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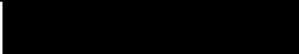
U.S. Citizenship
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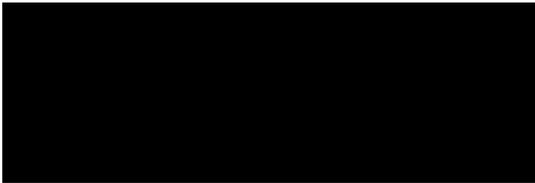
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

for

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

The petitioner is a public accounting and consulting firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined the petitioner had established its ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition, and during tax year 2003. The director also determined that the petitioner had not established its ability to pay the proffered wage in tax year 2002. The director denied the petition accordingly.

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

As set forth in the director's December 20, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Counsel on appeal raises an additional issue with regard to the portability of the petition pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) that the AAO will also address in these proceedings. The AAO will first examine whether the petitioner had the ability to pay the proffered wage as of the 2001 priority date and until the beneficiary obtains lawful permanent residency, and then address the issue raised by counsel on appeal.

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. Section 203(b)(3)(A)(ii) of the Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 20, 2001. The proffered wage as stated on the Form ETA 750 is \$28.75 per hour (\$59,800 per year).¹ The Form ETA 750 states that the position requires a four-year bachelor's degree in marketing and two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal counsel submits a brief, as well as a complete copy of a memorandum dated May 12, 2005, written by William R. Yates, former Associate Director of Operations, Citizenship and Immigration Services,³ and an earlier memorandum by Mr. Yates dated August 4, 2003.⁴ Counsel also submits an offer of employment letter dated January 16, 2005 written by [REDACTED], Chief Financial Officer, Arcor USA Inc., D/B/A Nutrex, Coral Gables, Florida. In his letter, [REDACTED] states that Arcor had offered the beneficiary a position as market research analyst as of September 2005 with a salary of \$58,000 per year. Counsel also submits Arcor's Form 1120 for tax year 2004 that indicates the company had taxable income before net operating loss deductions and special deductions of \$1,974,397. Counsel also submits three bank statements for Arcor USA for the months of October through December 2005, Arcor brochures and a copy of Arcor correspondence with a leasing agent of the Arcor office building. Finally counsel submits a copy of Department of Labor regulations 20 C.F.R. § 656.20 that identifies general filing instructions for the labor certification process. Counsel draws attention to 20 C.F.R. § 656.20 (c)(1) that states "job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that the employer has enough funds available to pay the wage or salary offered the alien."

Relevant evidence in the record includes the petitioner's Forms 1065, U.S Return for Partnership Income, for tax years 2001, 2002, and 2003. The petitioner's 2001 Form 1065 is a partial return, covering a period of time from May 15, 2001 to December 31, 2001. The petitioner also submitted a Form 1120S, U.S. Income Tax Return for an S Corporation, covering the period of January 1, 2001 to May 31, 2001. The petitioner also submitted evidence as to the merger of the company [REDACTED] into a limited liability company, SRS & Company, L.L.C. in June 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

¹ This wage is calculated by multiplying the hourly salary of \$28.75 by 2080 work hours.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ Memorandum from William R. Yates, Associate Director For Operations, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313))*, HQPRD 70/6.2.8-P, May 12, 2005.

⁴ Memorandum from William R. Yates, Associate Director For Operations, *Continuing Validity of Form I-140 Petition in accordance with Section 106 (c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)*, HQBCIS 70/6.2.8-P, August 4, 2003.

On appeal, with regard to the petitioner's ability to pay the proffered wage, counsel asserts that Citizenship and Immigration Services (CIS) should have adjudicated the I-140 petition prior to June 14, 2003, the date that was 180 days after the beneficiary filed her I-485 adjustment of status application. Counsel also asserts that the director had already determined that the petitioner had the ability to pay the proffered wage in 2003, the year in which the I-485 application remained pending for 180 days, and that if the case had been adjudicated on June 14, 2003, the petition would have been approved. Counsel also refers to the DOL 2001 regulatory language at 20 C.F.R. § 656.20(c) and states that the DOL approved the petitioner's labor certification on behalf of the beneficiary since the DOL was satisfied that the petitioner had the ability to pay the proffered wage as of November 20, 2001, the priority date. Counsel also addresses the beneficiary's ability to "port" the approved labor certification pursuant to the provisions of AC21. As stated previously, the AAO will address counsel's comments and the portability issue following the discussion of the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner, initially structured as an S Corporation from January 2001 to May 2001, was restructured as a partnership in June 2001 and taxed as a limited liability company for the remainder of tax year 2001, and for tax years 2002 and 2003. On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$900,000, and to currently employ eleven workers. On the Form ETA 750B, signed by the beneficiary on October 15, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel asserts that the petitioner established its ability to pay the proffered wage as of 2003 based on the director's determination in his decision that the petitioner had established this ability based on the petitioner's Form 1065 for tax year 2003. Counsel's assertion is not persuasive. The regulation 8 C.F.R. § 204.5(g)(2) clearly states:

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.

Thus the petitioner has to establish its ability to pay the proffered wage of \$59,800 as of the November 20, 2001 priority date and through tax years 2002 and 2003. Counsel also states that DOL had already evaluated the petitioner's ability to pay the proffered wage as of November 20, 2001, when it approved the petitioner's Form ETA 750. While counsel's reading of 20 C.F.R. § 656.20 (c)(1) is correct, it is not persuasive. With regard to DOL's role in the labor certification process, section 212(a)(5)(A)(i) of the Act provides:

In general. -Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for the job offered.⁵ This fact has not gone unnoticed by federal circuit courts.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)[(5)].⁶

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). See also *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

While the decisions described above primarily address whether the DOL has the authority to determine whether the beneficiary is qualified to perform the duties of the proffered position, their reference to section 212(a)(5)(A)(i) of the Act, further supports the CIS reasoning that the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to whether the petitioner has established its ability to pay the proffered wage as of the priority date and until the beneficiary obtains lawful permanent residency. Regardless, the petitioner has not established that the DOL looked at any financial documentation for any year after 2001 when the alien employment certification application was filed with the DOL.

⁵ Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

⁶ As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither the beneficiary nor the petitioner claimed that the petitioner had employed the beneficiary as of the priority date and onward. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Therefore the petitioner has to establish its ability to pay the entire proffered wage of \$59,800 as of the 2001 priority date and continuing through tax years 2002 and 2003.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 CIS, 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

Since the petitioner in the 2001 priority year filed both a Form 1120S and a Form 1065, the AAO will examine both documents to arrive at the petitioner's complete net income for the 2001 priority year. The AAO will then examine the petitioner's Forms 1065 for tax years 2002 and 2003.

Where an S corporation's income is exclusively from a trade or business, CIS 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), or line 18 (2006) of

Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional loss, deductions, and other adjustments shown on its Schedule K for tax year 2001, the petitioner's net income is found on Schedule K, line 23, of its 2001 tax return. Schedule K of the petitioner's Form 1120S for the months January 1, 2001 to May 31, 2001 stated net income of \$18,955.

With regard to the remainder of the tax year in which the petitioner was structured as a partnership, the petitioner's Form 1065 indicated ordinary income of \$29,566.⁸ The combination of the petitioner's 2001 net income as an S corporation and its net income as a partnership is \$48,521. This sum is not sufficient to pay the entire proffered wage of \$59,800 as of the 2001 priority date. Therefore, for the 2001 priority year, the petitioner did not have sufficient net income to pay the proffered wage.

With regard to tax years 2002 and 2003, the petitioner, based on its Forms 1065, had net income of \$4,605 in 2002 and \$13,021 in tax year 2003. Neither sum is sufficient to pay the proffered wage of \$59,800. Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net income during the priority year or during tax years 2002 and 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ An S corporation's year-end current assets are shown on Form 1120S, Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. For a petitioner structured as a partnership, year-end current assets are shown on Form 1065, Schedule L, lines 1 through 6, and its year-end current liabilities are shown on lines 15 through 17. 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.

Net current assets are a "snapshot" figure as of a date certain. Thus, we need only examine the petitioner's net current assets at the end of 2001. Regardless, the petitioner showed no assets or liabilities as of May 31, 2001 on its Form 1120S.

- The petitioner's net current assets as of December 31, 2001 were -\$15,195.

⁸ Ordinary income (loss) from trade or business activities as reported on line 22 of the Form 1065

⁹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Thus the petitioner's combined net current assets for tax year 2001 was -\$15,195. Therefore, for the 2001 priority, the petitioner did not have sufficient net current assets to pay the proffered wage.

With regard to tax years 2002 and 2003, the petitioner's net current assets were -\$27,887 in tax year 2002 and -\$24,566 in tax years 2003. Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The record reflects that the director determined that the petitioner had established its ability to pay the proffered wage as of the 2001 priority based on the petitioner's net income of \$29,566, noted on the petitioner's Form 1065 tax return. However, this figure is not sufficient to pay the proffered wage of \$59,800. Furthermore the director did not include any of the petitioner's net income for the months January to May 2001 in his calculations of the petitioner's net income in 2001. Even if we did not contest the director's favorable determination for 2001, the petitioner falls far short of establishing ability to pay in 2002 or 2003.

With regard to tax year 2002, the director identified the petitioner's ordinary income of \$4,605 as the petitioner's net profit and identified the petitioner's total assets of \$49,633 as identified on lines 14 and 22 of Schedule L as the petitioner's net current assets. While the AAO notes that the director correctly determined that the petitioner's net income in 2002 was not sufficient to pay the proffered wage of \$59,800, the director's analysis of the petitioner's 2002 net income and net current assets is incorrect. With regard to tax year 2003, the director also erroneously utilized the petitioner's end of the year total assets and liabilities and capital on its 2003 tax return, identified on lines 14 and 22, Schedule L, as \$44,245 to establish that the petitioner had the ability to pay the proffered wage in 2003. The AAO notes that this figure is not the petitioner's net current assets in tax year 2003, and even if the figure were the petitioner's net income, it was not sufficient to pay the proffered wage of \$59,800 in the 2003 tax year. Thus, the director's determination with regard to the petitioner's ability to pay the proffered wage as of the 2001 priority date year and during tax year 2003 in her decision dated December 20, 2005 is withdrawn. The AAO notes that based on its analysis of the petitioner's net income or net current assets, the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and until the beneficiary obtains lawful permanent residency.

The AAO will now turn to the issue raised by counsel on appeal with regard to the portability of the Form ETA 750 to another employer although the accompanying I-140 petition was not approved prior to the beneficiary's change of employers.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*¹⁰ to be approved despite the fact that the initial job offer is no longer valid. The

¹⁰ 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. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may

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. See section 106 (c) of the AC21, section 204(j) of the Act.

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, section 204(j) of the Act. 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, the underlying petition cannot be approved. Therefore the provisions of AC21 do not appear applicable in the instant petition.

Thus, the evidence submitted to the record fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date, or that the instant petition can be approved pursuant to AC21.

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.

be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer. 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. Further, the AAO is not obligated to follow the guidance outlined in policy memos, *ex parte* correspondence and/or other unpublished unprecedential decisions.