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)

[redacted]

Date: MAR 2 5 2014 Office: TEXAS SERVICE CENTER [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 employment-based immigrant visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner then filed a motion to reopen and reconsider before the AAO, which was granted and the previous decision of the AAO was affirmed. The petitioner has filed another 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 pizza and sandwich shop. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 denied the petition accordingly.

As set forth in the director's June 5, 2008 denial, the 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. On appeal, the AAO identified an additional ground of ineligibility concerning whether the beneficiary had the experience required by the terms of the labor certification. On December 12, 2011, the petitioner filed a motion to reopen or reconsider the AAO's decision. Counsel claimed that the petitioner had established its ability to pay the proffered wage to the beneficiary and to multiple other beneficiaries sponsored by the petitioner; and that the beneficiary has the required work experience. On June 27, 2013, the AAO granted the motion and sent a Notice of Intent to Dismiss, Request for Evidence, and Notice of Derogatory Information (NOID/RFE/NDI). One of the issues explored in the NOID/RFE/NDI is the beneficiary's relationship to the sole proprietor. The petitioner submitted sufficient evidence resolving the concerns on this issue and it is not a basis for the instant decision.

On September 6, 2013, the AAO affirmed its previous decision dismissing the appeal. The petitioner has now filed a motion to reopen and reconsider the AAO decision. The record shows that the motions are properly filed and timely.

The petitioner submitted new evidence and presented arguments supported by precedent decisions. Thus, the instant motions to reopen and reconsider are 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.

Concerning the petitioner's ability to pay the proffered wage, 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 AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 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 9089 was accepted on January 25, 2006. The proffered wage as stated on the ETA Form 9089 is $10.97 per hour ($22,817.60 per year).

In the AAO's November 10, 2011 decision, we specifically reviewed evidence of the petitioner's ability to pay the proffered wage. In doing the analysis, we noted that the Internal Revenue Service (IRS) Forms W-2 that were submitted for 2006 and 2007 contained a discrepancy between the beneficiary's claimed social security number and the social security number appearing on the Forms W-2. Because of the noted discrepancy, the AAO did not accept the amounts found on the Forms W-2. With the instant motions to reopen and reconsider, the petitioner submitted a letter from Certified Tax Accountant, stating that the beneficiary used a federal identification number (FIN) until he was assigned a social security number (SSN). Once the SSN was assigned, the beneficiary began using that number in order to get credits made to social security. The petitioner also submitted the beneficiary's personal IRS Form 1040 tax returns for 2006 through 2009.

The Forms W-2 in the record contains a SSN that matches the one included on the beneficiary's IRS Forms 1040. As a result, they are sufficient to demonstrate that the petitioner paid the beneficiary $21,840.00 in 2006, $22,328.80 in 2007, $22,817.60 in 2008, $5,704.40 in 2009, $24,084.40 in 2010, $23,205.00 in 2011, and $20,795.00 in 2012. The petitioner paid the beneficiary at or in excess of the proffered wage in 2008, 2010, and 2011. The amounts paid in 2006, 2007, 2009, and 2012 are less than the proffered wage, so the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which is $977.60 in 2006, $488.80 in 2007, $17,113.20 in 2009, and $2,022.60 in 2012.

The AAO's November 10, 2011 decision specifically reviewed the sole proprietor's Adjusted Gross Income (AGI)[1] and household expenses for 2006 and 2007, which stated expenses greater than AGI

[1] A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors

in both years. The petitioner submitted additional IRS Forms 1040 on appeal, which demonstrate AGI of $31,438 in 2009.[2]

The petitioner submitted no additional or revised statement of household expenses. The statement of household expenses previously submitted stated an annual obligation of $62,400. The petitioner's AGI in 2006, 2007, and 2009 was less than the household expenses, so the sole proprietor has not demonstrated its ability to pay the difference between the actual wages paid and the proffered wage in those years.

With the motions, counsel states that the profit stated on Schedule C should be used to determine the petitioner's ability to pay the proffered wage instead of using the AGI and household expenses calculation. As the petitioner is a sole proprietor, the business income may not be considered separately from the sole proprietor's adjusted gross income. *See Matter of United Investment Group*, 19 I&N Dec. at 250; *Ubeda,* 539 F.Supp. at 647. Counsel provided no legal basis to support the contention that the income on Schedule C should be considered without reference to the remainder of the sole proprietor's IRS Form 1040 individual tax return.

With the motions, as on appeal, counsel asserts that the financial assets of the sole proprietor should be considered in determining the petitioner's ability to pay the proffered wage. Specifically, counsel states that the sole proprietor owns property at . Counsel states a figure for the home's worth and the balance on the mortgage. No evidence was presented to support the home's worth or any mortgage balance. 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). In any event, real property is not a readily liquefiable asset. Further, it is unlikely that the sole proprietor would sell such a significant personal asset to pay the beneficiary's wage.

Counsel also reiterates that the petitioner has a "Home Equity Line of Credit of $50,000" which could be used to pay the proffered wage. As stated in the prior AAO decision, 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

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report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

[2] The AAO's June 27, 2013 NOID/RFE/NDI requested the sole proprietor's tax returns through 2012. The petitioner submitted a notice of extension for the sole proprietor to file his 2012 taxes, The tax return was not yet due at the time the petitioner responsed to the NOID/RFE/NDI.

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).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit were available at the time of filing the petition. As noted above, 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). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. Further, the previous decision specifically advised that if the petitioner wished to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit would augment and not weaken its overall financial position. The petitioner submitted no such evidence on motion. As previously noted, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

On motion, the petitioner states that his savings may be considered to determine the petitioner's ability to pay the proffered wage. The sole proprietor's savings account of $25,046.62 may be considered, yet the total savings are insufficient to demonstrate the ability to make up the difference between the remaining proffered wage and the petitioner's household expenses and the petitioner's AGI for 2006, 2007 and 2009.. Specifically, in 2006, the sole proprietor had an obligation of $23,702 in household expenses above the AGI; in 2007, the sole proprietor had an obligation of $21,002 in household expenses above the AGI; in 2009, the sole proprietor had an obligation of $30,962 in household expenses above the AGI. These figures do not include the remaining obligation owed in the amount of $977.60 in 2006; $488.80 in 2007; and $17,113.20 in 2008. Thus, while the sole proprietor could have used his savings to cover both his remaining household expenses of $23,702 and the remaining proffered wage of $977.70 in 2006 (a total of $24,679.70) the savings account of $25,046.62 would be depleted to $366.92, and the petitioner would have not had additional savings for 2007 and 2009. As a result, his savings account balance is insufficient to demonstrate the continuing ability to pay the proffered wage.

In addition, as noted in the prior AAO decision, USCIS electronic records show that there is a simultaneously pending Form I-140 filed by the petitioner. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed a second petition for another beneficiary which has been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg'l

Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner submitted no evidence concerning this additional sponsored worker on motion.

The evidence submitted does not establish that the petitioner either paid the other sponsored worker the proffered wage in each year or that the petitioner has sufficient AGI and savings to pay the difference between the actual wages paid and the proffered wage of both beneficiaries after payment of his personal household expenses.

Counsel refers to a decision issued by the AAO concerning its ability to pay the proffered wage, but the decision is not published. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the 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).

Counsel suggests that the AAO should consider wages paid to another employee of the petitioner who left the restaurant in 2008, as evidence of the petitioner's ability to pay the proffered wage to the instant beneficary. The record does not state the wages of the departing employee, verify her full-time employment, or provide evidence that the petitioner has replaced or will replace her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There is no evidence that the position of the departing employee involved the same duties as those set forth in the Form ETA 9089 in this case. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not replace him or her, and the wages paid to that employee may not be credited to the petitioner to establish the petitioner's ability to pay the proffered wage to the instant beneficiary.

Counsel also suggests that the AAO should recognize the petitioner's "Installment Sale Income" of $45,062.00 in 2007. However, the actual money received as income was already accounted for in the petitioner's IRS Form 1040 line 13 as a capital gain, and was considered in assessing the petitioner's AGI for 2007. As noted previously, the sole proprietor must establish that it has the ability to pay the beneficiary of each immigrant visa petition out of his AGI, after considering his personal household expenses. Thus, the AAO will not consider the petitioner's installment sales income in 2007.

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.

As stated in the prior AAO decisions, the petitioner has been in business since 2003; however, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date. 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.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO questions the applicability of AC21 in this case, as the record does not reflect that the beneficiary has moved to another job. Further, the validity of the beneficiary's claim to change jobs under AC21, if applicable, would be adjudicated in the context of the beneficiary's adjustment of status application, and is not an issue before the AAO in determining the validity of the Form I-140 petition. Thus, the AAO will not address whether AC21 may be applied in this case.[3]

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[3] In order to take advantage of the provisions of AC21, the petition must first be approved. 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 its eligibility. As noted above, AC21 allows an *application for adjustment of status*[3] 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 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

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 met that burden.

ORDER: The motions are granted. The previous decisions of the AAO and the director are affirmed. The petition remains denied.

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underlying I-140 was 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).