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: JUL 3 1 2014 OFFICE: TEXAS SERVICE CENTER FILE: [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. 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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen. The motion will be granted, and the previous decision of the AAO will be affirmed. The petition remains denied.

The petitioner describes itself as a full service travel agency. It seeks to permanently employ the beneficiary in the United States as a management analyst. The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision denying the petition concludes that the beneficiary does not have a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification. The petitioner appealed this decision and we dismissed the appeal on September 9, 2013, concluding that the beneficiary did not meet the qualifications for the professional worker category. However, we withdrew the director's decision regarding the beneficiary's qualifications under the skilled worker category. We concluded that the petitioner met the requirements for classification as a skilled worker and that the beneficiary met the experience requirements of the labor certification. We ultimately dismissed the appeal because the petitioner had not demonstrated that it had the ability to pay the beneficiary's proffered wage in addition to its other sponsored workers. The petitioner's ability to pay the proffered wage is the single issue before us on motion.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal and motion.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

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.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has had the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on May 21, 2007. The proffered wage as stated on the ETA Form 9089 is $67,280.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1975 and to currently employ 15 workers.

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. In instances where the petitioner has sponsored other workers, USCIS will also examine whether the petitioner has paid the other sponsored workers their respective proffered wages. The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition.

If the petitioner has not paid the beneficiary or the other sponsored workers 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 to the instant beneficiary and the other sponsored beneficiaries.[1] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay these proffered wages, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

On May 9, 2014, we sent the petitioner a request for evidence (RFE) and requested that the petitioner provide an explanation as to why the petitioner issued the beneficiary and its other sponsored workers a Form W-2 and a Form 1099-MISC. We also requested that the petitioner provide its IRS tax return transcripts for 2007, 2008, and 2009 and any Form W-2 or Form 1099 issued to the beneficiary for 2013. In response to our RFE, counsel for the petitioner stated that the Forms 1099-MISC were issued to the beneficiary in addition to the Forms W-2 to reflect reimbursements for work-related travel expenses that the beneficiary had incurred. Counsel further stated that the beneficiary traveled to the

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[1] *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).

petitioner's other offices in 2007, 2008, and 2009 to conduct company business and that these travel expenses reflected on the Forms 1099-MISC were not part of the beneficiary's regular salary. The petitioner does not state that the amount of reimbursed expenses will be added to the beneficiary's salary at any time. The petitioner does not indicate that these expenses will not occur in the future. As the amounts stated on the Forms 1099-MISC in wages represent reimbursements for expenses, these amounts cannot be considered toward the beneficiary's salary.[2] The following table reflects the amounts paid to the instant beneficiary on the Forms W-2 in the record for 2007 through 2011.

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[2] In addition, the IRS website discusses whether an employer may deduct amounts paid in reimbursing an employee's travel expenses and whether these reimbursements should be listed on the employee's Form W-2, as follows:

> Section 62(a)(2)(A) of the Internal Revenue Code provides that, for purposes of determining adjusted gross income, an employee may deduct certain business expenses paid by the employee in connection with the performance of services as an employee of the employer under a reimbursement or other expense allowance arrangement.
>
> Section 62(c) provides that, for purposes of § 62(a)(2)(A), an arrangement will not be treated as a reimbursement or other expense allowance arrangement if (1) the arrangement does not require the employee to substantiate the expenses covered by the arrangement to the person providing the reimbursement, or (2) the arrangement provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.
>
> Section 1.62-2(c)(1) of the Income Tax Regulations provides that a reimbursement or other expense allowance arrangement satisfies the requirements of § 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of substantiated expenses. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan. See § 1.62-2(c)(2). Amounts treated as paid under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes. See § 1.62-(2)(c)(4). Conversely, if the arrangement fails any one of these requirements, amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. See § 1.62-2(c)(3) and (5).

See http://www.irs.gov/irb/2006-46_IRB/ar08.html. The petitioner has not provided any evidence demonstrating that these reimbursements should have been reported as wages on the beneficiary's Form W-2 or that it deducted any of these amounts from its gross income as indicated on its tax returns. Accordingly, the amounts stated on the Forms 1099-MISC will not be viewed as part of the beneficiary's salary.

Year	Proffered Wage	Wages Paid on Form W-2	Deficiency in Wages Paid
2007	$67,280.00	$54,000.00	$13,280.00
2008	$67,280.00	$54,000.00	$13,280.00
2009	$67,280.00	$55,270.00	$12,010.00
2010	$67,280.00	$27,000.00[3]	$40,280.00
2011	$67,280.00	$96,000.00	$0.00

Thus, for the years 2007, 2008, 2009, and 2010, the petitioner must establish the ability to pay the difference between the proffered wage and wages actually paid to the beneficiary.

Further, the record reflects that the petitioner has filed six immigrant visa petitions since 2007. As stated above, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, *supra*, at 144-145 (Acting Reg'l Comm'r 1977).

On motion, counsel for the petitioner submitted Forms W-2 and 1099-MISC that it issued to its other sponsored workers.[4] The following table reflects the amounts paid to two of the other sponsored workers, which are less than the proffered wage.

Receipt Number	Year	Proffered Wage	Wages Paid on Form W-2	Wages paid on Form 1099-MISC	Deficiency in Wages Paid
	2007	$50,357	$42,000	N/A	$8,357
	2008	$50,357	$42,000	$6,000	$2,357
	2007	$55,000	N/A	$32,500	$22,500
	2011	$55,000	N/A	$47,207	$7,793

Because the record does not reflect that the petitioner paid the difference between the wages paid and the proffered wages of the instant beneficiary for 2007 through 2010 and of all of its sponsored

[3] It is unclear why the beneficiary received a salary of $27,000.00 in 2010 and had incurred travel expenses of $56,652.24, more than double his salary, which counsel indicates is reflected on the Form 1099-MISC. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

[4] The petitioner has not indicated whether these Forms 1099-MISC were also issued to these other sponsored workers to reimburse them for business-related travel expenses as was the case for the instant beneficiary. In any further filings, the petitioner must demonstrate why these Forms 1099-MISC were issued to the other sponsored workers.

workers for 2007, 2008, and 2011, USCIS will consider the petitioner's net income and net current assets.

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. The petitioner's tax returns demonstrate its net income for 2007 through 2011, as follows:

- In 2007, the Form 1120 stated net income of $(10,896.00).
- In 2008, the Form 1120 stated net income of $(2,234.00).
- In 2009, the Form 1120 stated net income of $(308.00).
- In 2010, the Form 1120 stated net income of $(50,822.00).
- In 2011, the Form 1120 stated net income of $25,424.00.

Therefore, the petitioner did not have sufficient net income to pay the difference between the wages paid and the proffered wage of the instant beneficiary for the years 2007, 2008, 2009, and 2010. The petitioner did not have sufficient net income to pay the difference between the wages paid and the proffered wages of all its other sponsored workers for 2007 and 2008. The petitioner's net income in 2011 was sufficient to pay the $7,793.00 deficiency for one beneficiary for that year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the sponsored beneficiaries during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] 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 total of a corporation's end-of-year net current assets and the wages paid (if any) to the sponsored beneficiaries are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2007 through 2011, as follows:

- In 2007, the Form 1120 stated net current assets of $(12,120.00).
- In 2008, the Form 1120 stated net current assets of $(203,441.00).
- In 2009, the Form 1120 stated net current assets of $(228,111.00).
- In 2010, the Form 1120 stated net current assets of $(110,318.00).
- In 2011, the Form 1120 stated net current assets of $(29,696.00).

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[5] 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.

Thus, the petitioner did not have sufficient net current assets to pay the difference between the wages paid and the proffered wage of the instant beneficiary for 2007, 2008, 2009, and 2010, and the other sponsored workers for 2007 and 2008. From the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the instant beneficiary and all of its sponsored workers their respective proffered wage as of the priority date through an examination of its net income or net current assets.

Therefore, our previous decision which held that the petitioner had established its ability to pay the instant beneficiary's proffered wage from 2007 through 2010 is withdrawn. In addition, as indicated in our September 9, 2013 decision, the petitioner has not established that it had the ability to pay its other sponsored workers from 2007 through 2011.

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).

ORDER: The motion to reopen is granted. The September 9, 2013 decision of the AAO is affirmed. The petition remains denied.