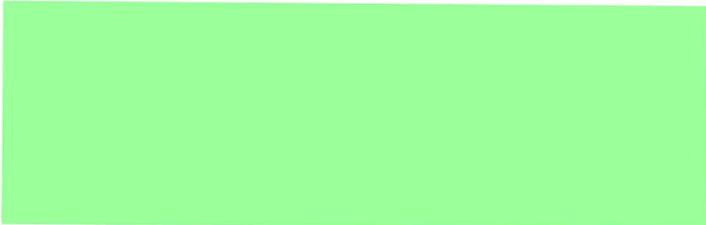


(b)(6)

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



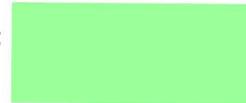
U.S. Citizenship  
and Immigration  
Services



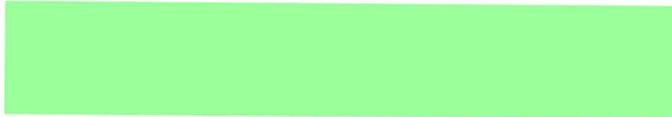
DATE: **MAY 28 2013**

Office: TEXAS SERVICE CENTER

FILE:



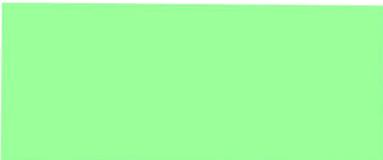
IN RE: Petitioner:



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:



**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,

  
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 reconsider the AAO's decision. The matter is again before the AAO. The motion to reconsider is granted. The director's decision is affirmed, and the petition remains denied.

The petitioner is a school. It seeks to employ the beneficiary permanently in the United States as a teacher (head-religious education). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 June 16, 2009, the petitioner filed a Form I-290B, Notice of Appeal or Motion, of the director's decision to the AAO. On November 6, 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 that the petitioner had not established that the beneficiary is qualified for the offered position. The AAO dismissed the appeal accordingly.

8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

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.

On motion, the petitioner submits a copy of Decree-Law 1051/69 Decree Law N. 1.051 of October 21, 1969 with certified English translation; a copy of the beneficiary's bachelor's degree in religious education from [REDACTED] with certified English summary translation; and a copy of the stamps from the back of the beneficiary's diploma. The stamps are not accompanied by a certified English translation.

On motion, counsel for the petitioner argues that the beneficiary's degree in religious studies is from a recognized and/or accredited institution. Counsel argues that the evaluator erred by not taking into account the stamps on the back of the beneficiary's diploma which, according to counsel, establish that the institution is recognized and/or accredited. In support of this contention, counsel refers to a stamp on the back of the beneficiary's diploma which, according to counsel, references a Brazilian decree "N.1501 of October 21, 1969."

The record contains an evaluation of the beneficiary's bachelor's degree in religious education from [REDACTED]. The evaluation from [REDACTED] dated August 19, 2004, states that "[t]he study was completed at a religiously affiliated institution that does not have the equivalent of regional accreditation." The record does not contain any evidence that the evaluator disregarded any information provided by the beneficiary, or that the stamps on the back of the beneficiary's degree establish that the institute has received the equivalence of regional accreditation.

The decree provided by the petitioner with certified English translation does not confer accreditation on the institute. Counsel's contention on motion that the decree establishes that the institute has the equivalence of regional accreditation contradicts the evaluator's conclusion. There is no independent, objective evidence submitted to resolve these contradictions. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (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.* at 592.

On motion, counsel asserts that the petitioner does not file tax returns because it is exempt. Additionally, counsel asserts that it is cost-prohibitive to provide audited financial statements because the petitioner is a small non-profit entity.

The record contains the following evidence: copies of bank account statements for five different bank accounts with [REDACTED] for 2006, 2007, 2008, and 2009; the beneficiary's Forms W-2 for 2007 and 2008; profit and loss statements for 2007 and 2008; copies of the beneficiary's earning statement for the period March 15, 2009 through May 30, 2009; a letter from the treasurer of the petitioner dated July 9, 2009; and a letter from the accountant and the president of the petitioner dated April 21, 2009.

On motion, counsel argues that too much emphasis is placed on the regulation at 8 C.F.R. § 204.5(g)(2) and that a more appropriate approach is to examine the totality of the circumstances in evaluating the petitioner's ability to pay the proffered wage. 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 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). The AAO cannot ignore the regulation at 8 C.F.R. § 204.5(g)(2).

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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, counsel argues that the petitioner's profit and loss statements and bank account statements should be considered in evaluating the totality of circumstances. The petitioner's profit and loss statements show a net income of \$14,655.09 for 2007 and a net income of \$24,312.54 for 2008. However, in a letter from the petitioner's treasurer dated April 21, 2009, the treasurer states that the petitioner's net income is \$192,845.65 for 2007 and \$97,074.41 for 2008. The beneficiary's Forms W-2 show that the beneficiary was paid \$18,915 in 2007 and \$7,917 in 2008. The difference between the proffered wage and the wage actually paid for 2007 is \$7,168.20 for 2007 and \$18,166.20 for 2008.

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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. 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.

Counsel also contends that the petitioner's bank account statements should be considered in evaluating the totality of the circumstances. The AAO notes that the petitioner has submitted bank statements for five different bank accounts with the same bank for the years 2006 through 2009. The petitioner did not submit bank statements for each account for each year from 2006 through 2009. It is difficult to ascertain if the petitioner has maintained each account for each year. Additionally, it is unclear whether the funds in the accounts are allocated for different purposes, or if the funds in the accounts can be used for any purpose. The AAO notes that one of the accounts is labeled "mission account" which indicates that the funds in the account may be allocated for a specific purpose. However, absent any independent, objective evidence to clarify the existence of the different bank accounts, the evidence cannot be considered.

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. The petitioner also failed to include any evidence of historical growth, 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.