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

[redacted]

DATE: JUN 1 2 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

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 AAO 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.

Thank you,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider the AAO's decision. The matter is again before the AAO. The motion to reopen is rejected and the motion to reconsider is granted. The director's decision is affirmed, and the petition remains denied.

The petitioner is an asphalt paving company. It seeks to employ the beneficiary permanently in the United States as an equipment operator/assistant foreman. 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 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. On May 19, 2009, the petitioner filed a Form I-290B, Notice of Appeal or Motion, of the director's decision to the AAO. On July 18, 2012, the AAO dismissed the petitioner's appeal under its authority for *de novo* review. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner did not have the ability to pay the prevailing wage, and dismissed the appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

In the instant case, the petitioner submits with the motion the following evidence not previously submitted: A copy of a Yates Memorandum; a letter from the petitioner dated August 13, 2012 stating the approximate number of employees and independent contractors employed by the petitioner for the years 2005 through 2011; a letter from the petitioner's two shareholders dated August 9, 2012 stating that they would forego their income to pay the beneficiary's wages; an updated letter from the petitioner's accountant dated August 13, 2012 regarding the petitioner's unappropriated retained earnings; copies of the beneficiary's Forms W-2, Forms 1099, and Forms 1040 U.S. Individual Tax Returns for 2008 through 2011; and copies of the petitioner's Forms 1120 U.S. Corporate Income Tax Return for 2008 through 2011.

The petitioner resubmits the following evidence on motion: a copy of the petitioner's accountant's letter dated May 11, 2009; copies of the beneficiary's Forms W-2, Forms 1099, and Forms 1040 U.S. Individual Tax Returns for 2004 through 2007; copies of the petitioner's Forms 1120 U.S. Corporate Income Tax Return for 2004 through 2007; and copies of the petitioner's bank account statements for January 1, 2004 through May 31, 2007.

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. The petitioner has submitted evidence with this motion that was originally requested by the AAO in a request for evidence (RFE) dated April 11, 2012. Additionally, counsel in his brief on motion, states, "[p]etitioner concedes that it did not provide the evidence as requested." As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted for the first time on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

As the petitioner did not present any new facts with supporting documentation not previously submitted, the petitioner has not established a proper basis for a motion to reopen.

In the instant case, the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy. Therefore, the petitioner's motion to reconsider is granted.

On motion, counsel argues that the evidence requested by the AAO in the RFE was not required as per a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), because the beneficiary was paid at least the proffered wage for the years 2008 through 2011, and the AAO already had "the company's entire financial history, including its tax returns from 1996 through 2007."

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum.[2] However, counsel's interpretation of the language in that memorandum is overly broad and does not comport

[2] The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski,* 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date, which is 2004. Thus, the petitioner must show its ability to pay the proffered wage not only from 2008 to 2011, when counsel claims it actually began paying the proffered wage rate, but beginning in 2004 and continuing until the beneficiary obtains lawful permanent residence status.

Counsel argues that the Forms W-2 show that the petitioner has paid the beneficiary in excess of the proffered wage from 2008 to 2011, and thus, are *prima facie* evidence of the petitioner's ability to pay the proffered wage. However, the beneficiary's Forms W-2 and Forms 1099 for 2008 through 2011 were not submitted in response to the AAO's RFE. As the Forms W-2 and Forms 1099 were not submitted previously even though requested, the AAO declines to consider them in the petitioner's ability to pay the proffered wage. Even if considered, however, the petitioner must demonstrate its ability to pay the proffered wage from the priority date in 2004.

Counsel further argues that the petitioner has shown the ability to pay the proffered wage as evidenced by its tax returns submitted for the years 1997 through 2011.[3] As noted in the AAO's RFE, the beneficiary's Forms W-2 relate to the calendar year, whereas the petitioner's tax returns relates to a fiscal year which runs from April 1 to March 31. Thus, determining the petitioner's ability to pay is not simply a matter of determining that the beneficiary was paid the full proffered wage in any of the relevant years, or of combining the net income from the petitioner's tax returns and the wages listed on the beneficiary's Forms W-2. It is not clear how much, if any, of the petitioner's net income is attributable to the calendar year; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage in any of the relevant years. The record does not contain any evidence establishing that enough of this net income was available during the calendar year to pay the beneficiary, and the record also does not contain evidence, as requested in the AAO's RFE, to establish the beneficiary's monthly wages in the years since the priority date.

Counsel also requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date in 2004. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Additionally, it is impossible to ascertain to which portion of the petitioner's fiscal year the beneficiary's wages are attributable since the beneficiary is paid according to the calendar year.

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[3] It is noted that, although requested in the AAO's RFE dated April 11, 2012, the petitioner did not submit its tax returns for 2008 through 2011 until submission of the instant motion. Therefore, only the petitioner's tax returns for the years 2004 through 2007 will be considered.

The AAO notes that the Forms W-2 and Form 1099 issued to the beneficiary contain three different social security numbers (SSN). The SSN on the beneficiary's 2004 and 2005 Forms 1099 does not match the SSN on the Form 1099 for 2006 or the SSN listed on the beneficiary's Form W-2 for 2008, and Forms W-2 and Forms 1099 for 2009, 2010, and 2011. Additionally, the Forms 1099 for 2007 and 2008 do not contain a SSN. Further, it is noted that on the petition, in part 3, no SSN is listed for the beneficiary.[4] Therefore, the actual recipient of the wages paid is in question, and the AAO cannot consider any of the Forms W-2 or Forms 1099 as evidence of wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent

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[4] Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 25, 2013).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

objective evidence pointing to where the truth lies. *Id.* This issue must be addressed in any further filings.

On motion, counsel argues that the petitioner's bank account statements for the period January 1, 2004 through May 31, 2007 should be considered in establishing the petitioner's ability to pay the proffered wage. Counsel states that "[i]t is impossible to show which portion of the company's taxable income is attributable to the calendar year." Counsel argues that the petitioner's bank account statements show that the company had enough "cash on hand" to pay the proffered wage in any given month. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate the petitioner's ability to pay the proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

Counsel also contends that the AAO erred in not considering the petitioner's unappropriated retained earnings should be considered in establishing its ability to pay the proffered wage. To support this contention, the petitioner submitted a letter from its accountant dated May 11, 2009, and an updated letter from its accountant dated August 13, 2012. In both letters, the accountant states that the petitioner has reported unappropriated retained earnings on its balance sheets since 1997. Retained earnings are a company's accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. The record does not demonstrate that the petitioner's unappropriated retained earnings are cash or current assets that would be available to pay the proffered wage. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage from the priority date onwards.

Counsel also argues that the totality of the circumstances should be evaluated in determining 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.

In the instant case, the petitioner has not demonstrated that it has paid the beneficiary the proffered wage for each year since the priority date, nor has it demonstrated sufficient net income or net assets to pay the proffered wage in all relevant years. Counsel contends that the company has continually grown since 1995. However, the record does not contain any evidence to support this contention. The petitioner also failed to include any evidence of the petitioner's reputation within the industry, or 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.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reconsider is granted. The previous decision of the AAO is affirmed. The petition remains denied.