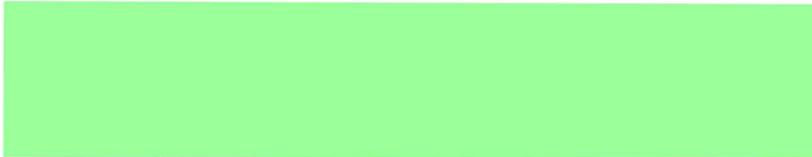
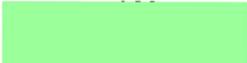




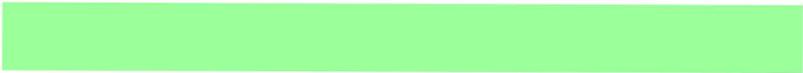
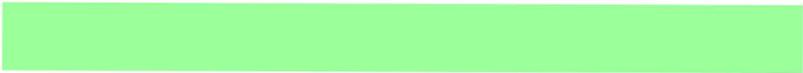
U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date: Office: TEXAS SERVICE CENTER FILE: 

MAR 27 2013

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:

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:** On November 28, 2011 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director). The petitioner has now filed a motion to reopen and a motion to reconsider the AAO's decision. The motions will be granted, and the appeal will be reconsidered. Upon reconsideration, the appeal will be dismissed, and the AAO's previous decision will remain undisturbed.

The petitioner is a law office. It seeks to employ the beneficiary permanently in the United States as a legal 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).<sup>1</sup> 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). We dismissed the appeal and denied the petition, finding that the petitioner did not establish the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives lawful permanent residence.

On motion to reopen/reconsider, counsel for the petitioner argues that the AAO failed to consider all of the evidence submitted, i.e. unaudited financial statements, as evidence of the petitioner's ability to pay. Counsel states that both the U.S. Citizenship and Immigration Services (USCIS) SOP (Standard Operating Procedures)<sup>2</sup> and the Yates Memo<sup>3</sup> do not prohibit USCIS from accepting and considering evidence such as unaudited financial statements as proof of the petitioner's ability to pay. Counsel further highlights the following sentence from 8 C.F.R. § 204.5(g)(2):

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.

Based on the above, counsel accuses the AAO of abusing its discretion and authority and incorrectly applying the law to this case.

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<sup>1</sup> 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.

<sup>2</sup> By USCIS SOP, counsel is referring to the Adjudicator's Field Manual, Section 22.2 Employment-based Immigrant Visa Petitions (Form I-140). The Adjudicator's Field Manual is available online and can be accessed at <http://www.uscis.gov> under Immigration Handbooks, Manual, and Guidance (last accessed March 7, 2013).

<sup>3</sup> By Yates Memo, counsel is referring to the Interoffice Memorandum dated May 4, 2004 from William R. Yates to Service Center Directors, document number HQOPRD 90/16.45. The Yates Memo is available online and can be accessed at <http://www/uscis.gov> under Policy Memoranda (last accessed March 7, 2013).

The record shows that the motions are properly filed, timely and supported by new evidence. The AAO conducts this 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 in this proceeding.<sup>4</sup>

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. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the motion is not accompanied by new facts and supported by any corroborating documentary evidence. However, it states the reasons for reconsideration, and counsel argues that the AAO erroneously applied the law to this case. The motion to reconsider is granted, and the appeal will be reconsidered.

Upon *de novo* review, we find that the AAO previous decision is based on the correct application of law and regulations. The AAO acknowledged the submission of the unaudited financial statements into the record but declined to accept them as reliable. 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.

In this case, none of the financial statements submitted to demonstrate the petitioner's ability to pay was audited. Therefore, we cannot accept these unaudited financial statements as reliable. In addition, the record does not contain any evidence showing that the figures reported on the unaudited financial statements somehow reflect separate additional net income or net current assets that were not reflected on the petitioner's tax returns.

Moreover, counsel's insistence on the AAO to follow the Yates memo and USCIS SOP is not persuasive and is misplaced, as neither the Yates memo nor the USCIS SOP concerning the determination of the petitioner's ability to pay is binding. USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on

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<sup>4</sup> The submission of additional evidence on appeal 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 appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006.

The AAO is only 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedure Act, even when they are published in private publications or widely circulated).

In the present case, the proffered wage as indicated on the Form ETA 750 is \$38,000 per year. The priority date, or date the Form ETA 750 was filed for processing and accepted by the DOL is December 2, 2002. The record does not contain any evidence that the petitioner employed the beneficiary. However in support of its ability to pay, the petitioner submitted copies of Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 2002 through 2006.

In its 2011 decision, the AAO was not persuaded that the petitioner had established the ability to pay, because the petitioner did not have sufficient net income or net current assets to cover the full proffered wage of the beneficiary from 2002 to 2006. As no new evidence as prescribed by the regulations has been submitted, the AAO affirms its prior finding that the petitioner has failed to establish the ability to pay the proffered wage from the priority date onwards.

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 met that burden. For the reasons stated above, the appeal must be dismissed.

**ORDER:** The motions to reopen/reconsider are granted; upon reconsideration, the appeal is dismissed.