(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

DATE: SEP 2 6 2013 Office: TEXAS 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:

SELF-REPRESENTED

INSTRUCTIONS

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
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on August 17, 2012. The petitioner filed a motion to reopen and a motion to reconsider the AAO decision. On June 27, 2013, the AAO granted the motions, withdrew its previous decision, and entered a new decision dismissing the appeal. The matter is now before the AAO on another motion to reopen and motion to 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 religious organization. It seeks to employ the beneficiary permanently in the United States as a teacher assistant, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). On June 27, 2013, the AAO dismissed the appeal, finding that the petitioner failed to overcome the director's decision that the petitioner has not established the continuing ability to pay the proffered wage of the beneficiary from the priority date. Beyond the decision of the director, the AAO also determined that the petitioner had not established that the beneficiary is qualified for the position offered, and that the petition is not supported by a *bona fide* job offer.

The record shows that the motion to reopen and motion to reconsider is properly filed and timely. The motion qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel requests that the AAO consider the "overall magnitude of the Petitioner's religious activity in its determination of the Petitioner's ability to pay the proffered wage." However, as set forth below, following consideration of the record on motion, the petition remains denied and the AAO's decision of June 27, 2013 is affirmed.

The AAO conducts appellate review on a *de novo* basis. *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]

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.

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[1] 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.

[2] The submission of additional evidence on motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As set forth in the AAO's previous decision, an 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.

The regulation 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 ETA Form 9089, Application for Permanent Employment Certification, 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on April 26, 2007. The proffered wage as stated on the ETA Form 9089 is $16,380 per year. The ETA Form 9089 states that the position requires 24 months in the job offered as a teacher assistant.

In determining the petitioner's ability to pay the proffered wage during a given period, the AAO previously examined whether the petitioner employed and paid the beneficiary during the relevant period. The petitioner provided the beneficiary's Forms W-2, Wage and Tax Statements, for 2007 through 2010 issued by the petitioner. However, for 2007 through 2010, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage from the priority date onwards. The petitioner's instant motion provided no new evidence regarding wages paid to the beneficiary.

In its June 27, 2013 decision, the AAO noted that on the labor certification, signed by the beneficiary on August 16, 2007, the beneficiary did not claim to have worked for the petitioner. The AAO also noted that the record contains a Form W-2 for the beneficiary issued by the petitioner in 2007, and a Form G-325A indicating that the beneficiary has worked for the petitioner since 2003 as a pastor, a different occupation than the position offered, a teacher assistant. The AAO determined that these inconsistencies cast doubt on the beneficiary's employment with the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing

to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). On motion, the petitioner fails to address these inconsistencies; therefore, the petitioner has failed to overcome the AAO's findings.

Further, while the petitioner submitted a Form 990 for 2007, the petitioner submitted unaudited profit and loss statements for 2008 through 2012. Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), the AAO concluded that the petitioner failed to establish it had sufficient net income or net current assets to pay the proffered wage for the years 2008 through 2012 because the petitioner failed to submit regulatory required evidence in response to the AAO's RFE. Further, the petitioner has sponsored multiple beneficiaries and failed to provide regulatory required evidence in response to the AAO's RFE, therefore the AAO found that the petitioner failed to demonstrate its ability to pay the proffered wage in 2007 also.

On motion, counsel asserts that the petitioner has the means to support the beneficiary. The petitioner submits a copy of a letter from the petitioner's accountant and audited financial statements for the year ending December 31, 2011. However, the September 7, 2012 letter from the petitioner's accountant appears to be a letter offering the accountant's services for a review of the petitioner's 2012 finances. While the letter is dated September 7, 2012, it appears to have been revised by the petitioner's president and signed on June 27, 2013. It is unclear whether these services were ever retained as an audited financial statement for 2012 was not provided on motion. The letter fails to provide any relevant information with which the AAO may analyze the petitioner's ability to pay the proffered wage in 2012, or to state that the accountant audited the petitioner's financial statements.[3]

The petitioner's audited financial statements for 2011 provides a Statement of Activities, which lists "Deficiency in net assets, December 31, 2011" as $(3,996,393). In the Notes to Financial Statements, Note 2 - Summary of Significant Accounting Policies, Going Concern, the accountant states the following:

> The Church had a net loss of approximately $923 thousand for the year ended December 31, 2011, had a working capital deficit of approximately $78 thousand and liabilities in excess of net assets of approximately $4.0 million at December 31, 2011. The Church's ability to continue is limited without continued financial support from donors and its existing members. These matters raise substantial doubt about the Church's ability to continue as a going concern.

Based on the above, the petitioner does not have the ability to pay the beneficiary the proffered wage in 2011. The petitioner reports negative net income, working capital, and assets. The accountant further indicates that the petitioner has continued to experience "recurring losses." The accountant,

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[3] As stated in the AAO's prior decision, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

in Note 2, also states that the petitioner does not report on going support from its parishioners, but rather that the petitioner "had no unconditional or conditional promises to give as of December 31, 2011." As noted by the accountant, the petitioner's reliance on financial support from donors raise concerns regarding the overall viability of the petitioner's organization, and its continuing ability to pay the proffered wage onwards. Further, the petitioner has failed to submit regulatory required evidence of its ability to pay the proffered wage for 2008 through 2010, and 2012. Therefore, the petitioner has failed to establish it had sufficient net income or net current assets to pay the proffered wage from the priority date onwards.

On motion, counsel requests that the AAO "consider the overall magnitude of the petitioner's religious activity in its determination of the Petitioner's ability to pay the proffered wage." 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 AAO's previous decision, the petitioner has failed to demonstrate that it paid the beneficiary the proffered wage for each year since the priority date, nor has it demonstrated sufficient net income or net current assets to pay the proffered wage in 2008 through 2012. The petitioner failed to provide any regulatory-prescribed evidence of its ability to pay the proffered wage in 2008 through 2010, and in 2012. On motion, the petitioner submits a printout from its website describing its pastors, and a list of its congregations around the world. While this evidence demonstrates the petitioner's leaders and its current size, the petitioner has failed to include evidence to document its historical growth since its inception in 1995, preventing the AAO from determining whether the petitioner's growth is increasing, decreasing or remaining stable. Further, the petitioner failed to demonstrate that its inability to pay the proffered wage was based on the occurrence of any uncharacteristic business expenditures or losses, such as those in *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.

It is further noted that in its June 1, 2012 Request for Evidence (RFE), the AAO requested that the petitioner submit information regarding the multiple I-140 petitions filed on behalf of other beneficiaries. In response to the AAO's RFE, the petitioner referenced an exhibit, but the evidence in the record failed to contain any information regarding any other I-140 petition filed by the petitioner on behalf of other beneficiaries, or any H-1B worker the petitioner has employed since the priority date of the instant petition. The AAO's "2013" decision discussed the petitioner's failure to provide this evidence. On motion, the petitioner again failed to address this issue or submit the requested evidence. The 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). Accordingly, the AAO cannot properly analyze the petitioner's ability to pay the proffered wage of the instant beneficiary or other beneficiaries. Further, as previously stated, because the petitioner has not provided regulatory required evidence of its ability to pay for all years, the AAO cannot analyze the full extent of the petitioner's ability to pay even if it had provided the evidence of the petitioner's additional beneficiaries as required in the AAO's RFE. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date onwards.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Even if the petitioner had demonstrated its ability to pay, the petition could not be approved. As stated in its previous decision, beyond the decision of the director,[4] the AAO found that the petitioner has not established that the beneficiary is qualified for the offered position, or that the petition is supported by a *bona fide* job offer.

In its previous decision, the AAO determined that the petitioner has not established that the beneficiary is qualified for the offered position. In the instant case, the labor certification states that the offered position requires 24 months in the job offered as a teacher assistant. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a teacher assistant at [redacted] from August 17, 1999 through February 23, 2002.

[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [redacted] While there is an attached translation, the translator states that she is "fluent in English and Spanish," not Portuguese. As previously noted by the AAO, the translation of the letter does not comply with the terms of 8 C.F.R. § 103.2(b)(3). The letter failed to contain a description of the beneficiary's experience and fails to list the author's name underneath the signature. As this letter did not meet the regulatory requirements, the AAO informed the petitioner of these deficiencies in its June 1, 2012 RFE.

In response to the AAO's RFE, the petitioner submitted a second letter from the same organization. The AAO's June 27, 2013 decision stated that the letterhead appears to be photocopied onto the second letter as it is located in a substantially different location on the page. In addition, the second letter is written in English by the same person who wrote in Portuguese previously, and now lists duties that mirror labor certification duties in their order and word choice. These discrepancies cast serious doubt on the credibility of the letter. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The AAO stated that, in any future filings, the petitioner must overcome these inconsistencies with independent, objective evidence of the beneficiary's claimed employment experience, such as payroll, government or ministry records. On motion, the petitioner failed to address these inconsistencies or to submit independent, objective evidence. Accordingly, the petitioner has failed to overcome the AAO's findings.

Therefore, the evidence in the record does not establish that the beneficiary possesses the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Also beyond the decision of the director, in its previous decision, the AAO concluded that the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the record contains a Form G-325A, Biographic Information, signed by the beneficiary on August 16, 2007. On his Form G-325A, the beneficiary states that he was employed by the petitioner as a pastor from August 2003 to the present (2007). This is inconsistent with the beneficiary's Form 9089, Part K, where the beneficiary failed to state that he ever worked for the petitioner, or any other employer from 2003 onwards. As the beneficiary reports on Form G-325A, which was signed under penalty of perjury, that he is employed as a pastor, and not as a teacher's assistant, it appears that the petitioner may not intend to employ the beneficiary in the position offered. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In its previous decision, the AAO

stated that, in any further filings, the petitioner must establish that a *bona fide* job offer exists. On motion, the petitioner did not address this inconsistency or submit independent, objective evidence. Accordingly, the petitioner has failed to overcome the AAO's findings. The petitioner has failed to establish that the instant petition is based on a *bona fide* job opportunity available to U.S. workers.

Therefore, the AAO finds that on motion the petitioner failed to establish the continuing ability to pay the proffered wage of the beneficiary from the priority date, the petitioner failed to establish that the beneficiary is qualified for the position offered, and the petitioner failed to establish that the petition is supported by a *bona fide* job offer.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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). The petitioner has not met that burden. Accordingly, the motions will be granted and the previous decision of the AAO will be affirmed.

ORDER: The motions are granted. The previous decision of the AAO, dated June 27, 2013, is affirmed. The petition remains denied.