affiliation with the instant petitioner.

In response to the NOIR, counsel stated that the director concluded that the letter of work experience signed by [REDACTED] owner, Classic Cleaners, was fraudulent based solely upon the lack of earnings by the beneficiary on his Social Security Earnings Record during the relevant period of time. Counsel stated that in the response to the director's Form WR827, the beneficiary had stated that, in exchange for performing fulltime duties as an alteration tailor for Classic Cleaners, he received housing, food and a salary of approximately \$500 per month from [REDACTED]. Counsel also stated that the non-reporting of such cash payments to Social Security is not inconsistent with the letter of work experience, or any other evidence submitted to the record and does not establish fraud. Counsel further stated that despite having contact information for the beneficiary's prior employer's owner, [REDACTED] CIS had not verified the details of the beneficiary's claimed previous employment with [REDACTED]. Counsel stated that the director's NOIR was improperly issued because at least some of the evidence submitted to the record at the time the NOIR was issued was apparently overlooked by CIS, and thus a denial of the petition based upon the petitioner's failure to meet its burden of proof was not warranted.

² The director did not provide a copy of the interoffice memo to the petitioner. The memo addresses both the lack of social security earnings for the beneficiary for the years 1992 to 1998, and the cessation of business operations by the instant petitioner. The memo also notes that while the instant petitioner is no longer in business, the beneficiary had not requested the application of the provisions of the American Competitiveness Act in the Twentieth Century Act (AC21) regarding his current employment.

³ The beneficiary's Social Security documentation, as noted by counsel, was submitted to the record in response to the CIS Form WR287 issued after the beneficiary's adjustment of status interview.

Counsel submitted the following additional documentation to the record in response to the NOIR:

A copy of the beneficiary's notarized four-page response to CIS's Form WR-827, Final Notice. This CIS document had requested further information on the beneficiary's social security earnings, the relationship between the instant petitioner and the business identified as Orange Corporation, and copies of all pages of the beneficiary's passport;⁴

A copy of the beneficiary's Social Security Earnings statement dated November 29, 2004 that examined the beneficiary's FICA earnings for the years 1993 to 1998;

An un-notarized document dated November 15, 2005 entitled "Statement of Facts."⁵ In this document, the beneficiary stated Classic Cleaners employed him as a full-time alteration tailor from November 1993 to February 1996, and that he was paid for his services in cash. The beneficiary further stated that in consultation with his CPA, he had filed voluntary U.S. individual income tax returns for tax year 1993 to 1996 without Forms W-2 since the former employer could not issue separate W-2 forms retroactively unless they reported the beneficiary's payroll on their quarterly payroll tax form during the relevant period of time;

Copies of the beneficiary's Forms 1040 for the year 1993, 1994, 1995, and 1996 with corresponding Schedules C. The IRS receipt date for these forms is noted on the respective front pages as November 14, 2005. Counsel stated that the beneficiary reported gross receipts of \$1,473 in 1993, \$8,840 in 1994, \$8,840 in 1995, and \$1,473 in tax year 1996. Counsel stated that the reported gross receipts included the monthly salary paid in cash and housing and food provided by Classic Cleaners. All four Forms 1040 identified the beneficiary's place of employment where he performed the alteration and repair of clothing performed as 5701 College Avenue, Oakland, California; and

Copies of the beneficiary's Forms 1040-V, Payment Vouchers for the tax years 1994 through 1996.

In his decision, the director reiterated statements made in the initial NOIR and then referenced the statement by the beneficiary that he was paid in cash while he worked for *Classic Cleaners*. The director stated that the

⁴ Copies of the beneficiary's and his spouse's passport pages were not resubmitted with the petitioner's response to the director's NOIR, but are found in the record with the petitioner's initial response to the director's WR 827 document. Both entered the United States initially in 1992 with multiple entry visas.

⁵ Although counsel in the response to the director's NOIR describes the beneficiary's November 15, 2005 statement as an affidavit signed under penalty of perjury, the one page document is not an affidavit as it is not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). However, the response to the director's WR 827 document that contains the beneficiary's assertions as to wages paid in cash, and housing and food contributions is notarized.

assertions of counsel did not constitute evidence, and that without corroborating documentation, the written statement with regard to the beneficiary being paid in cash was not sufficient to satisfy the petitioner's burden of proof. The director determined that the petitioner had not established that the beneficiary had the requisite employment experience as stated on the approved Form ETA 750, and thus was not qualified for the visa classification. The director also restated that the petitioner had submitted a fraudulent document in order to obtain benefits for the beneficiary.

On appeal, counsel also resubmits evidence previously submitted in response to the director's NOIR, and also submits the following documentation for the first time in support of the petition:

A notarized letter dated April 7, 2006 written by [REDACTED] himself as the owner of Classic Cleaners located at 2631 Blanding Avenue, Alameda, California. [REDACTED] states that the business was sold around 1997, and that the beneficiary began working at Classic Cleaners as an alteration tailor in November 1993 to February 1996. [REDACTED] also stated, in pertinent part, that the beneficiary worked no less than 40 hours a week, and that the beneficiary was paid in cash in the following amounts: \$ [REDACTED] in 1995, [REDACTED] in 1996;

Eight photographs of the interior of a building that contains a sewing machine, washing machine and dryer, and an empty clothing rack. One photograph contains a partial logo that states: "Cla" on one line, and "Cle" on the next line;

Copies of documents for Classic Cleaners, also identified as Speedmatic. These documents include a 1993 Operating Expenses Reconciliation statement, bills for common area maintenance for Speedmatic, letters with regard to rent increases for Classic Cleaners, and a 1995 Operating Expense Reconciliation of common area maintenance for Classic Cleaners, dated January 11, 1996; and

A copy of a flyer announcing the grand opening of Classic Cleaners on August 2, 1993 at 2631 Blanding Avenue, Alameda, California.

On appeal, counsel states that the sole allegation stated as grounds for the revocation of the instant petition was the petitioner's submission of an unnamed fraudulent document. Counsel also states that the director did not provide any evidence to explain his conclusion that a fraudulent document had been submitted to the record. Counsel also notes that while the fact that the beneficiary's earnings were not timely reported to the Social Security Administration may discount the weight to be given to the letter of work experience submitted by the beneficiary's prior employer, this fact does not render the letter of work verification false, fraudulent or even inconsistent with the evidence of prior work experience. Counsel states that the payment of unreported cash wages is very common in the garment manufacturing industry.

Counsel then notes that where a notice of the intent to revoke a petition is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of the derogatory

evidence, revocation of the visa petition cannot be sustained. Counsel cites *Matter of Estime*, 19 I&N Dec. 450, Int. Dec. (BIA 1987).

Counsel further asserts that the director did not consider the beneficiary's statement with regard to his being paid in cash by Classic Cleaners and having housing and food provided in either the director's NOID or in his decision to revoke the petition's approval. Counsel notes that the director states in both documents that aside from the certificate of employment, "there is nothing in the record to verify this claim." Counsel states that in addition to the beneficiary's statement with regard to cash payments,⁶ the record also contains the beneficiary's Forms 1040-V Payment Vouchers for the years 1994, 1995, and 1996 that reflect his reporting of wages received as well as payment of income tax for the relevant period of time. Counsel also asserts that the director discounted the beneficiary's statement by stating that the assertions of counsel do not constitute evidence. Counsel states that the beneficiary's statements were not asserted by counsel but rather was submitted under penalty of perjury by the beneficiary. Counsel states that the beneficiary's November 2005 statement with regard to his wages and in kind contributions of food and housing is further substantiated by statement submitted on appeal.

In the conclusion of his brief, counsel states that the director cited no authority when he stated that CIS cannot confirm if the beneficiary was paid cash for services, and that without corroborating documentation, the written statement of paying the beneficiary "cash" is insufficient to satisfy the burden of proof. Counsel states that the director confuses the terms "burden of proof" with "standard of proof." Counsel states that the standard of proof applied in most administrative immigration proceedings is "the preponderance of evidence standard." Counsel asserts that even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true or more likely than not true, the application or petitioner has satisfied the standard of proof. Counsel cites *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) that defines the term "more likely than not" as a greater than 50 percent probability of something occurring. Counsel states that in revocation proceedings, CIS bears the burden of meeting the higher standard of good and sufficient cause based upon substantial evidence that the petitioner was approved in error. Counsel states that CIS has not meet that standard.

With regard to counsel's assertion with regard to standards of proof, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Counsel's reference to the *Cardozo-Fonseca* discussion of the preponderance of the evidence is correct. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that

⁶ Counsel again refers to the document as an "affidavit" submitted by the beneficiary under penalty of perjury. As noted previously, the beneficiary's statement is not notarized, nor is there any notation of the beneficiary being subject to penalty of perjury.

something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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). Upon review of the record, the ETA 750 submitted to the record states in Part A that the minimum requirements for the position are two years of work experience as a garment sample maker or two years of work experience as an alteration tailor. The beneficiary indicated on the Form ETA 750 Part B, that he worked 40 hours a week from November 1993 to February 1996 at Classic Cleaners, located on Blanding Avenue, Alameda, California. The duties of the position were as follows:

Altered individual customer's clothes inclu[d]ing jackets, pants, skirts, tops, blouses, vests, coats, etc. to fit individual customer. Repaired and replaced defective or worn parts of garments such as pockets, pocket-flaps, zippers, paddings, coat lining, etc. **Marked and cut garments if necessary for alteration. Shorten or lengthen sleeves and legs. Expanded or narrowed waist and chests, etc.,** using needle, thread or various sewing machines such as single, double/multi-needle, overlock, buttonhole, autopocket machines.

In the initial letter of work experience dated October 26, 1996, [REDACTED] Classic Cleaners stated that the beneficiary was employed at Classic Cleaners [REDACTED] as an alteration tailor from November 1993 to February 1996. [REDACTED] stated that the position was fulltime and described the beneficiary's duties, as follows: "altered and repaired individual customer's clothes including jackets, pants, skirts, tops, blouses, vests, coats [sic] etc. to fit individual customer."

As a result of the beneficiary's adjustment of status interview held on October 15, 2004, CIS requested further corroboration of the beneficiary's prior work experience as an alteration tailor, specifically evidentiary documentation of wages paid to the beneficiary during the years 1992 to the present, which included the period of time the beneficiary claimed to work for Classic Cleaners. In response, counsel for the beneficiary submitted a Social Security Administration report that indicated no wages were paid to the beneficiary during the years 1993 to 1996, the claimed years of employment with Classic Cleaners. Both in his NOIR and in the final decision to revoke the petition's approval, the director stated that the letter of work experience was not sufficient to overcome the information provided by the Social Security Administration that the beneficiary had received no wages during the years 1993 to 1996. The AAO views this fact as sufficient to support the director's further enquiry as to whether the beneficiary had worked fulltime at Classic Cleaners during the period of time stipulated on the letter of work experience.

In response to the director's NOIR, counsel submitted copies of the beneficiary's Forms 1040 for tax years 1993, 1994, 1995, and 1996 submitted to IRS in November 2005, and states that these forms, in addition to the Forms 1040-V Payment Vouchers are evidence that the Classic Cleaners paid wages to the beneficiary in the years in question. Based on the gross receipts indicated on the beneficiary's Schedule Cs, he earned \$1,473 in 1993, \$8,840 in 1994, \$8,840 in 1995, and \$1,473 in tax year 1996. On appeal, counsel also submits a sworn letter from Mr. Kim, former owner of Classic Cleaners that states the beneficiary was paid

in cash in tax years 1993 to 1996 and provides the following amounts for the respective years: \$1,053 in 1993; \$5,850 in 1994, \$5,850 in 1995, and \$1,053 in 1996.

The AAO does not find these documents to be probative of the beneficiary's previous two years of fulltime employment as a alteration tailor, as stipulated in the Form ETA 750. First, the beneficiary submitted the Forms 1040 to the IRS in 2005, and following the director's enquiry in the Form WR 287 as to wages paid to the beneficiary during the years 1992 and onward. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Of more probative weight would have been income tax forms submitted during the respective years in question.

Second, the Schedules C submitted with the beneficiary's Forms 1040 identify the beneficiary's self-employment in the business of alteration and repair of clothing as taking place at 5701 College Avenue, Oakland, California 94618, a location distinct from the location of Classic Cleaners, or the beneficiary's home residence. Thus, the record, based on the beneficiary's Forms 1040, does not establish that the beneficiary worked at [REDACTED] during tax years 1993 to 1996. Third, the amounts of the beneficiary's cash payments for the years 1993 to 1996 described by [REDACTED] in the letter submitted on appeal differ from the gross receipts reported by the beneficiary on his voluntary Forms 1040. Furthermore [REDACTED] in his letter submitted on appeal makes no mention of any provided housing or food that would be considered in-kind wages. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further, *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Thus the record is not clear that the beneficiary received wages of \$500 a week and additional in-kind wages in the form of housing and food, as stated in the beneficiary's statement submitted in response to the director's Form WR 827. Furthermore, the level of wages described in both sets of documents also raise a question as to whether the beneficiary worked at a fulltime basis during the years in question and actually acquired two years of fulltime work experience as an alteration tailor.

With regard to the photos of the cleaning establishment submitted to the record on appeal and the other documents with regard to Classic Cleaners submitted to the record, the AAO does not view these documents as relevant to these proceedings. The relevant question to be addressed by the petitioner and counsel is whether Classic Cleaners employed the beneficiary in a fulltime basis for a two-year period of time. The earlier documentation with regard to Classic Cleaners bills establish the business's existence during some of the years in question, but they do not establish that the beneficiary worked at Classic Cleaners fulltime for the period of time stipulated on the Form ETA 750.

With regard to the director's comments with regard to the submission of a fraudulent document to the record, the AAO does not find sufficient explanation in the director's decision as to why the letter of work verification should be considered fraudulent. The AAO will withdraw the director's comments as to the submission of a fraudulent document. The AAO does find that the petitioner did not provide sufficient corroborating evidence to more fully substantiate the information provided in the letter of work experience. The petitioner has not established with persuasive evidence demonstrating that it is more likely than not that the beneficiary had two years of requisite work experience as an alteration tailor prior to the January 13, 1998 priority date. Thus, the director's decision shall stand as he had good and sufficient cause to revoke the petition's approval.

With regard to the director's assertion that counsel's assertions do not constitute evidence, counsel is correct in noting that counsel did not make assertions with regard to the payment of cash wages in the response submitted to the CIS Form WR 827. The four-page notarized statement was signed by the beneficiary, and any assertions contained in the document are his. The director would have been clearer in stating that neither the petitioner, the beneficiary, nor counsel can go on the record without supporting documentary evidence. Thus, the beneficiary's statement in the WR 827 response that he was provided housing, food and a salary of about \$500 dollars a week at Classic Cleaners is not sufficient to establish he worked for Classic Cleaners for the requisite two years of work experience. 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)). Contrary to counsel's assertion, the fact that the four-page statement in which the beneficiary made this statement was notarized does not in itself provide sufficient evidence to establish the beneficiary's qualifications for the proffered position.

Beyond the decision of the director, the record is not clear that the instant petitioner identified as [REDACTED] Fashion, Inc., d/b/a Orange Fashion remains an affected party, and that the appeal of the revocation decision has been properly submitted by this same petitioner, or by the beneficiary represented by the instant petitioner's counsel. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In the beneficiary's response to the director's WR 827, the beneficiary stated that the instant petitioner had ceased business operations in December 2003. The instant petitioner is identified on the I-140 as [REDACTED] Fashion, Inc. D/B/A Orange Fashion. The state of California website on corporations indicates that both [REDACTED] Inc. and the Orange Corporation, located a 1019 S. Maple Avenue, Suite 4, submitted its DE6 Final Return as of the fourth quarter of tax year 2003. *See* <http://www.keplar.sos.ca.gov/corp/data/showalllist?QuerycorpNumber=C1770778> for Orange Corporation and C2697137 for [REDACTED] Fashion, Inc. (available as of August 22, 2007.) Based on the state of California corporation records, the instant petitioner ceased business operations as of December 2003. Although CIS approved the instant petition on March 9, 2002, the instant petitioner was no longer in business as of December 2003, and therefore at the time of the beneficiary's adjustment of status interview on October 15, 2004, the beneficiary

would not have been eligible to adjust his status based on the instant petitioner's I-140 petition. The regulations at 8 C.F.R. § 205.1 (a) and 8 C.F.R. § 205.1(a)(3)(iii)(D) state, in pertinent part:

Reasons for automatic revocation. The approval of a petition or self-petition made under Section 204 of the Act and in accordance with part 204 of this chapter is revoked as of the date of approval: upon termination of the employer's business in an employment-based preference case under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2) or 203(b)(3) of the Act.

Since the instant petition was filed in accordance with section 203(b)(3) of the Act, the AAO finds the petition's approval to have been automatically revoked when the petitioner ceased business operations. In addition, if the instant petitioner has ceased operations, the record is not clear that counsel on behalf of the beneficiary can submit an appeal with regard to the revocation of the I-140 petition. The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to [CIS] means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The regulation at 8 C.F.R. § 103.3(a)(2)(v) states:

Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee [CIS} has accepted will not be refunded.

The appeal has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather by the beneficiary.⁷ Therefore, the appeal may not have been properly filed, and could have been rejected.

Although the CIS interoffice memo with regard to the beneficiary's adjustment of status interview alluded to the beneficiary's ability to "port" his approved Form ETA 750 and approved I-140 petition to another petitioner, there is no further discussion of this issue in the record. The AAO will comment briefly on this issue.

⁷ The AAO notes that the petitioner has not attempted to establish that S. K. Apparel is the successor in interest to the beneficiary's claimed previous employer, [REDACTED] Inc., d/b/a Orange Corporation. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Although the record indicates that the beneficiary worked after the I-140 petition for S.K. Apparel, another business that operated on the same premises as [REDACTED] Inc. d/b/a Orange Fashion, both counsel and the beneficiary have stated and provided corroborating evidence that the S.K. Apparel business is distinct from the instant petitioner. Therefore the beneficiary presently works for a business distinct from the instant petitioner. Further the record contains a letter from [REDACTED] Apparel, 1420 Grand Vista Avenue, Los Angeles, California dated October 8, 2004 that indicates the beneficiary began working for this company as of December 2003.

However, neither the beneficiary, counsel, or the employer for whom the beneficiary worked at the time of his adjustment of status interview appears to have explored the beneficiary's eligibility for the portability provisions outlined in the *American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* AC21 which allows an *application for adjustment of status*⁸ 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, CIS 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. In the instant petition, with the revocation of the instant petition, there is no valid petition to be considered under the portability provisions of AC21.

In sum, with regard to the beneficiary's qualifications for the proffered position, and with regard to the cessation of the instant petitioner's business operations in December 2003, the director had good and sufficient cause to revoke the instant petition's approval, pursuant to Section 205 of the Act, 8 U.S.C. 1155 and as discussed in *Matter of Estime*, 19 I&N 450 (BIA 1987)). The realization by the director that the

⁸ The AAO notes that after the enactment of AC21, CIS 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. Since this consideration takes place in the context of an the adjudication of an alien's *application for adjustment of status*, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The AAO concurs with the director's decision to revoke the petition's approval.

ORDER: The decision of the director dated March 28, 2006 is affirmed. The petition's approval is revoked.