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

(b)(6)

U.S. Citizenship and Immigration Services

Date: SEP 0 4 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 (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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on February 8, 2013. The matter is again before the AAO on a motion to reopen. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an electrical engineer, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 June 10, 2003 priority date of the visa petition. The director denied the petition accordingly. The petitioner appealed, and the AAO dismissed the appeal on February 8, 2013.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact.[1] On motion, the petitioner submits additional evidence in an attempt to establish its ability to pay the proffered wage. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. The procedural history in this case is documented by the

---

[1] The petitioner indicated on the Form I-290B that it was filing an appeal. With the Form I-290B the petitioner submitted additional evidence and requested that the AAO reconsider its dismissal decision. In the instant case, the petitioner checked the box stating that it wishes to file an appeal, and indicated that a brief or evidence would be filed within 30 days. The AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. The petitioner argued that it has established the ability to pay the proffered wage and submitted evidence with the Form I-290B. Therefore, the AAO will consider the matter as a motion to reopen or reconsider.

record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *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.[2]

As set forth in the director's denial and in the AAO's dismissal, the primary 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. 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.

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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

---

[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).

In the dismissal of the appeal, the AAO concluded that the petitioner did not establish the ability to pay the proffered wage of $52,562 as stated on the Form ETA 750 from the date the Form ETA 750 was accepted on June 10, 2003. Specifically, the AAO determined that the petitioner did not establish its ability to pay the proffered wage in 2003.[3] The AAO noted that the petitioner submitted an Internal Revenue Service (IRS) 2003 Wage and Tax Statement, Form W-2, which shows that the petitioner paid the beneficiary a wage of $20,400 for that year; however, the record lacked evidence of the petitioner's ability to pay the full proffered wage.

On motion, counsel contends that in determining the petitioner's ability to pay the proffered wage, the AAO should consider the equity value in the petitioner's owner's real property. According to counsel, the petitioner could have used the equity to pay the difference between the proffered wage of $52,562, and the $20,400 wage the petitioner paid the beneficiary in 2003. The evidence submitted with the motion that is being considered now is a property 2013 search record for a property located at Texas owned by the petitioner's owner; and, a January 26, 2009 letter from stating that in 1995 he purchased the property located at Texas and that in 2003 there was an estimated equity value of $128,857 in the property.[4] Counsel asserts that this evidence establishes that in 2003 the petitioner's owner had sufficient equity in the property which the petitioner could have used to pay the proffered wage. The AAO disagrees.

Regarding the petitioner's owner's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Further, any funds from the sale/equity of the petitioner's property would only be available on a future date. A petitioner must establish its ability to pay from the time of the priority date, which in this matter is June 10, 2003. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm'r 1971).

If counsel is referring to a line of credit or a pledge to pay the beneficiary's wage, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

---

[3] The AAO noted that in 2003 the petitioner was a sole proprietorship and that thereafter it was structured as a C corporation.

[4] The petitioner did not submit evidence of the amount of the outstanding mortgage or corroborating evidence to establish the equity value of the property.

On motion, counsel submitted a copy of a bank statement from Bank of America for the statement period from December 1, 2003 to December 31, 2003. The funds in the Bank of America account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses after business deductions are taken and then brought forward to page one of the sole proprietor's IRS Form 1040. Thus, the funds in this account are included in the calculation of the petitioner's Adjusted Gross Income. Additionally, the record does not include average ledger amounts for the entire year. Thus, this bank statement does not establish the petitioner's ability to pay the proffered wage.

Therefore, the petitioner has not established the ability to pay the proffered wage.

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 sustained that burden. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is approved. The appeal is dismissed. The petition remains denied.