(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: MAY 0 3 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The visa petition was denied by the Director, Texas Service Center (director) and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is again before the AAO as a motion to reopen and a motion to reconsider. The motion to reopen and motion to reconsider will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a telecommunications carrier company. It seeks to employ the beneficiary permanently in the United States as a project accountant. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly. The AAO also found the record to contain insufficient proof of the petitioner's ability to pay the proffered wage and dismissed the appeal.

On motion, counsel for the petitioner submits a brief and new evidence, including an April 9, 2012 letter from the Vice President of Finance for the petitioner as well as its parent company, ; copies of federal tax returns for 2008 and 2010; copies of Internal Revenue Service (IRS) W-2 Registers for 2008 and 2011 showing the names of the petitioner's employees and total wages paid; a copy of an IRS Form W-3, Transmittal of Wage and Tax Statement, for the petitioner; a copy of the petitioner's internal income statements for the years 2007 and 2008; a printed SunTrust statement entitled "Zero Balance Account;" a copy of the 2011 IRS Form W-2 Wage and Tax Statement for the beneficiary; and copies of the decisions in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), *Matter of Chawathe*, 25 I&N Dec 369 (AAO 2010), and *Matter of E—M—*, 20 I&N Dec. 77 (Comm'r 1989), as well as three unpublished AAO decisions.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

> (2) *Requirements for motion to reopen.* 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 . . . .
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> (3) *Requirements for motion to reconsider.* 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed, timely, and meet the above requirements. Accordingly, the motion to reopen and the motion to reconsider are granted. The AAO will reopen and reconsider our decision of March 15, 2012.

As indicated in that decision, the single issue in this case is whether or not the petitioner meets the requirements of the regulation at 8 C.F.R. § 204.5(g)(2), which states:

> *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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On motion, counsel contends that the totality of the petitioner's financial circumstances establish its ability to pay the proffered wage and that the AAO erred in determining otherwise. She asserts that the AAO ignored clear and credible evidence of the significant financial resources available to the petitioner through its parent company, and that our refusal to consider these resources was arbitrary and capricious, and reversible error. As on appeal, counsel contends that the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) (Full Gospel) is applicable to the petitioner's circumstances and that its reasoning should be followed here, allowing the financial resources of to be considered in determining the petitioner's ability to pay the proffered wage. Counsel also asserts that the AAO should be guided by *Matter of Sonegawa*, 12 I&N Dec. at 612 (*Sonegawa*) and prior unpublished AAO decisions in which we have applied *Sonegawa* to find the petitioner's consistent ability to meet a multi-million dollar payroll and the totality of its other financial circumstances, to establish its ability to pay the proffered wage. As proof of the petitioner's ability to meet its payroll, counsel submits a 2011 IRS Form W-3 and the IRS Form W-2 Registers for 2008 and 2011, which reflect that the petitioner employed 32 individuals in 2008 who earned a total of $2,144,018.62 and 33 individuals in 2011 to whom it paid a total of $1,627,902.94. She also submits the petitioner's internal income statement for 2007 and 2008 indicating net income of $3,070,042 in 2007 and a net loss of $1,915,926 in 2008; and consolidated tax returns for for 2008 and 2010.

Accompanying this financial documentation is an April 9, 2012 statement from who states that he serves as the Vice President of Finance for the petitioner as well as for In his letter, indicates that the petitioner does not file tax returns separate from its parent company and does not have separate annual reports or separate audited financial statements. He states that he finds the AAO's unwillingness to consider the submitted consolidated tax returns for to reflect a lack of understanding of consolidated corporate financing and tax reporting. contends that "[i]t is fully consistent with sound accounting and financial practice to permit consolidated reporting of the financial resources of [the petitioner] and for tax purposes, and should similarly be permitted for immigration purposes."

also states that has funded the petitioner for more than ten years and has invested millions of dollars in its business operations, providing the petitioner with access to its accounts to pay operating expenses, including salaries. He indicates that as a financial officer of both and the petitioner, he does not understand how USCIS can ignore resources in considering the petitioner's ability to pay the proffered wage.

On motion, counsel also contends that the AAO has failed to apply the appropriate standard of proof in the petitioner's case, requiring it to establish its ability to pay the beneficiary "beyond a doubt" rather than by a preponderance of the evidence. Referencing *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) and *Matter in E—M—*, 20 I&N Dec. at 77, counsel asserts that the submitted evidence clearly demonstrates that it is more likely than not that the petitioner has the ability to pay the proffered wage, which is sufficient for USCIS to approve the petition.

Before addressing the issues raised by counsel on motion, the AAO will review the analytical framework under which United States Citizenship and Immigration Services (USCIS) determines a petitioner's ability to pay the proffered wage, beginning with whether the petitioner has employed and paid the beneficiary during the required period. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is consider *prima facie* proof of the petitioner's ability to pay the proffered wage. In the absence of such evidence, USCIS examines the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation of other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[1] If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonegawa*, 12 I&N Dec. at 612. In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In our March 2012 decision, the AAO found that the petitioner had not employed the beneficiary, nor could it establish that it had paid him a salary at or above the proffered wage. We further concluded that as the petitioner had not submitted copies of the annual reports, federal tax returns or audited financial statements required to satisfy the requirements at 8 C.F.R. § 204.5(g)(2), it could not establish that it had the net income or net current assets to pay the proffered wage. While the record was found to contain a 2007 IRS Form 1120S for the petitioner's parent company, and payroll information for the beneficiary that indicated he had worked for in 2008 and

[1] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

through February 15, 2009, the AAO found that these records could not be used to establish the petitioner's ability to pay the proffered wage. We also determined that the statements submitted by a Vice President of Finance for the petitioner and for concerning willingness to cover the petitioner's operating costs, including salaries, were not proof of a legally-binding commitment on the part of to pay the proffered wage.

We now turn to a consideration of counsel's claims and the evidence submitted on motion.

As stated in our March 15, 2012 decision, the petitioner is a Limited Liability Corporation (LLC) formed under Virginia law, an entity legally separate and distinct from its owners. Because of this separate and distinct legal identity, we found that the assets of LLC members or of other enterprises or corporations could not be considered in determining the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.* 17 I&N Dec. 530 (Comm'r 1980). We noted that similar reasoning was reflected in *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), which stated that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

We note the April 9, 2012 letter written by as well as those he has written in support of the Form I-140 petition and on appeal, describing the financial relationship between the petitioner and and ongoing commitment to meeting the petitioner's operating expenses. However, statements do not establish a legal obligation on the part of to pay the proffered wage and no independent documentation of such an obligation is found in the record. Although counsel asserts that the decision in *Full Gospel* allows us to consider the financial resources of in the absence of a legal agreement establishing its commitment to meeting the petitioner's financial obligations, her assertions in this regard are unpersuasive. As discussed on appeal, the decision in *Full Gospel* does not bind us in this matter and, moreover, is distinguishable from the present case. Therefore, in the absence of any documented legal obligation on the part of to meet the proffered wage, the AAO continues to find that the petitioner cannot rely on its parent company's financial resources to satisfy the requirements at 8 C.F.R. § 204.5(g)(2).

On motion, counsel also contends that the totality of the petitioner's own financial circumstances establishes its ability to pay the proffered wage, submitting a 2011 IRS Form W-3 and IRS Form W-2 Registers for 2008 and 2011, which, as previously indicated, reflect that the petitioner employed 32 individuals in 2008 who earned a total of $2,144,018.62 and 33 individuals in 2011 to whom it paid a total of $1,627,902.94. She asserts that pursuant to *Sonegawa*, the preceding evidence leaves "little doubt" that the petitioner can meet an additional wage obligation of $43,337 per year, which is less than 2.1 percent of its payroll. [2]

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[2] As indicated in our March 15, 2012 decision, the petitioner has filed four employment-based immigrant visa petitions, including the present case, and is, therefore, required to establish its continuing ability to pay the combined wages of all four individuals. The petitioner has not addressed this issue on motion.

The AAO acknowledges that, pursuant to *Sonegawa*, we may, at our discretion, consider evidence relevant to a petitioner's financial circumstances outside its net income or net current assets where its ability to pay is marginal or borderline. Such consideration, however, is reliant on the petitioner providing sufficient financial documentation to support such an analysis.[3]

In *Sonegawa*, the Regional Commissioner considered an immigrant visa petition which had been filed by a small "custom dress and boutique shop" that had been in business for more than 11 years and had routinely earned gross annual income of approximately $100,000. During the year in which the petition was filed, the petitioner had changed business locations, paying rent on both the old and new locations for five months. It also faced significant moving costs and was unable to conduct regular business for a period of time. After determining that the beneficiary's annual wage of $6,240 was considerably in excess of the petitioner's net profit of $280 for the year of filing, the District Director denied the petition. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's inadequate net income, the Regional Commissioner granted the petition, looking beyond its uncharacteristic business loss and finding that its expectations of continued business growth and increasing profits were reasonable.

Unlike the petitioner in *Sonegawa*, who presented evidence that its business had routinely grossed $100,000 per year over an 11-year period, the petitioner in the present case has submitted financial evidence limited to employment figures and wages for 2008 and 2011, and unaudited financial statements reflecting its net income/net loss for 2007 and 2008. These documents do not satisfy the evidentiary requirements of the regulation at 8 C.F.R. § 204.5(g)(2). Neither do they establish the petitioner's financial history since it began business operations in 2001. We further note that the petitioner's reported wage expenses for 2008 and 2011 are not reliable proof of an ability to pay the proffered wage.

The petitioner in the present case has also submitted no evidence to establish its business's reputation or its success within its industry, as did the petitioner in *Sonegawa*. It has further failed to document any unusual business expenditures or losses that would explain the net loss of $1,915,926 reported in its unaudited 2008 internal income statement. Accordingly, we do not find the record to contain sufficient evidence to establish that the totality of the petitioner's circumstances demonstrate a continuing ability to pay the beneficiary the proffered wage.

Counsel contends that in reaching this determination, the AAO is holding the petitioner to a higher standard of proof than the preponderance of evidence standard articulated in *Matter of Chawathe*, 25 I&N Dec. at 386 and in *Matter of E—M—*, 20 I&N Dec. at 77. While we acknowledge counsel's concerns in this regard, they are not supported by the record. The assertions of counsel do not

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[3] The AAO notes counsel's submission of prior unpublished AAO decisions, but will not discuss them here. As indicated in our March 15, 2012 decision, these decisions are unpublished and, therefore, are not binding on the AAO. Moreover, each is based on the evidence of record in specific proceedings and, therefore, may be distinguished from the present matter.

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).

Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E—M—, supra*. The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Id.*

In the present case, the petitioner has submitted none of the financial evidence required by the regulation at 8 C.F.R. § 204.5(g)(2) to establish an ability to pay the proffered wage, i.e., annual reports, federal tax returns or audited financial statements. Although the regulation also indicates that additional financial evidence may be submitted by a petitioner or requested by USCIS, the submission of such documentation is not a substitute for the required financial records. Moreover, the evidence provided by the petitioner concerning its financial situation is limited in its scope and reliability, and, further, does not address the totality of its circumstances pursuant to *Sonegawa*. Accordingly, the AAO finds that the petitioner has failed to establish its ability to pay from the priority date onwards.

Beyond the decision of the director, we also note that a review of USCIS records indicates that subsequent to the petitioner's filing of the instant appeal, its parent company, [redacted] filed a Form I-140 on behalf of the beneficiary, which was approved as of October 25, 2012, and that the beneficiary has applied for adjustment of status based on that petition.

Under 20 C.F.R. §§ 656.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). In light of M.C. Dean's filing of a Form I-140 on behalf of the beneficiary, it is no longer clear that the petitioner still intends to employ the beneficiary. Therefore, should the petitioner pursue the present matter, it will need to demonstrate in any future proceedings that its offer of employment to the beneficiary continues to be *bona fide.*

The new evidence submitted on motion does not establish the petitioner's ability to pay the proffered wage and the petitioner has failed to demonstrate that our March 15, 2012 decision was based on an incorrect application of law or policy. Therefore, our prior decision will be affirmed.

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 reopen and the motion to reconsider are granted and the decision of the AAO, dated March 15, 2012, is affirmed. The petition is denied.