U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a donut manufacturer and retail sales company. It seeks to employ the beneficiary permanently in the United States as a manager of yeast donut shop. 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 had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director additionally determined that the petitioner had not established that it continued to offer permanent, full-time employment to the beneficiary. 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 July 6, 2011 denial, an 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.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $18.00 per hour ($37,440 per year based on a forty-hour work week). The Form ETA 750 states that the position requires two years in the job offered of manager, or two years in the related occupation of sales clerk of yeast donut/pastry shop.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ twelve workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary for the years 2005 and 2006 through the submission of the beneficiary's Forms W-2 for those years.[2] The beneficiary's Forms W-2 demonstrate the wages paid for 2005 and 2006 as shown in the table below.

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

[2] The AAO notes that Forms W-2 were submitted for the beneficiary for the years 2004 through 2009. The petitioner, [redacted] with Employer Identification Number [redacted] only employed the beneficiary in 2005 and 2006 according to the record of

- In 2005, the Form W-2 showed wages paid to the beneficiary of $8,600.00
- In 2006, the Form W-2 showed wages paid to the beneficiary of $37,440.00

The petitioner paid the beneficiary the full proffered wage in 2006. For 2005, the petitioner paid the beneficiary less than the proffered wage of $37,440.00. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage for the year 2005 (which is $28,840), and the full proffered wage for 2001 to 2004 and 2007 onwards.

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

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proceeding. The other Forms W-2 submitted for 2004 through 2009 were from [redacted] As these organizations possess a different EIN than the petitioner, they are separate entities from the petitioner, and therefore, the Forms W-2 from these entities will not be considered as evidence of the petitioner's ability to pay the proffered wage.

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

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

The record before the director closed on January 25, 2011 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2007, 2008 through 2009, as shown in the table below.

- In 2001, the Form 1120S stated net income of $26,477.00
- In 2002, the Form 1120S stated net income[3] of -$2,268.00
- In 2003, the Form 1120S stated net income of -$5,410.00
- In 2004, the Form 1120S stated net income of $67,437.00
- In 2005, the Form 1120S stated net income of -$45,983.00
- In 2007, the Form 1120S stated net income of -$142,953.00
- In 2008, the Form 1120S stated net income of -$155,544.00
- In 2009, the Form 1120S stated net income of -$144,685.00

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed February 15, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income credits and other adjustments shown on its Schedule K for 2002, 2003, 2004, 2005, 2007, 2008, and 2009, the petitioner's net income is found on Schedule K of its tax returns for 2002 through 2009.

Therefore, for the years 2001, 2002, 2003, 2005, 2007 2008, and 2009, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between the proffered wages already paid to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2005, 2007, 2008, and 2009, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -$8,081
- In 2002, the Form 1120S stated net current assets of -$23,286
- In 2003, the Form 1120S stated net current assets of -$48,189
- In 2005, the Form 1120S stated net current assets of -$44,362
- In 2007, the Form 1120S stated net current assets of -$3,977
- In 2008, the Form 1120S stated net current assets of -$96,707
- In 2009, the Form 1120S stated net current assets of -$76,590

Therefore, for the years 2001, 2002, 2003, 2005, 2007, 2008, and 2009, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference the wages already paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage. Counsel states that since the labor certification was accepted on April 27, 2001, the proffered wage should be prorated for that year. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record

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[4] 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.

contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel further asserts that the petitioner is part of a larger conglomerate of companies, and therefore, the strength of the entire "conglomerate" should be considered in determining the petitioner's ability to pay the proffered wage. Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled.

Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

In the instant case, the tax returns submitted reflect that each corporation is a separate and distinct entity, and the tax returns do not indicate that the entities are part of a controlled group. Therefore, the financial information of the other entities cannot be considered in the petitioner's ability to pay the proffered wage.

Counsel also argues that one of the owners of the petitioner, has personally guaranteed the beneficiary's salary, and therefore, he is legally obligated to pay the proffered wage. The guaranty of a third party, cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. The guaranty submitted by the petitioner states that the guarantor, guarantees the beneficiary's salary "with all personal and corporate monies and resources available now or hereinafter." He is guaranteeing the beneficiary's salary with both personal and corporate funds. However, there is nothing in the record of proceeding to show that he has the authority to guarantee corporate funds without the approval of the Board of Directors or of the other shareholders of the company. Without express authority to do so, the guaranty is not legally binding.

Additionally, the guaranty contains other deficiencies. The guaranty is dated August 1, 2011, more than ten years after the priority date. Even if enforceable as a guaranty of the future wages of the beneficiary, the affidavit of could not help to establish the ability of the petitioner to pay the proffered wage prior to 2011. With the I-140 petition, evidence is required of a sponsoring employer's ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a

new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). In this case, the petitioner has not established eligibility from the priority date onwards.

Counsel further urges the AAO to consider the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). However, that decision is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases not arising within the same district. See *Matter of K-S*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wage. Here, counsel's assertion is that USCIS should treat its shareholder's guaranty as evidence of its ability to pay, even though a guaranty creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the guaranty. Furthermore, the instant case is distinguishable from *Full Gospel* because in *Full Gospel,* the smaller church relied on support from the larger church as was demonstrated through documentation. In this case, the petitioner does not rely on a larger entity for support; as noted above, the petitioner is its own separate, legal entity.

Counsel additionally contends that [redacted] personal finances should be considered in determining the petitioner's ability to pay the proffered wage. Counsel argues that the guaranty pierces the corporate veil, and thus, the petitioner should be treated as a sole proprietorship. As stated above, the personal guaranty will not be considered in the petitioner's ability to pay the proffered wage. Therefore, the petitioner's shareholder's finances will not be considered. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her

clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel argues that the petitioner's gross income and salaries and wages paid to employees should be considered in assessing the totality of the circumstances. Counsel cites to two unpublished AAO decisions that reversed the director's decisions based on *Matter of Sonegawa*. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS, formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In the instant case, the petitioner has demonstrated sufficient net income or net assets to pay the proffered wage for only two of the relevant years. Additionally, the petitioner's gross receipts declined from $1,228,220.00 in 2004 to $496,873.00 in 2009, a decrease of 59.5%. Additionally, the wages paid to employees declined from $418,279 in 2001 to $116,104 in 2009, a decrease of 72.2%. The petitioner also failed to include any evidence of historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

According to the director's July 6, 2011 denial, another issue in this case is whether a *bona fide* offer of full-time, permanent employment exists. The petitioner has the burden when asked to show that a valid employment relationship exists. *See* 20 C.F.R. §§ 626.20(c)(8) and 656.3. In this case, the record of proceeding contains a letter from operating partner at dated December 15, 2009, which states that the beneficiary is currently employed as a manager of the shop owned by The letter states that intends to make this position permanent once the beneficiary's permanent residence is approved. In its response to the director's RFE dated November 8, 2010, the petitioner resubmitted the letter with only the date changed to January 18, 2011. In the director's decision, he noted that the letter was not from the petitioner and that the beneficiary has not worked for the petitioner since 2006.

On appeal, the petitioner submits a letter from partner of dated August 1, 2011, which states that it continues to offer the beneficiary full-time employment as a manager once her permanent residence is approved.

In his brief on appeal, counsel states that the petitioner is not required to permanently employ the beneficiary until permanent residence is obtained and cites to the 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, dated August 4, 2003 (Yates' Memorandum).[5] The evidence contained in the record of proceeding, however, does not establish that a *bona fide* job offer exists. Two letters from were submitted confirming that the beneficiary had been employed with the company since 2001 on a full-time basis and that it intends to continue her full-

[5] The AAO notes that counsel states in his brief that the Yates' Memorandum is "binding" on USCIS. 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).

time, permanent employment once she obtains permanent residence. A letter from the petitioner, was submitted on appeal stating that the beneficiary will work for it once she obtains permanent residence status. No explanation was given regarding the discrepancy in the letters, and no evidence was submitted to demonstrate a relationship between and the petitioner.

Additionally, the Forms W-2 submitted for the beneficiary show that the beneficiary worked for and the petitioner in 2005 and 2006; and in 2004. No Forms W-2 were submitted on behalf of the beneficiary from which stated in two letters that it has employed the beneficiary since 2001. It is also significant that the beneficiary has not worked for the petitioner since 2006. Although it is not required that the beneficiary work for the petitioner until she has obtained permanent residence status, it is also the petitioner's burden to show that a *bona fide* offer of full-time permanent employment exists. The AAO also notes that the letter from the beneficiary dated January 15, 2011 states that she has worked as a "manager" for the last ten-and-a-half years. However, on the G-325A dated September 18, 2003, the beneficiary lists her position with as a "sales clerk." 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 592.

Based on the information in the record, the petitioner has not established that a *bona fide* offer of full-time, permanent employment exists.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.