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: JAN 0 3 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motions to reopen and reconsider will be granted. The previous decision of the AAO will be affirmed. The petition will remain denied.

The petitioner describes itself as a charitable organization. It seeks to permanently employ the beneficiary in the United States as a controller (comptroller). The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The director determined that the record did not establish that the beneficiary held a Master's degree from an accredited university or college in the United States, as required for classification as an advanced degree professional under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). He further concluded that the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage. The director denied the petition accordingly.

On appeal, the AAO also found that the beneficiary's Master's degree from an unaccredited university did not satisfy the requirements of the labor certification or establish her eligibility for classification as an advanced degree professional under section 203(b)(2) of the Act. It further determined that the evidence of record failed to demonstrate the petitioner's ability to pay the beneficiary the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). The AAO based its July 31, 2013 dismissal of the appeal on both these findings, with each identified as an independent and alternate basis for the denial of the visa petition.

The petitioner now submits a motion to reopen and a motion to reconsider, contending that in requiring the beneficiary's degree to have been awarded by an accredited U.S. college or university, the AAO has impermissibly expanded the Act. The petitioner also asserts that the AAO has erred in finding that the record does not establish its ability to pay the proffered wage and submits additional documentation in support of this claim.

Based on its review of the record, the AAO grants the petitioner's motions and will reconsider its prior decision in this matter, limiting its reconsideration solely to the issues raised on motion.

Classification as Advanced Degree Professional

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of

the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) defines the term "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

- Accreditation Requirement

On motion, counsel for the petitioner asserts that neither the Act nor the above regulation requires that an academic degree have been awarded by an accredited university or college and, therefore, that the AAO erred as a matter of law in refusing to accept the beneficiary's Master's degree. She notes that a fundamental canon in statutory interpretation is "the plain meaning rule," requiring statutes to be interpreted using the ordinary meaning of their language. In support of her assertions, counsel cites *Caminetti v. United States*, 242 U.S. 470 (1917) as standing for the proposition that if a statute's language is plain and clear, "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." Counsel further contends that the use of the phrase "any United States academic or professional degree" in the regulation at 8 C.F.R. § 204.5(k)(2) "can only be interpreted as referring to any and every degree obtained in the United States without restriction and with or without accreditation." She asserts that if the Congress had intended to require that the advanced degree defined at 8 C.F.R. § 204.5(k)(2) be from an accredited school, it should have included that language in the regulations and that absent the amendment of the law or the issuance of a precedent decision, the AAO has abused its discretion as "construction of the law is a matter left for Congress." Counsel's reasoning is not persuasive.

The U.S. Constitution empowers the Executive Branch to create the regulations that govern the implementation of statute and the U.S. Congress has delegated the authority to promulgate regulations implementing immigration law to the Department of Homeland Security (DHS).[1] The regulatory definition of advanced degree, which United States Citizenship and Immigration Services (USCIS) has interpreted as a degree issued by an accredited U.S. university or college, was published by the legacy Immigration and Naturalization Service (INS, now USCIS) on November

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[1] The Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946 governs the way in which Executive Branch agencies propose and establish regulations.

29, 1991, following the enactment of the Immigration Act of 1990 on November 29, 1990. Although counsel questions USCIS' reading of 8 C.F.R. § 204.5(k)(2), an agency's interpretation of its regulations has been found to be controlling unless "'plainly erroneous or inconsistent with the regulation.'" *See Auer v. Robbins*, 519 U.S. 452, 461-463 (1997)(citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989)(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217 89 L.Ed. 1700 (1945)).

The AAO acknowledges that 8 C.F.R. § 204.5(k)(2) does not specifically state that a degree must come from an accredited college or university to qualify as an "advanced degree." The accreditation requirement is, instead, implicit in the language of the regulation.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States** academic or professional degree . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States** baccalaureate degree" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States** doctorate" (or a foreign equivalent degree). (Emphases added.) Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States** baccalaureate degree" (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis.

As stated by the U.S. Department of Education (DEd) on its website:

> The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition . . . must meet the Secretary's procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . . The Secretary . . . makes the final determination regarding recognition.
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> The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.
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> . . . [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting

> the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.
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> . . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed December 9, 2013).

The DEd and the Council for Higher Education Accreditation (CHEA) are the two entities responsible for the recognition of accrediting bodies in the United States. CHEA, which was established in 1996, is an association of 3,000 degree-granting colleges and universities. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established." *See* www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf. Accordingly, to be recognized nationally a U.S. university or college must be accredited by an accrediting organization recognized by DOE and CHEA.

In the present case, the record reflects that the beneficiary holds a Master of Science in International Business from DEd and CHEA recognize the as the accrediting association with jurisdiction over [2] A review of the website, which lists all the accredited academic institutions within its jurisdiction, does not find *See* http://www.[redacted]org/. As the beneficiary's Master's degree was not awarded by an accredited institution, it cannot be deemed to have nationwide recognition and, therefore, does not qualify as an advanced degree within the meaning of 8 C.F.R. 204.5(k)(2).

This conclusion is in line with federal case law. In *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service* (*Tang v. INS*), 298 F. Supp. 413 (D.C. Cal. 1969), the district court agreed with the legacy Immigration and Naturalization Service (INS, now USCIS) that a bachelor of science in electronic engineering from Pacific States University in California, an institution that was not accredited by the WASC, did not entitle the alien to a third preference visa because his degree was not equivalent to a bachelor's degree from an accredited college or university in the United States. *See* 298 F.Supp. at 417, 419. The district court's decision was affirmed without further discussion by the U.S. Court of Appeals for the Ninth Circuit in a *per curiam* ruling. *See Tang v. INS*, 433 F.2d 1311 (9th Cir. 1970).

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[2] *See* http://www.chea.org/Directories/regional.asp.

- Approval by Bureau for Private Postsecondary Education

On motion, counsel contends that has been "accredited" by the California Bureau for Private Postsecondary Education (BPPE) and, resubmits a printout from the BPPE website and a November 13, 2012 statement from , both of which identify as a BPPE-approved institution. However, being approved to operate by the State of California is not the same as being accredited by a recognized accrediting agency, which "signifies that an institution has attained a threshold level of academic quality."

The State of California has acknowledged the qualitative difference between accredited and unaccredited educational institutions. The California Postsecondary Education Commission (CPEC), the state's planning and coordinating body for higher education from 1974 to 2011,[3] includes the following language regarding the "benefits associated with accreditation" on its website:

> Both the federal government and the states use accreditation as an indication of the quality of education offered by American schools and colleges.
>
> At the federal level, colleges and universities must be accredited by an agency recognized by the United States Secretary of Education in order for it or its students to receive federal funds.
>
> At the state level, California allows colleges and universities that are accredited by the Western Association of Schools and Colleges (the recognized regional accrediting agency for California) to grant degrees without the review and approval of the Bureau for Private Postsecondary Education (BPPE). A list of approved institutions is available at the California Bureau for Private Postsecondary Education (BPPE).
>
> In some states, it can be illegal to use a degree from an institution that is not accredited by a nationally recognized accrediting agency, unless approved by the state licensing agency. This helps prevent the possibility of fraud . . . .

www.cpec.ca.gov/CollegeGuide/Accreditation.asp (accessed December 9, 2013).

The qualitative difference between accredited and unaccredited educational institutions, acknowledged above by the CPEC, is also recognized by the State of California in its Education Code. Cal. Ed. Code section 94813 defines "accredited" as follows:

> "Accredited" means an institution is recognized or approved by an accrediting agency recognized by the United States Department of Education.

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[3] The CPEC ceased operations on November 18, 2011, after its funding was eliminated. *See* http://www.cpec.ca.gov.

With respect to unaccredited institutions that are approved to operate in California, Cal. Ed. Code section 94817.5 provides the following basic definition:

> "Approved to operate" or "approved" means that an institution has received authorization pursuant to this chapter to offer to the public and to provide postsecondary educational programs.

Cal. Ed. Code section 94887 sets the following guideline for the BPPE's grant of an approval to operate:

> An approval to operate shall be granted only after an applicant has presented sufficient evidence to the bureau [BPPE], and the bureau has independently verified the information provided by the applicant through site visits or other methods deemed appropriate by the bureau, that the applicant has the capacity to satisfy the minimum operating standards . . . .

Accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. BPPE approval represents a lower-level endorsement, establishing only that an educational institution "has the capacity to satisfy the minimum operating standards." *See* Cal. Ed. Code section 94887. There is no guarantee that degrees awarded by a BPPE-approved school in California will be recognized and honored nationwide. Accordingly, the AAO does not find the BPPE's approval of Master of Science in International Business program to establish as an accredited university.

- Approval of Form I-20 by Student and Exchange Visitor Program[4]

Counsel also contends that the beneficiary's degree from should be accepted as an advanced degree because the Department of Homeland Security (DHS) has approved the school for attendance by foreign students. She asserts that "it is clearly inequitable to initially acknowledge that the applicant is pursuing a United States master's degree and later [claim] that said degree is not such." Counsel further asserts that the definition of a Master's degree is uniform and may not be defined differently in nonimmigrant and immigrant visa categories.

The AAO acknowledges that the Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status – For Academic and Language Students, previously filed by the beneficiary indicates

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[4] The Student and Exchange Visitor Program (SEVP) is a part of the National Security Investigations Division of U.S. Immigration and Customs Enforcement (ICE) and acts as a bridge for government organizations that have an interest in information on nonimmigrants whose primary reason for coming to the United States is to study. On behalf of DHS, SEVP manages schools, nonimmigrant students in the F and M visa classifications and their dependents.

that she studied for a Master's degree at However, as discussed on appeal, the approval of an institution for attendance by foreign students in F-1 nonimmigrant visa status[5] is not related to the requirements for immigrant classification as an advanced degree professional. Although counsel's assertions are acknowledged, the AAO does not find them to be supported by the record, e.g., relevant precedent decisions. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the record also fails to establish that the approval of the beneficiary's Form I-20 provides a basis for finding her Master's degree to establish her qualifications for the offered position.

After reviewing the evidence of record on motion, the AAO again concludes that the petitioner has failed to establish that the beneficiary possesses at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the record does not establish that the beneficiary is qualified for classification as an advanced degree professional under section 203(b)(2) of the Act.

Minimum Requirements of the Offered Position

The petitioner must establish that the beneficiary satisfies all of the educational, training, experience and any other requirements of the offered position as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the only requirement for the offered position is a Master's degree in Business Administration or a related field, or accounting. For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses the required degree. Therefore, the petitioner has also failed to demonstrate that the beneficiary met the minimum requirements of the offered position, as set forth in the labor certification, by the priority date, which in the present case is July 12, 2012.

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[5] *See* 8 C.F.R. § 214.3.

Ability to Pay the Proffered Wage

Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner must demonstrate a continuing ability to pay the beneficiary the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). Here, as previously noted, the priority date of the ETA Form 9089 is July 12, 2012. The proffered wage, as stated on the ETA Form 9089, is $76,565.00 per year.

As indicated on appeal, USCIS, in determining a petitioner's ability to pay, first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage during the required period, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[6] If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither an employer's net income nor its net current assets establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonegawa* at 612. In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

On appeal, the AAO found the evidence of record did not establish the petitioner's ability to pay the beneficiary the proffered wage. In its decision, the AAO indicated that the petitioner had submitted no documentation, including Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (W-2s), to establish that it had paid the beneficiary at or above the proffered wage since the July 12, 2012 priority date. Although the AAO acknowledged the petitioner's submission of a 2011 Form

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[6] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

990, Return of Organization Exempt from Income Tax, it found that the tax return did not support the petitioner's claim that it had $152,007.00 in net current assets. It further refused to consider the 2012 balance sheet the petitioner submitted on appeal, which reflected $746,542.55 in net current assets, finding that it was not audited, as required by the regulation at 8 C.F.R. § 204.5(g)(2) and, also, that it provided only an interim computation of the petitioner's assets and liabilities. The AAO's decision further informed the petitioner that the 2012 bank statements it had submitted were insufficient proof of its ability to pay, as they reflected only the amount of money it had in its account on a given date, rather than a sustained ability to pay the proffered wage.

The AAO's decision on appeal also discussed the petitioner's failure to establish that the totality of the petitioner's circumstances demonstrated its ability to pay the proffered wage. Unlike the petitioner in *Sonegawa*, the petitioner in the present case was found to have submitted no evidence relating to its financial and/or organizational history since its establishment. The AAO therefore concluded that there was no basis on which to find that the totality of the petitioner's circumstances demonstrated its continuing ability to pay the proffered wage.

On motion, counsel for the petitioner asserts that the AAO has erred in disregarding the petitioner's Form 990 tax return, which, she contends, establishes that it has the net current assets to cover the proffered wage. She submits a copy of the petitioner's Form 990 for 2012, which she asserts demonstrates that the petitioner had net current assets of $272,839.00 in 2012. As noted in the appeal, the Form 990 does not contain the figures required to calculate net current assets.[7] These figures would be obtained from an audited balance sheet, which the petitioner has not submitted. Counsel also submits additional bank statements, covering the period October 1, 2012 through July 31, 2013, contending that they are proof that the petitioner retains "more than sufficient cash balances" to pay the proffered wage.

While the AAO acknowledges counsel's claims regarding the sufficiency of the preceding evidence in establishing the petitioner's ability to pay the proffered wage, these assertions were addressed by the AAO at the time of the appeal, the discussion of which is incorporated herein by reference. On motion, the petitioner has submitted none of the documentary evidence that the AAO, on appeal, indicated could establish its ability to pay. Instead, it supplements the record with a 2012 Form 990 that reports net income of $46,472.00, which is $30,093.00 less than the proffered wage, and additional bank statements, which the AAO has previously indicated are insufficient to establish its ability to pay.[8] Therefore, the AAO continues to find that the record does not demonstrate the petitioner's continuing ability to pay the beneficiary the proffered wage.

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[7] Current assets are generally defined as items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000).

[8] The AAO's most recent review of the bank statements submitted by the petitioner also finds that the account balances are identified as the petitioner's "Emergency Fund" and no evidence in the record demonstrates the circumstances under which the monies from such a fund could be used, including whether these resources could be used to pay the beneficiary's wages.

Conclusion

In summary, the petitioner has failed to establish that the beneficiary qualifies for the offered position or for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The petitioner has also failed to demonstrate its ability to pay the beneficiary the proffered wage from the July 12, 2012 priority date onward, as required by the regulation at 8 C.F.R. § 204.5(g)(2).

The motions are granted and the appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met. Accordingly, the AAO will affirm its prior decision.

ORDER: The motions to reopen and reconsider are granted. The prior decision of the AAO is affirmed. The petition remains denied.