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U.S. Citizenship  
and Immigration  
Services

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B6

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

AUG 22 2006

SRC-04-039-50122

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospitality service industry firm. It seeks to employ the beneficiary permanently in the United States as an Administration and Marketing Manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the qualifications required by the ETA 750 as of the priority date and also 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 accordingly denied the petition.

The record shows that the appeal is properly filed and timely and makes specific allegations of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 11, 2004 decision denying the petition, the issues in this case are whether the evidence establishes that the beneficiary had the qualifications require by the ETA 750 as of the priority date and whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001.

On appeal, counsel submits a brief and additional evidence. The evidence submitted on appeal consists of a copy of an evaluation report of the beneficiary's education and experience dated January 7, 2005, copies of unaudited financial statements, a copy of the petitioner's Form 1065 U.S. Return of Partnership Income for 2003, and copies of bank statements for an account of the petitioner. Evidence submitted previously for the record consists of an evaluation report of the beneficiary's education dated August 27, 1997 and copies of the petitioner's Form 1065 tax returns for 2001 and 2002.

Counsel states on appeal that an evaluation report submitted on appeal finds that the beneficiary's work and education are the equivalent of a Bachelor's of Business Administration Degree. Concerning the petitioner's ability to pay the proffered wage, counsel states that bank statements submitted on appeal show sufficient balances each month to pay the proffered wage. Counsel also states that the petitioner's relationship with Motels of America and additional financial statements show actual cash flows sufficient to pay the proffered wage. Counsel states that hiring the beneficiary will generate additional revenue for the petitioner and will also free the petitioner's owner to work on other ventures, and will therefore free up additional revenue currently being paid to the owner as a combination of salary and dividends.

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).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of Administration and Marketing Manager. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

- 14. Education (number of years)
  - Grade School [blank]
  - High School [blank]
  - College 4
  - College Degree Required Bachelor's Degree
  - Major Field of Study [blank]
- Training - yrs [blank]
- Experience
  - Job Offered Yrs 3
  - Related Occupation Yrs [blank]
  - Related Occupation (specify) [blank]
- 15. Other Special Requirements [blank]

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
[all rows blank]	[all rows blank]	[all rows blank]	[all rows blank]	[all rows blank]

On the ETA 750B in block 15, for information on the beneficiary's work experience, the beneficiary states the following:

Name and Address of Employer	Name of Job	From	To	Kind of Business
Universal Products Johannesburg, South Africa	Administration Manager	9/95	04/98	Leather works

[all other rows blank]

The record contains a copy of an evaluation of the beneficiary's education dated August 17, 1997 by the American Credentials Evaluation Institute, Inc., (ACEI), of Beverly Hills, California, which finds that the beneficiary's education is equivalent to three years of the four-year United States Bachelor's degree. Attached to that evaluation report are a copy of a Diploma in Accountancy of the beneficiary issued on July 1992 by the Institute of Administration and Commerce of Southern Africa, a copy of a Diploma in Company Secretaryship of the beneficiary also issued in July 1992 by that same Institute, and a copy of an undated certificate from Henley Management College stating the beneficiary's successful completion of a course of study leading to the award of a Certificate of Management.

The record also contains a copy of an evaluation of the beneficiary's education and experience dated January 7, 2005 by Foreign Credential Evaluations, Inc., (FCE), of Rosewell, Georgia, which finds that the beneficiary's education and experience are equivalent to the degree, Bachelor of Business Administration in Accounting, for employment purposes, from an accredited educational institute in the United States.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Under the regulations governing H-1B nonimmigrant visas petitions specialized work experience may be substituted for university level education using a formula of three years of specialized work experience being considered as equivalent to one year of university level education. See 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part

*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

*Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Concerning the evidence needed to support classification in the above preference categories, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) states in pertinent part:

(A) *General*. Any requirements of training or experience for skilled workers, professionals or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

In the definition of "professional," the regulation at 8 C.F.R. § 204.5(1)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

With regard to the preference category applicable to the instant petition, the instant petition was submitted with a mark in check box letter "e," for "A skilled worker (requiring at least two years of specialized training or experience) or professional." (See Form I-140). The Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, for a single check box, letter "e," applies both to skilled workers and to professionals. (See Form I-140 Immigrant Petition for Alien Worker, Part 2, Petition Type).

Concerning petitions for skilled workers, no provision of the regulations specifies the equivalent of a bachelor's degree. Therefore if the petition is evaluated as one for a skilled worker, the petition would thereby lack any criteria in the regulations to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a Bachelor's degree, but the petitioner did not do so.

The evaluation report by ACEI of the beneficiary's education makes no finding that the beneficiary's education is equivalent to a United States Bachelor's degree. The evaluation report by FCE makes a finding that the combination of the beneficiary's education and experience is equivalent to a United States Bachelor's degree. However, since the FCE report relies in part on the beneficiary's experience for that finding, it fails to establish that the beneficiary has a degree which is a foreign equivalent to a United States Bachelor's degree.

In addition, block 14 of the ETA 750 also specifically requires four years of college education. Neither of the evaluation reports in the record finds that the beneficiary has four years of college education.

As a matter of evidence, moreover, the record lacks copies of academic transcripts of the beneficiary. Such transcripts normally show course names, dates taken, and grades. Absent documentation of the specific courses taken by the beneficiary, the record could not support a finding that the beneficiary has a bachelor's degree and four years of college education.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The evidence in the record fails to establish that the beneficiary had those requirements as of the petition's priority date.

In her decision, the director found that the evidence failed to establish that the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The decision of the director was correct on that issue, based on the evidence in the record before the director. The assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome that portion of the director's decision.

A second reason for the director's decision to deny the petition was the failure of the evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). As noted above, the priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$41,000.00 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage,

this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner, and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The name of the petitioner ends with the abbreviation "LLC," indicating that the petitioner is a limited liability company. (I-140 petition, Part I.) Limited liability companies with a single member are generally "disregarded" for the purpose of filing a federal tax return. *See Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, available at <http://www.irs.gov/pub/irs-pdf/p3402.pdf>.* If the only member of an LLC is an individual, the income and expenses of the LLC are reported on Form 1040, Schedule C, E, or F, and if the only member of an LLC is a corporation, the income and expenses of the LLC are reported on the corporation's return, usually on Form 1120 or on Form 1120S. *Id.* LLC's which have more than one member file a partnership return, Form 1065. *Id.* In the instant petition, the tax returns in the record are partnership returns, a fact which therefore indicates that the petitioner has more than one member.

The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2001, 2002 and 2003. The I-140 petition was submitted on November 12, 2003. As of that date, the petitioner's federal tax return for 2003 was not yet available. However, a copy of the petitioner's Form 1065 tax return has been submitted on appeal.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. Where a partnership has income from sources other than from a trade or business, that income is reported on Schedule K. Similarly, some deductions appear only on the Schedule K. *See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>.*

In the instant petition, the petitioner's tax returns indicate no income from activities other than from a trade or business and no additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns may be considered as the petitioner's net income. Those figures are shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$37,966.00	\$41,000.00*	\$(3,034.00)
2002	\$25,513.00	\$41,000.00*	\$(15,487.00)
2003	\$23,665.00	\$41,000.00*	\$(17,335.00)

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information fails to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record contains copies of cash flow statements which treat depreciation expenses as additional financial resources of the petitioner. Although it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

For this reason, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a partnership taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17. If a partnership's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$21,797.00	\$41,000.00*	\$(19,203.00)
2002	\$7,649.00	\$41,000.00*	\$(33,351.00)
2003	\$89,305.00	\$41,000.00*	\$48,305.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2003, but it fails to establish the petitioner's ability to pay the proffered wage in 2001 or in 2002.

Counsel states on appeal that the petitioner's relationship with Motels of America and additional financial statements show actual cash flows sufficient to pay the proffered wage.

The record contains copies of unaudited financial statements which are evidently the documents referred to in counsel's statements. However, unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel also states that bank statements submitted on appeal show sufficient balances each month to pay the proffered wage. The record contains copies of bank statements for an account of the petitioner. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	2001	2002	2003	2004
January	-	\$6,966.52	\$5,164.46	\$8,116.85
February	-	\$6,427.44	\$1,271.14	\$4,922.65
March	\$1,754.00	\$3,110.74	\$2,095.09	\$1,651.07
April	\$9,130.44	\$3,439.42	\$2,417.29	\$1,555.43
May	\$6,037.83	\$3,978.25	\$4,758.80	\$5,224.26
June	\$13,982.99	\$8,799.93	\$12,584.12	\$17,038.95
July	\$21,737.98	\$17,833.00	\$14,964.22	\$46,300.38
August	\$21,996.96	\$16,979.14	\$16,673.12	\$73,985.93
September	\$25,358.20	\$29,985.72	\$24,056.46	\$79,206.54
October	\$20,344.98	\$16,941.35	\$24,686.03	\$83,405.07
November	\$19,587.46	\$15,079.77	\$24,800.12	\$82,689.44
December	\$15,427.05	\$7,199.26	\$13,523.68	-

The ending balances above do not show monthly increases by amounts which would be sufficient to pay the proffered wage throughout the entire period at issue. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel states that hiring the beneficiary will generate additional revenue for the petitioner and will also free the petitioner's owner to work on other ventures, which will therefore free up additional revenue currently being paid to the owner as a combination of salary and dividends. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506

(BIA 1980). Counsel refers to Schedule M-2 on page 4 of the Form 1065 tax returns as evidence of the amounts currently being paid to the petitioner's owner.

The Schedule M-2 for 2001 shows no distributions of cash or property. The Schedule M-2 for 2002 shows distributions of cash in the amount of \$20,000.00. The Schedule M-2 for 2003 shows distributions of cash in the amount of \$57,990.00.

The information on the Schedules M-2 is insufficient to establish the amount of any funds which could become available to pay the beneficiary the proffered wage if the petitioner's owner were to devote his or her time toward other ventures. The evidence also fails to identify the person whom counsel refers to as the petitioner's owner. As noted above, the fact that the petitioner files its tax returns on the Form 1065 partnership return indicates that the petitioner has more than one member.

Concerning counsel's assertion that by hiring the beneficiary the petitioner will be able to generate additional income, the record lacks any evidence on which to base any such projected increase in the petitioner's income.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director correctly stated the petitioner's net income in 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director concerning the petitioner's ability to pay the proffered wage.

In summary, the evidence in the record fails to establish that the beneficiary had the qualifications required on the Form ETA 750 as of the priority date, and fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

ORDER:       The appeal is dismissed.