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: FEB 2 7 2014 OFFICE: TEXAS SERVICE CENTER

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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the petition to the director. The director denied the petition. The petitioner then appealed the denial decision to the AAO; the AAO dismissed the appeal as moot. The matter is now before the AAO on motion to reopen and reconsider. The motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner describes itself as an advertising and communications business. It seeks to permanently employ the beneficiary in the United States as a bookkeeper. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The director's decision denying the petition concludes that the petition is moot based on the petitioner's admission that the company went out of business and that it can no longer employ the beneficiary.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 12, 2005. *See* 8 C.F.R. § 204.5(d).

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts the AAO made an erroneous decision through the misapplication of law or policy accompanied by citation to precedent and policy. The AAO will consider the merits of the appeal.

In the petitioner's November 16, 2012 appeal, counsel informed the AAO that the petitioner no longer intends to employ the beneficiary in the position described on the labor certification as the petitioner is out of business. Counsel asserts nevertheless, that since the AAO found that the director's decision denying the petition for failure to establish the ability to pay was erroneous; then the petition should be approved under the facts as they existed on April 22, 2008, the date of the director's wrongful denial of the petition.

On motion, the petitioner through counsel contends that the AAO failed to address the substance of the appeal. Counsel asserts that had the director correctly found that the petitioner had established the ability to pay the proffered wage, that the beneficiary would be a lawful permanent resident by now. The petitioner states that the petition and the beneficiary's subsequent application for adjustment of status (Form I-485) should have been approved. Counsel states that the director's decision was erroneous and that the AAO should retroactively approve the petition as of the date of the director's denial. Counsel also states that had the petition been correctly approved, the beneficiary would have been able to "port" under the provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated the beneficiary's eligibility. AC21 allows an *application for adjustment of status*[1] to 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 with the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Since the petition has never been approved, it cannot form the basis for the beneficiary's ability to port to new employment.

Moreover, the AAO disagrees that had the director's decision been correctly approved to begin with, the beneficiary would be a permanent resident by now and not dependent on the approvability of the petition. [1] On November 15, 2007, the director correctly denied the petition based on the available information in the record; and on June 19, 2012, the AAO remanded the petition to the director because the petitioner provided additional evidence establishing its ability to pay the proffered wage, but the petitioner had not established the continuing job offer. Thus, the petitioner's claim that the

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[1] The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

petition was erroneously denied on November 15, 2007 is erroneous. The petitioner's argument also fails to account for the AAO's decision finding that the petitioner admitted it had a new job for the beneficiary in a more complex role; and that it had filed a new labor certification application reflecting the change in job duties. Thus, at the time the appeal was adjudicated the petition was moot. The petitioner is requesting the AAO to approve a petition retroactively based on facts that no longer exist. The petitioner's continued viability is critical to its approval at any stage of the proceedings prior to the time the beneficiary may adjust to permanent resident.[2]

The petitioner is no longer in business, therefore no job opportunity exists and as such the petition must remain denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is granted and the decision of the AAO dated October 31, 2013 is affirmed. The petition is denied.

[2] *See* 8 C.F.R. § 204.5(g)(2) (ability to pay must be established from the priority date until the date the beneficiary obtains legal permanent residence); *See* 8 C.F.R. § 205.1(a)(3)(iii)(D) (if a petitioner is no longer in business and cannot employ the beneficiary, the petition is automatically revoked without notice).