(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

[redacted]

Date: NOV 14 2013 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Vermont Service Center, on June 19, 2003; however, on May 8, 2012 the Director, Texas Service Center, revoked the approval of the immigrant petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) pursuant to 8 C.F.R. § 103.4(a). The AAO affirmed the decision and withdrew the director's decision to invalidate the labor certification. The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cook, pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i).[1] 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 of the Texas Service Center (the director) revoked the approval of the petition, finding that: (a) the beneficiary did not have the requisite work experience in the job offered as of the priority date; (b) the petitioner failed to establish the ability to pay the beneficiary's proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence; and (c) the labor certification contains an amendment that was not authorized by DOL. Accordingly, the director invalidated the labor certification and certified the decision to the AAO.

On November 8, 2012, the AAO affirmed the director's decision, holding that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The AAO withdrew that portion of the director's decision stating that the petitioner had not established that the beneficiary had the required experience as of the priority date and that the petitioner committed fraud or material misrepresentation in amending the labor certification without DOL authorization. The petitioner then filed a motion to reopen and reconsider the AAO decision. We will accept the motion to reopen the matter based on the new information submitted and the motion to reconsider based on arguments made by counsel. Thus, the instant motion is granted. 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.

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.

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[1] Section 203(b)(3)(A)(i) of 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 raining or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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.

As noted in the prior AAO decision, 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 ETA Form 750 was accepted for processing by the DOL on April 4, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is $12.57 per hour or $22,877.40 per year based on a 35 hour work week.[2]

In the AAO's November 8, 2012 decision, we specifically reviewed the petitioner's 2003 Internal Revenue Service (IRS) Form 1099-MISC and 2004 through 2006 Forms W-2 Wage and Tax Statements issued by the petitioner to the beneficiary; paystubs issued by the petitioner to the beneficiary for works performed in 2005 and 2006;[3] the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001; and the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2005. That evidence demonstrated that the petitioner had sufficient net income to pay the difference between the actual wage paid and the proffered wage in 2001 and 2005, but not in 2002, 2003, 2004, 2006, and 2007.

With the instant motion, the petitioner submitted a Form 2003 Form 1099 stating that the petitioner paid the beneficiary $3,600 in that year; its 2002 IRS Form 1120 stating net income of $30,196 and net current assets of -$21,856; its 2003 IRS Form 1120 stating net income of $14,815 and net current

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[2] The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

[3] Based on the paystubs submitted above, the beneficiary received a net pay of $750 per pay period. It is not clear if these paystubs were included in the beneficiary's W-2s for 2005 and 2006.

assets of -$44,253; its 2004 IRS Form 1120 stating net income of $18,735 and net current assets of -$30,578; and its 2006 Form 1120 stating net income of $377 and net current assets of -$726.

As stated in the previous AAO decision, although the petitioner submitted evidence of sufficient net income to pay the difference between the actual wage paid and the proffered wage, a review of USCIS electronic databases reveals that the petitioner has previously filed multiple immigrant petitions since 2001.[4] Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of the current beneficiary and also of *all* other beneficiaries listed by the director from the date of filing each respective labor certification application until the date each beneficiary including the beneficiary in this instance obtains lawful permanent residence, or until the petition is either withdrawn or revoked.[5]

With this motion, the petitioner submitted Forms WR-1 Employer's Quarterly Report of Wages Paid and Forms 941 covering the period April 1, 2003 through December 31, 2003. The petitioner also submitted 2004 IRS Forms W-2 and a payroll statement of wages paid in that year. This evidence does not include the proffered wage to each beneficiary, the immigration status of each beneficiary, or the dates of employment so that we are unable to ascertain whether the petitioner had the ability to pay each sponsored worker from their individual priority date through their date of termination with the petitioner or date of permanent residency. Counsel states on motion that the petitioner is unable to gather any additional information concerning these sponsored workers. Counsel cites two individuals, as sponsored workers who have left the United States and have no intention of returning. The corresponding petitions have never been withdrawn by the petitioner. Counsel also states that four other sponsored workers received their permanent resident status through the petitioner. No priority dates or dates of legal permanent residency were provided. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel states on motion that it is unreasonable to expect the petitioner to supply employment and financial records dating back ten years. The petitioner has not submitted any evidence that it attempted to obtain these records from the corresponding authority, such as the Internal Revenue Service, and that the records are unavailable. It is the petitioner's burden to demonstrate that the petition filed is approvable. The petitioner has not submitted such evidence here. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127 (BIA 2013).

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[4] The director in the Notice of Intent to Revoke dated March 1, 2012 (2012 NOIR) identified nine other immigrant petitions (Form I-140) that the petitioner filed for alien beneficiaries other than the beneficiary in the instant case since 2001. The details of those nine petitions will not be repeated here.

[5] The director advised the petitioner in the 2012 NOIR to submit copies of the other sponsored beneficiaries' Forms W-2, 1099-MISC, paystubs, or other documents to show the ability to pay. The petitioner submitted Forms W-2 for 2004 and 2005 of some beneficiaries. Mr. in his March 29, 2012 sworn statement stated that he did not have any other evidence to offer.

Finally, 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. 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.

As stated in the previous AAO decision, unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

On motion, counsel states that the petitioner was a "successful restaurant . . . for over ten years, during which time the restaurant employed many staff and made significant profits." The tax returns in the record, however, demonstrate a diminishing gross income from 2001 through 2006 and a drop in total wages paid to levels in 2005 and 2006 that amount to only slightly more than the beneficiary's proffered wage. This evidence does not establish a situation similar to the one presented in *Sonegawa,* so the petitioner has not demonstrated the ability to pay the proffered wage.

Moreover, the petitioner in this case did not establish the ability to pay as of the filing date. The petition was initially approved on June 19, 2003 but its approval was later revoked. At the time of the petition's approval, the petitioner's tax return for 2002 was not yet due. Thus, at the time of the petition's approval, the petitioner must have established that it had the ability to pay the proffered wage in 2001. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that, at the time of the petition's approval, it had the continuing ability to pay the proffered wage from the priority date, the petitioner must have demonstrated that it could pay the full proffered

wage of $12.57 per hour or $22,877.40 to the instant beneficiary and the wages to all other sponsored beneficiaries in 2001. No evidence of the petitioner's ability to pay the proffered wage to all sponsored workers for 2001 was submitted, as noted above. Thus, the petition was not approvable when filed, and the director had good and sufficient cause to revoke the petition's approval based on the petitioner's failure to establish the ability to pay the proffered wage in 2001.

Counsel notes that the petitioner need only demonstrate its ability to pay the proffered wage until the date that the beneficiary ported to another qualified employer. According to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), an application for adjustment of status may 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.

Furthermore, 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 the same or similar. Section 106(c) states that the underlying I-140 petition "shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." 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). Thus, the statute simply permits the beneficiary to change jobs and remain eligible to adjust based on a prior approved petition if the processing times reach or exceed 180 days.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

> Long Delayed Adjustment Applicants- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991).

There is no evidence that Congress intended to confer anything more than a benefit to beneficiaries of long delayed adjustment applications. In other words, the plain language of the statute indicates that

Congress intended to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's application for adjustment of status took 180 days or more to process. Thus, 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. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). The AAO concludes that is not the case here, as the underlying petition's approval has been revoked. *Herrera v. USCIS*, 571 F.3d at 881.

The petitioner submitted an affidavit from on letterhead stating that the beneficiary began working at the restaurant in March 2007. The petitioner's former owner submitted a statement that the petitioning restaurant ceased operations in April 2007. As a result, the petitioner must demonstrate its ability to pay the proffered wage from the priority date until April 2007. It has not submitted such evidence here.

Concerning the finding that the petition must also be dismissed as moot, under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if:

A. The labor certification is invalidated pursuant to 20 C.F.R. § 656;
B. The petitioner or the beneficiary dies;
C. The petitioner withdraws the petition in writing; or
D. The petitioner is no longer in business.

Here, through the admission of Mr. the owner of the petitioner, the petitioning business has been closed since February 2007. Where the petitioning company is no longer an active business, the petition is moot.[6]

It is true that, absent revocation, the beneficiary would have been eligible for adjustment of status with a new employer provided, as counsel points out, that "the new job is in the same or similar occupation as that for which the petition was filed." However, critical to section 106(c) of AC21, the petition must be "valid" to begin with if it is to "**remain valid with respect to a new job.**" Section 204(j) of the Act, 8 U.S.C. § 1154(j) (emphasis added).[7] The new employer has failed to show that

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[6] Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation, without notice, upon termination of the employer's business in an employment-based preference case.

[7] Furthermore, it would subvert the statutory scheme of the U.S. immigration laws to find that a petition is valid when that petition was never approved or, even if it was approved, if it was filed on behalf of an alien that was never entitled to the requested immigrant classification. We will not construe section 204(j) of the Act in a manner that would allow ineligible aliens to gain immigrant status simply by filing visa petitions and adjustment applications, thereby increasing USCIS backlogs, in the hopes that the application might remain unadjudicated for 180 days. In a case

the passage of AC21 granted any rights, much less benefits, to subsequent employers of aliens eligible for the job portability provisions of section 106(c). As the petitioner has not shown that it had the ability to pay its sponsored workers in 2001, the director had good and sufficient cause to revoke the approval of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende,* 26 I&N Dec. 127 (BIA 2013). The petitioner has not met that burden.

ORDER: The motions are granted, the previous AAO decision is affirmed, and the petition's approval remains revoked.

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pertaining to the revocation of an I-140 petition, the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009). Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.