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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 2 3 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or a Professional pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center (Director). The approval was subsequently revoked by the Director. The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The case is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be granted, the motion to reconsider will be dismissed, and the dismissal of the appeal will be affirmed.

The petitioner describes itself as a non-profit religious organization. On July 31, 2006, it filed a Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary permanently in the United States as a "pastoral assistant" and to classify her as a professional or a skilled worker under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed with the Department of Labor (DOL) on July 19, 2002, and certified by the DOL (labor certification) on April 4, 2006.[2]

The petition was initially approved on August 16, 2006.

On October 1, 2013, however, the Director revoked the approval of the petition[3] on two grounds:

1. The petitioner failed to establish its continuing ability to pay the proffered wage of the job offered from the priority date of the petition (July 19, 2002)[4] up to the present.

2. The evidence of record failed to establish that the beneficiary had at least two years of qualifying experience as a pastoral assistant, as required by the labor certification.

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[1] Under section 203(b)(3)(A)(i) of the Act preference classification may be granted to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] While the petitioner identified itself as [redacted] on the Form I-140, it identified itself as [redacted] on the Form ETA 750. Throughout this proceeding the petitioner has been inconsistent in its self-identification – sometimes using [redacted] and sometimes using [redacted] in its title.

[3] The Director had issued a Notice of Intent to Revoke (NOIR) on May 18, 2012. The petitioner responded to the NOIR with a letter from counsel and additional documentation.

[4] The priority date of the petition is the date the underlying labor certification application was received for processing at the DOL. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner filed an appeal, supplemented by a brief from counsel and additional documentation. In addition to contesting the two grounds for revocation in the Director's decision, counsel asserted that revocation of the approved I-140 petition was erroneous because the petitioner had a new job offer from a different employer and an unadjudicated Form I-485 application (for adjustment to permanent resident status) that was pending for more than 180 days at the time the NOIR was issued, which precluded the revocation of the I-140 petition in this case under the terms of the American Competitiveness in the 21st Century Act of 2000 (AC-21). Counsel quoted excerpts from two internal documents of U.S. Citizenship and Immigration Services (USCIS) – the "Yates Memorandum" of August 4, 2003 and the Adjudicator's Manual – and claimed that their interpretation of AC-21 allowed for the revocation of an approved I-140 petition, if the beneficiary thereof was porting to a new employer and had an I-485 application pending for more than 180 days, only if fraud was found in connection with the original approval of the I-140 petition. Since there was no fraud finding in the revocation notice in this case, counsel contended that the revocation of the approved I-140 petition was inconsistent with AC-21 and USCIS policy.

On September 22, 2014, we issued a decision dismissing the appeal. In addition to affirming the two grounds for denial in the Director's decision, we found no merit in the petitioner's argument that AC-21 and USCIS policy precluded the revocation of the I-140 petition absent a finding of fraud. We noted that the authority of USCIS to revoke a previously approved petition is grounded in section 205 of the Act and is unaffected by AC-21. We also discussed the federal court case of *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), whose facts were similar to the instant case, and quoted the court's observation that the 2003 USCIS memo cited by the petitioner "concerns the processing of I-485 applications, not the conditions under which the agency may revoke its previous approval of an I-140 petition." 571 F.3d at 889. (The court's observation applies equally to the excerpted language from the USCIS Adjudicator's Manual.) Based on the entire record we concluded that the Director had good and sufficient cause to revoke the approval of the petition. Finally, we questioned whether the petitioner, in the person of [redacted] actually signed the Form I-140, the Form ETA 750, and the Form G-28 in the record. We stated that the signatures on the three documents did not match and cited information from the petitioner's website indicating that Mr. [redacted] was residing in Botswana at the time the Form ETA 750 was signed in 2002.

On October 24, 2014, the petitioner filed a motion to reopen and a motion to reconsider, accompanied by a brief from counsel and supporting documentation. The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

> 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 [USCIS] 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.

As further provided in 8 C.F.R. § 103.5(a)(4):

> A motion that does not meet applicable requirements shall be dismissed.

In the motion brief counsel asserts that we should vacate our findings on all four of the issues discussed in our previous decision dismissing the appeal. In support of the brief the petitioner has submitted new documentation on three of the issues, including its ability to pay the proffered wage, the beneficiary's experience, and the signatures on the Forms G-28, I-140, and ETA 750. Based on the petitioner's current submission, we find that the requirements for a motion to reopen have been met. Accordingly, we will grant the motion to reopen. At the same time, we find that the requirements of a motion to reconsider have not been met because the petitioner has not established that our decision dismissing the appeal was incorrect in any respect based on the evidence of record at that stage of the proceeding. Accordingly, we will dismiss the motion to reconsider.

For the reasons discussed hereinafter, we find that the petitioner has failed to overcome all of the bases for revocation discussed in our dismissal of the appeal. Therefore, we affirm our decision to leave the Director's notice of revocation intact.

The procedural history of this case, in particular our previous decision dismissing the appeal of the Director's notice of revocation, is incorporated into the instant decision. Further elaboration of the procedural history, and our prior decision, will be made only as necessary. We will address the issues in the order they were discussed in our previous decision.

Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part as follows:

> *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 Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the Form ETA 750 was accepted by the DOL on July 19, 2002. The

proffered wage, as stated in Part A, Box 12, on the Form ETA 750, is $10.50 per hour ($21,840 per year, based on a work year of 2,080 hours).

There is no evidence in the record that the beneficiary has ever been employed and compensated by the petitioner. Thus, the petitioner cannot establish its ability to pay the proffered wage on the basis of wages actually paid to the beneficiary.

At the time of our previous decision the petitioner had submitted copies of its federal tax returns (IRS Form 990, Return of Organization Exempt from Income Tax) for the years 2002, 2003, and 2004. Those were the only documents in the record among the three alternative types of required evidence identified in the regulation at 8 C.F.R. § 204.5(g)(2). As discussed in our decision, the tax returns stated surpluses in 2002 and 2004 of $76,833 and $33,780, respectively, but a deficit in 2003 of -$68,739. No tax returns were submitted for any years after 2004. Thus, the only years for which the petitioner established its ability to pay the proffered wage based on surpluses recorded in its tax returns were 2002 and 2004. For 2003 and every year from 2005 onward the petitioner failed to establish its ability to pay the proffered wage based on the surpluses recorded in its tax returns. As noted in our previous decision, the net current assets (or liabilities) of a non-profit organization like the petitioner cannot be determined on the basis of its IRS Form 990 for years prior to 2008. Therefore, the evidence of record did not establish the petitioner's ability to pay the proffered wage in any year based on its net current assets. We concluded in our previous decision that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward based on either its surpluses or its net current assets over the years.

The petitioner has now submitted copies of three additional federal tax returns (IRS Form 990) for the years 2005, 2006, and 2007. The returns recorded surpluses those years in the amounts of $271,290 (2005), $121,917 (2006), and $115,440 (2007). Thus, the petitioner has now established its ability to pay the proffered wage in the years 2002 and 2004-2007 based on its surpluses in those years. However, the petitioner has still not established its ability to pay the proffered wage in 2003 based on a surplus because it had no surplus that year, but rather a deficit of more than $68,000. Nor has the petitioner established its ability to pay the proffered wage after 2007 based on annual surpluses because it has not submitted any tax returns for the years from 2008 onward. The evidence of record still does not establish the petitioner's ability to pay the proffered wage in any year based on its net current assets. As explained above, the petitioner's net current assets (or liabilities) cannot be determined on the basis of its tax returns for any of the years 2002-2007, and no returns for subsequent years have been submitted. Nor have any audited financial statements been submitted for any year from 2002 onward, which would show its net current assets year by year.

Thus, the evidence of record does not establish the petitioner's ability to pay the proffered wage in 2003 or in the years from 2008 onward based on its surpluses or its net current assets in those years.

USCIS may also 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).[5] In the instant case, counsel claims that the petitioner has established a historical growth pattern based on the surpluses recorded in its federal tax returns. We do not agree. The petitioner's tax returns actually show considerable fluctuation during the years 2002-2007. From a surplus of $76,833 in 2002, the petitioner dropped to a deficit of $68,739 in 2003, and then recovered to a modest surplus of $33,780 in 2004. The surplus increased dramatically to $271,290 in 2005, before dropping sharply to $121,917 in 2006 and $115,440 in 2007. The gyrations in that six-year period do not show a pattern of historical growth. Moreover, there is no evidence whatsoever of the petitioner's financial condition since 2007, since no further tax returns have been submitted. The petitioner has provided no information as to how long it has been in operation, its number of employees, its reputation, or any other criteria by which to measure its overall financial condition. Thus, the petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates an ability to pay the proffered wage from the priority date up to the present.

For all of the reasons discussed in this decision, the evidence of record does not establish the petitioner's continuing ability to pay the proffered wage from the priority date of July 19, 2002, up to the present. On this ground alone, the petition cannot be approved.

Beneficiary's Qualifications for the Job Offered

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 103.2(b)(l), (12). *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In this case, the Form ETA 750

[5] 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.

specifies that a minimum of two years of experience in the job offered is required to qualify for the proffered position of pastoral assistant. No specific education or training is required. According to the labor certification the beneficiary met the experience requirement for the job offered by working as a full-time pastoral assistant for India, from July 1996 to September 1999.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or the training received.

When it filed the instant petition in 2006, the petitioner submitted the copy of an undated letter signed by Mr. , on the letterhead of which stated that the beneficiary was employed by the organization as a full-time pastoral assistant from July 1996 through September 1999 at a monthly pay rate of 4,500 rupees, and described her job duties. This evidence was supplemented by another undated letter signed by a Mr. also on the letterhead of which was submitted in response to the Director's Notice on Intent to Revoke and further explained the nature of the beneficiary's work. In the revocation decision the Director found that neither of these letters complied with the substantive requirements of 8 C.F.R. § 204.5(g)(1) because the titles of the respective signatories, Mr. and Mr. were not identified. On appeal before the AAO the petitioner submitted new versions of the two letters from both dated October 25, 2013, and both signed by Mr. as Chairman. In our decision dismissing the appeal we noted that the new letters were virtually identical to the old letters and expressed doubt that Mr. actually wrote the letters (or that Mr. actually wrote one of the "originals"). We also noted that no independent, objective evidence of the beneficiary's employment by had been submitted, such as paystubs or payroll records. In its current brief, dated October 22, 2014, counsel asserts that no paystubs or payroll records are available from that document the beneficiary's employment in the years 1996-1999 because no such records were kept. Counsel states that died four years ago, at which point Mr. took over his position as chairman, and that the experience letters from were based on templates prepared by the petitioner's counsel because neither Mr. nor Mr. are (were) native English speakers.

After reviewing the entire record in this proceeding, and the contents of the experience letters in detail, we are persuaded by a preponderance of the evidence that the beneficiary was employed by in India as a pastoral assistant in the years 1996-1999. We find, therefore, that the beneficiary meets the minimum experience requirement set forth in the labor certification to qualify for the job offered. Accordingly, we will withdraw the previous findings to the contrary by the office and the Director, and withdraw this ground for denying the petition.

American Competitiveness in the 21st Century Act (AC-21)

The petitioner offers no new argument(s) or evidence with respect to its AC-21 claim. As stated by counsel in its current brief, "[t]he previous argument from the appeal is incorporated herein without change." We fully considered the petitioner's "previous argument" in our prior decision dismissing the appeal, and find no reason to change our ruling in the current decision. Accordingly, we affirm our previous decision that AC-21 presents no legal or policy obstacles to the revocation of the petitioner's I-140 petition originally approved by the Director.

Signatures on the Forms I-140, G-28, and ETA 750

With regard to the questionable signatures on the above forms, counsel points out in its current brief that the Mr. cited in the petitioner's website as residing in Botswana at the time the Form ETA 750 was signed in 2002 was not the petitioner's president, but rather another individual, who was the petitioner's resident scholar ("alim") in Botswana. An excerpt from the petitioner's website has been submitted, dated July 24, 2012, which confirms that served as its resident scholar in Botswana during the years 1999-2004. Counsel notes that the petitioner's federal tax returns (IRS Form 990) for the years 2002-2007 all identify the address of its president, as located in the United States (New York State, to be specific). Thus, there was no geographical impediment to the signing of the Form ETA 750 by in 2002. An affidavit has also been submitted from dated October 22, 2014, who states that he signed the three forms at issue as the petitioner's president and "[t]hat any discrepancy in my signature's appearance was not purposeful but due to fatigue."

We have reviewed the signatures on the three documents again, and conclude that they are not so divergent in their features that they could not have come from the same individual.[6] Based on the current record, including the additional materials submitted in support of the current motion, discussed above, we are persuaded that the petitioner has established by a preponderance of the evidence that the signatures on the Forms I-140, G-28, and ETA 750 were produced by Accordingly, we will withdraw our previous finding that the approval of the petition was revocable for the additional reason that the petitioner failed to resolve inconsistencies concerning the signatures on the cited forms.

[6] The signatures on the Form I-140 and the Form G-28, both dated in 2006, appear quite similar in form, while the signature on the Form ETA 750, dated in 2002, differs somewhat from the other two (and also identifies as the petitioner's "director" rather than its "president"). However, none of the three signatures is legible as " and none of them contain so much as one clearly identifiable letter. Considering the nature of the signatures – scribbles rather than legible names – no firm conclusion can be drawn as to the likelihood of their coming from different individuals.

Conclusion

Based on the foregoing discussion, we determine that the petition is deniable on the following grounds:

1. The petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date up to the present, in accordance with 8 C.F.R. § 204.5(g)(2).

2. The petitioner has failed to establish that the provisions of AC-21 preclude the revocation of the initial approval of the petition.

Therefore, the Director's revocation of the initially approved petition will be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The motion to reopen is granted, and the motion to reconsider is dismissed. The findings of the Director and/or this office that the petitioner failed to establish the beneficiary's qualifications for the job offered, and whether the petitioner's president actually signed the Forms I-140, G-28, and ETA 750, are withdrawn. The findings of the Director and/or this office that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date up to the present, and that AC-21 does not preclude the revocation of the initial approval of the petition, are affirmed. The Director's revocation on October 1, 2013 of the approval notice of August 16, 2006, is affirmed.