(b)(6)

**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

DATE: MAY 0 6 2013 OFFICE: VERMONT 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 initially approved by the Director, Vermont Service Center. The director issued a notice of intent to revoke the approval of the petition (NOIR) on June 13, 2007 and ultimately a Notice of Revocation (NOR) on July 31, 2007. The matter came before the Administrative Appeals Office (AAO) on appeal. The AAO dismissed this appeal on March 11, 2010. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted.[1] The previous decision of the AAO, dated March 11, 2010, will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the substituted instant beneficiary[2] permanently in the United States as a baker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As part of the petition, the petitioner was required to file the original Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL). As set forth in the director's revocation issued on July 31, 2007, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward. The director revoked the approval of the petition accordingly. The petitioner filed an appeal of the director's decision to the AAO on August 16, 2007. The AAO affirmed the director's decision on March 11, 2010, and further held that the petitioner had not established its ability to pay the proffered wages of the other beneficiaries cited by the director as these petitions had not been withdrawn. The AAO also held that the instant petition is unapprovable because the labor certification had been used by the prior beneficiary and is no longer valid to be used by the instant beneficiary.

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.

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[1] On motion, the petitioner has demonstrated that the instant motion was timely filed.

[2] The regulation at 20 C.F.R. § 656.30 provides in relevant part:

> (c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:
>
> > (2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

The substitution procedure was enacted to accommodate U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien worker. Historically, this was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140. *See generally* Department of Labor Proposed Rule, "Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity," 71 Fed. Reg. 7656 (February 13, 2006).

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

At the outset, the AAO notes that the instant petition cannot be approved because the underlying labor certification has already been used by another alien to obtain lawful permanent residence. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm'r 1986).[3]

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which 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-
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> (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
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The priority date is the date that the Form ETA 750 was accepted for processing by any office within the employment service system of the Department of Labor. In this case, the priority date is April 30, 2001 as set forth on the labor certification filed on behalf of the original beneficiary, [redacted] The petitioner is seeking to substitute the instant beneficiary for [redacted]. The record indicates the following:

- On April 26, 2004, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140) for [redacted], who concurrently filed an I-485 Application to Register Permanent Resident or Adjust Status. The petitioner sought to sponsor [redacted] as a skilled worker. The Form I-140 was supported by a Form ETA 750, Case Number P2004-NY-[redacted], with a priority date of April 30, 2001. On February 24, 2005, the director of the Vermont Service Center approved the Form I-140 on behalf of Mr.

[3] While *Harry Bailen,* 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen,* 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga,* 23 I&N Dec. 886, 889-90 (BIA 2006).

- On June 28, 2005 the petitioner requested to withdraw the approved Form I-140 for and indicated its intention to substitute the instant beneficiary instead.
- On September 29, 2005, the director acknowledged the request to withdraw the Form I-140 filed on behalf of and automatically revoked the petition's approval pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(C).
- The petitioner filed another Form I-140 on behalf of the instant beneficiary on July 14, 2005 and requested that he be substituted for on the labor certification, that had been previously submitted in support of the Form I-140 filed on behalf of the original beneficiary.
- On January 17, 2006, the director approved the instant beneficiary's Form I-140.
- On July 31, 2007, the director revoked the petitioner's Form I-140 filed on behalf of the instant beneficiary regarding the petitioner's ability to pay the proffered wage in addition to the proffered wages of four other sponsored workers. The petitioner filed an appeal of this decision on August 16, 2007 to the AAO
- On February 5, 2009, the immigration court approved previously revoked visa petition and adjusted his status to permanent residence, based upon the same labor certification, that the beneficiary is seeking to rely upon at this time.
- On March 11, 2010, the AAO affirmed the director's decision and dismissed the petitioner's appeal on the ground that the petitioner has not established its ability to pay the proffered wage of the instant beneficiary, or the proffered wages of the other beneficiaries for whom it had filed Form I-140s. The AAO also stated that the instant petition is unapprovable because the labor certification had been used by the prior beneficiary to adjust to permanent resident status and is therefore no longer available to be used by the instant beneficiary.

It is noted that the immigration court, not USCIS, has approved adjustment of status based on the employment-based visa petition filed by the petitioner, which was later withdrawn by the petitioner. The AAO has no jurisdiction to overturn the court's decision. Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of the instant beneficiary based on a labor certification that formed the basis for another alien's admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility. To interpret section 212(a)(5)(iv) in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. V. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994).

Counsel argues that because adjusted "through" his new employer, the labor certification can be "used" by the instant beneficiary. Counsel's interpretation of American Competitiveness in the Twenty-First Century Act of 2000 (AC21)[4] does not account for the underlying statutory requirements of admissibility.

[4] *See* Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000); § 204(j) of the Act, 8 U.S.C. § 1154(j).

USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986).[5] When Congress enacted the job flexibility provision of section 204(j) (AC21) of the Act, it made no corresponding amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two aliens. It must be assumed that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying instant petition is based has already served as the basis of admissibility for a different beneficiary and is no longer "valid."

Even if it had jurisdiction to rescind case, USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS or any agency need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Once a labor certification has been used for the original beneficiary, even in error, that labor certification is no longer available. Accordingly, the labor certification is no longer available to support the petitioner's I-140 petition filed on behalf of the current beneficiary in the instant matter.

In addition to affirming the AAO's March 11, 2010 decision on the ground that the labor certification has already been used by another beneficiary, the AAO's decision will be affirmed on the additional ground that the petitioner has not demonstrated its ability to pay the beneficiary's proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $32,300.00 annually. The record contains the petitioner's tax returns for 2001 through 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 a priority date for any immigrant petition later based on the Form ETA 750, the

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[5] *Supra*, n. 3.

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, 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. Comm. 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 has not established that it paid the beneficiary the full proffered wage from the priority date onward. The record reflects that the petitioner paid the beneficiary wages of $16,146.00 in 2006 only.

If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[6] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the AAO's decision, it stated that the petitioner's tax return documentation reflects net income and net current assets for 2001, 2002, 2003, 2004, 2005, and 2006 which could not establish its ability to pay the beneficiary's proffered wage. The petitioner must establish that it had the continuing ability to pay the combined proffered wages to each beneficiary for whom it has filed a Form I-140 from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The AAO also notes that the petitioner has filed for at least seven other beneficiaries from the priority date of the instant petition. The petitioner has not demonstrated that it withdrew the petitions for these beneficiaries or that these beneficiaries adjusted status. The petitioner did not submit any additional evidence regarding its ability to pay the proffered wage for these beneficiaries from 2001 onward. Therefore, the petitioner has not established its ability to pay the instant beneficiary's proffered wage to overcome the basis for the AAO's dismissal of the appeal.

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[6] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

On motion, counsel argues that the totality of the circumstances shows that the "petitioner had the resources to pay the proffered wage pursuant to the test established in *Matter of Sonegawa*." The AAO stated in its decision that the evidence in the record is insufficient to establish that the petitioner's circumstances were similar to those in *Sonegawa*. On motion, the petitioner has not provided any additional evidence to demonstrate the petitioner's ability to pay the proffered wage of the instant beneficiary and the other beneficiaries it sponsored from 2001 onward. The record does not contain any evidence of the petitioner's reputation in the industry, or of unexpected business losses similar to *Sonegawa*, to establish the ability to pay the beneficiary's proffered wage in the totality of the circumstances. Counsel alleges that the petitioner has experienced consistent growth, growing wages and argues that the events of September 11, 2001 negatively affected its business. The petitioner states that it "has not only been doing business in excess of [a] million dollars but also has given employment to dozens of people both directly and indirectly." Although the AAO acknowledges the disastrous effects of September 11, 2001, the petitioner has not explained why its gross receipts for 2003 were lower than these amounts for 2001 and 2002, the years most closely tied to the aftermath of September 11, 2001. As stated above, the petitioner has also not demonstrated its ability to pay the proffered wages of the other beneficiaries the petitioner has sponsored, in addition to the instant beneficiary's proffered wage. The petitioner states that these employees are now employed elsewhere, but there is nothing in the record to substantiate this or that demonstrates that the petitioner is no longer obligated to pay these wages.

Accordingly, after considering the totality of the circumstances again on the petitioner's motion, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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. The petitioner has not met that burden. The previous decision of the AAO will be affirmed.

**ORDER**: The motion to reopen is granted, and the decision of the AAO dated March 11, 2010 is affirmed. The petition remains denied.