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: MAY 0 6 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 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,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an information technology company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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 the beneficiary possessed the qualifications required by the terms of the labor certification as of the priority date. The director denied the petition accordingly.

On August 27, 2012, the AAO dismissed the subsequent appeal, holding that the petitioner had established the beneficiary's qualifications as required by the terms of the labor certification, but finding that the petitioner did not have the ability to pay the proffered wage and that the petitioner had not established that the job offer was *bona fide* or that it would be the beneficiary's actual employer. The petitioner then filed a motion to reconsider the AAO decision. The record shows that the motion is properly filed, timely, and makes a specific allegation of error in law or fact.

Here, we will accept the motion to reconsider the matter based on the arguments made by counsel that the previous decision was not in line with current USCIS policy and applicable immigration law. 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.

With regards to 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 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 for processing on June 27, 2002. The proffered wage as stated on the Form ETA 750 is $60,000 per year.

In the AAO's August 27, 2012 decision, the AAO specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of Internal Revenue Service (IRS) Forms W-2 demonstrating that the petitioner paid the beneficiary $50,000.04 in 2002, $54,383.07 in 2003, $51,500.04 in 2004, $23,194.30 in 2005, $65,340.00 in 2006, $62,520.00 in 2007, $60,180.00 in 2008, $57,842.89 in 2009, and $55,059.96 in 2010. The AAO noted that the Forms W-2 established the petitioner's ability to pay the proffered wage in 2006, 2007, and 2008. The AAO decision then considered the petitioner's IRS Form 1120S to determine the ability to pay the difference between the actual wage paid and the proffered wage. The petitioner's net income in 2002 through 2005 was sufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage. The petitioner, however, failed to submit tax returns from 2006 onwards as was specifically requested in the AAO's November 28, 2011 Request for Evidence (RFE). The AAO's decision stated that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner did not submit this requested evidence with its motion. The petitioner did not, therefore, establish its ability to pay the difference between the actual wage paid and the proffered wage in 2009 and 2010.

On motion, counsel argues that the petitioner need not demonstrate its ability to pay the difference between the proffered wage and actual wage paid past 2008 because the petition was approvable when filed and thus the beneficiary was eligible to port to new employment in 2008. Counsel refers to the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") in asserting that the beneficiary should have been able to port to his new employer under the current petition. AC21 states:

> A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more 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.

Counsel specifically asserts that under the above, the instant petition was "valid" and, but for the director's denial of the petition for the failure of the petitioner to demonstrate that the beneficiary had the education and experience required by the labor certification that the AAO disagreed with, the petition would have been approved in 2008 and the petitioner's ability to pay the proffered wage in 2009 and 2010 would never have been an issue. In support of this argument, counsel cites to *Matter of Al Wazzan,* 25 I&N Dec. 359 (AAO 2010), in stating that the instant petition was "valid" at the time of filing. Counsel juxtaposes the instant petition as one that was always approvable, as opposed to the petition in *Al Wazzan* which was unapprovable when filed and remained unapprovable thereafter. The AAO held in *Al Wazzan*:

> to be considered "valid" in harmony with the thrust of the related provisions and with the statute as a whole, the petition must have been filed for an alien who is "entitled" to the requested classification **and that petition must have been "approved" by a USCIS officer** pursuant to his or her authority under the Act. *See generally* section 204 of the Act.

Id. at 367 (Emphasis added). Counsel does not assert that the petition was approved by the director, only that it was approvable at the time filed. However, that the petition was "approvable" is not the same as it having been "approved" by USCIS, which is the standard set out in *Al Wazzan.* Because the petition was not approved in 2008, the petitioner must still demonstrate its ability to pay the proffered wage in 2009 and 2010.

Counsel seeks to further distinguish the situation in *Al Wazzan* from the instant case by stating that not only are the facts different, but that the Congressional intent behind AC21 should lead to a different decision in the instant case as opposed to the one reached in *Al Wazzan.* Specifically, counsel cites to the intent in enacting AC21 to mitigate delays in processing and states that the AAO should follow the guidance in the May 12, 2005, William R. Yates, Associate Director for Operations United States Citizenship and Immigration Services, Department of Homeland Security Memo, "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)." That Memo states in pertinent part:

> **Question 1. How should service centers or district offices process unapproved I-140 petitions that were concurrently filed with I-485 applications that have been pending 180 days in relation to the I-140 portability provisions under §106(c) of AC21?**
>
> Answer: If it is discovered that a beneficiary has ported off of an unapproved I-140 and I-485 that has been pending for 180 days or more, the following procedures should be applied:
>
> A. Review the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days. If the petition is approvable but for an ability to pay issue or any other issue relating to a time after the filing of the petition, approve the petition on its merits. Then adjudicate the adjustment of status application to determine if the new position is the same or similar occupational classification for I-140 portability purposes.
>
> B. If additional evidence is necessary to resolve a material post-filing issue such as ability to pay, an RFE can be sent to try to resolve the issue. When a response is received, and if the petition is approvable, follow the procedures in part A above.

Although counsel states on motion that the above section was quoted but not discussed, the previous AAO decision stated that the petition is unapprovable for the petitioner's failure to demonstrate the ability to pay the proffered wage prior to the time that the beneficiary ported to new employment. As stated above and in the previous AAO decision, the petition must be approvable in all respects for the entire time prior to the beneficiary porting to new employment. In reviewing the instant petition, the Form I-140 petition is not currently approvable because the petitioner failed to demonstrate its ability to pay the proffered wage in 2009 and 2010.

In addition, the Congressional intent behind the statute was to provide the alien, as a "long delayed applicant for adjustment," with the ability to change jobs if the individual's Form I-485 took 180 days or more to process. No argument has been made by counsel that the beneficiary has been precluded from changing jobs, but instead, counsel continues to assert that as the petition was approvable when filed that it should be approved under the new circumstances currently presented. AC21 concerns the beneficiary's ability to change jobs, an issue not debated in this case.

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.

In the instant case, the petitioner submitted no new evidence concerning its ability to pay the proffered wage. As stated in the prior AAO decision, the petitioner is no longer a functioning entity and has been operated by a group of professional advisors for two years or longer with the sole purpose of pursuing this petition. In addition, no evidence was submitted about the petitioner's reputation or any other evidence concerning its standing in the community to liken its situation to that of *Sonegawa.* 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.

Additionally, as stated in the previous AAO decision and unaddressed on the motion to reconsider, the petitioner is out of business. Thus the certified position is no longer open to the beneficiary and the petition is moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). A business that has been dissolved or is otherwise not operational cannot issue a *bona fide* offer of employment rendering this appeal moot.

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. Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the decision of the AAO dated August 27, 2012 is affirmed. The petition remains denied.