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

(b)(6)

[redacted]

DATE: MAR 2 1 2014 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

[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. 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
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO) and on May 20, 2011, the AAO dismissed the appeal. The petitioner filed a motion to reconsider the AAO's decision which the AAO dismissed for being untimely filed on March 7, 2013.[1] On April 1, 2013, the petitioner filed a motion to the AAO regarding its May 20, 2011 decision. On July 11, 2013, the AAO again dismissed the motion to reopen the May 20, 2011 decision as being untimely filed. The petitioner then filed a motion to reopen and reconsider the AAO's July 11, 2013 decision. On November 6, 2013, the AAO denied the motion to reopen and reconsider its July 11, 2013 decision, but it certified the March 7, 2013 decision to itself and granted the petitioner 30 days to submit a brief regarding the issues presented.[2] The petitioner responded to the AAO's certification and the matter is now before the AAO. The motion will be remanded to the director in accordance with the following.

The petitioner describes itself as a medical diagnostics company. It seeks to permanently employ the beneficiary in the United States as an account executive. The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision denying the petition concludes that the petitioner did not establish its ability to pay the beneficiary's proffered wage. The petitioner filed a motion to reopen and reconsider this decision. The director granted the motion and affirmed the denial of the petition. On appeal, the AAO affirmed the director's decision on May 20, 2011. The AAO also dismissed the appeal because the petitioner had not demonstrated that it had the ability to pay the proffered wages of the other foreign nationals for whom it had filed Forms I-129 and Forms I-140 prior to 2007.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts 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 upon appeal or motion.

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.

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[1] Counsel for the petitioner filed the motion to reopen directly with the AAO on June 17, 2011, which was returned as improperly filed. Counsel subsequently sent the motion to the Nebraska Service Center, which it received on June 23, 2011.

[2] The AAO's March 7, 2013 decision denied the motion as being untimely filed. However, the AAO certified this decision to itself because the cover page to the AAO's May 20, 2011 decision was somewhat ambiguous as to where the motion should be filed.

To be eligible for approval, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The Form ETA 750 was accepted on August 13, 2004, the priority date. The proffered wage as stated on the Form ETA 750 is $54,500.00 per year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[3]

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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[3] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In the instant case, the evidence in the record demonstrates the following:

Year	W-2	Deficiency in Wages Paid	Net Income	Net Current Assets
2004	$37,225.31	$17,274.69	$28,992.00	($206,334.00)
2005	$27,169.35	$27,330.65	$70,301.00	($117,796.00)
2006	$30,415.65	$24,084.35	$51,866.00	($485,863.00)
2007	$47,677.71	$6,822.29	$59,410.00	($659,785.00)
2008	$56,592.60	$0.00	($24,122.00)	$587,770.00
2009	$56,987.52	$0.00	$33,900.00	$506,789.00
2010	$36,109.59[5]	$18,390.41	$60,885.00	$71,786.00
2011	$56,620.62	$0.00	$3,696.00	$2,327,291.00
2012	$55,969.78	$0.00	$59,359.00	$2,220,458.00

This demonstrates that the petitioner's net income exceeded the deficiency in wages paid to the beneficiary for the years at issue: 2004, 2005, 2006, 2007, and 2010. The beneficiary's Forms W-2 exceeded the proffered wage for all of the relevant remaining years: 2008, 2009, 2011 and 2012. On motion, the petitioner has also demonstrated that it paid the proffered wages of the other beneficiaries for whom it filed I-140 petitions from their respective priority dates onward. Therefore, the petitioner has demonstrated that it had the ability to pay the proffered wages of its sponsored I-140 beneficiaries.

However, the petition is not approvable at this time as the director has not considered whether the petitioner has established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification 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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to 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* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

Because the director has not had the opportunity to assess whether the beneficiary's educational credentials qualify him for the position offered, the instant matter will be remanded to the director for consideration of this issue.

In view of the foregoing, the previous decision of the director will be withdrawn. The petitioner has established that it is more likely than not that it had the ability to pay the beneficiary's proffered

[5] This amount is from the beneficiary's 2010 pay statement as of October 2010.

wage as of the priority date. However, the petition is remanded to the director for consideration of whether the beneficiary meets the education requirements of the labor certification. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new 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). The petitioner has not met that burden.

ORDER: The director's decision of November 5, 2007, is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.