

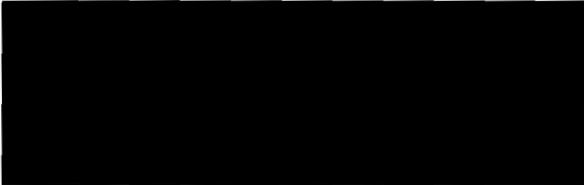
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U.S. Citizenship  
and Immigration  
Services

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FILE: LIN-03-113-50786 Office: NEBRASKA SERVICE CENTER Date: SEP 12 2006

IN RE: Petitioner: [Redacted]  
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:



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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a developmental disability specialist. 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 training required to qualify as a skilled worker in the occupation of developmental disability specialist, and denied the petition accordingly.

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.

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 (Comm. 1977). 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 September 30, 2002.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

The I-140 petition was submitted on February 18, 2003. On the petition, in Part 2, Petition type, the petitioner checked box "e" for "a skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, Part 2). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of "+\$20 Million," and to have a net annual income of "+\$889,000." (I-140 petition, Part 5). With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. With the petition, the petitioner also submitted supporting evidence.

In a November 16, 2004 decision, the director determined that the evidence failed to establish that the beneficiary possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

On appeal, counsel submits no brief, but submits an addendum to the I-290B notice of appeal and additional evidence. The evidence newly submitted on appeal consists of a list of names of beneficiaries of approved I-140 petitions submitted by the petitioner. Counsel also submits copies of three AAO decisions in petitions submitted previously by the petitioner which had been certified by the director to the AAO. Those decisions are not evidentiary documents, but are submitted as legal authority in support of the instant appeal. The petitioner also submits a copy of a memorandum of April 23, 2004 by William R. Yates, Associate Director for Operations, CIS, which is submitted as legal authority.

Counsel states on appeal that the beneficiary's post-secondary education is not relevant to the offered position under the standards of previous AAO decisions in petitions submitted by the petitioner. But counsel states that the AAO should defer to the judgment of the Department of Labor which certified the instant petition with job qualifications which did not require post-secondary education to be in any particular field. Counsel also states that the petitioner has a constitutionally protected property right in the employment of its workers. Counsel states that the CIS has determined that the position offered to the beneficiary qualifies for no employment-based classification, and that such a determination is a violation of due process guaranteed to the employer and is not supported by applicable regulations.

Finally, counsel states that the petitioner and the beneficiary have relied on prior approvals by CIS of similar petitions and that under the guidelines in the April 23, 2004 memorandum by William R. Yates, the same analysis should be applied by CIS to the instant petition. Counsel states that the beneficiary is in the United States and that after receiving her employment authorization card she was given a six-week training course by the petitioner. Counsel states that the beneficiary is a diligent and hard-working employee who has been unnecessarily harmed by the "re-adjudication" of the instant petition. (I-290B Addendum, at 2).

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

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.

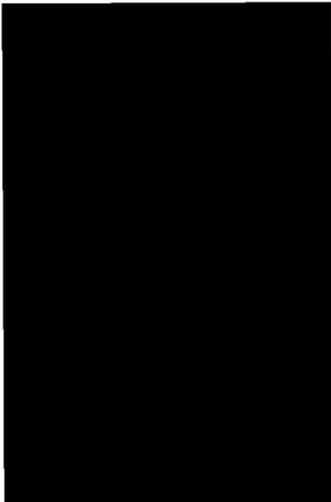
To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of developmental disability specialist. 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	8
	High School	4
	College	4
	College Degree Required	Bachelor's**
	Major Field of Study	Any field
	Training - yrs	n/a

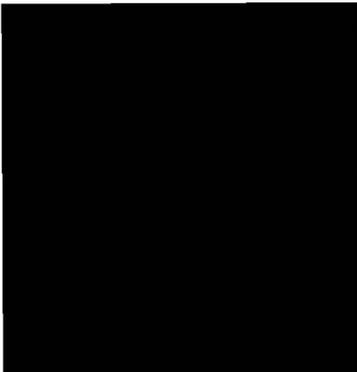
Experience  
 Job Offered Yrs 0  
 Related Occupation Yrs 0  
 Related Occupation (specify) None

15. Other Special Requirements \*\* Bachelor's/ Foreign Equivalent/ Credential Evaluation which shows a combination of education, training and or work experience equivalency

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:

<u>Schools, Colleges and Universities, etc.</u>	<u>Field of Study</u>	<u>From</u>	<u>To</u>	<u>Degrees or Certificates Received</u>
	Evaluation	01/2003		BS Engineering MA Management
	Development Studies	06/1999	03/2001	Master's
	Public Management	1992	11/1996	Master's in Management
	Mining Engr	06/1976	1992	Bachelor's in Science Engr

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

<u>Name and Address of Employer</u>	<u>Name of Job</u>	<u>From</u>	<u>To</u>	<u>Kind of Business</u>
	Qualified Mental Retardation professional	01/14/2003	01/21/2003	healthcare facility for profoundly handicapped
	Student	06/1999	03/2001	university
	Development Management Officer IV	02/1989	06/1999	government agency

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

*Definitions.* As used in this part:

*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.

Copies of three AAO decisions submitted on appeal discuss the portion of the regulatory definition of skilled worker which states, "Relevant post-secondary education may be considered as training for the purposes of this provision." 8 C.F.R. § 204.5(l)(2). Each of those decision was issued on July 9, 2004. In those decisions, the AAO discusses the meaning of the word "relevant" in the foregoing definition and states, "for a beneficiary's post secondary education to be considered it must be logically related and have appreciable probative value as to the capacity of the beneficiary to perform the job duties on the basis of the educational qualifications alone." (AAO decision in LIN-03-110-55083, at 6). The AAO's reasoning was based on the definition of the term "relevant" found in Black's Law Dictionary, a definition which appears to address the meaning of that term as it relates to evidentiary questions. (AAO decision in LIN-03-110-55083, at 6, quoting Black's Law Dictionary 1293 (7<sup>th</sup> ed. 1999)).

None of the three cases submitted by the petitioner has been published as a precedent case. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nonetheless, the analysis in the three decisions submitted by the petitioner of the skilled worker definition in the regulation at 8 C.F.R. § 204.5(l)(2) is reasonable.

Two of the decisions state that study "in various fields of health care" would be sufficient to qualify as relevant post-secondary education for the position of developmental disability specialist. (AAO decisions in LIN-03-067-51563, at 8, and in LIN-03-110-55083, at 8). The other AAO decision finds that the beneficiary's education in the field of medicine is sufficient for that occupation. (AAO decision in LIN-03-072-51157, at 7). The latter decision also states the following:

The AAO is not suggesting that a post-secondary education other than a medical degree is not relevant as a number of other fields would have a substantial connection to the duties of a Developmental Disability Specialist as set forth in the ETA 750. Among the post secondary education likely to have such a connection would be areas of study involving teaching, various fields of health care, occupational training, or therapy.

(AAO decision in LIN-03-072-51157, at 8, fn. 5).

In the instant I-140 petition, the ETA 750 specifies the following duties for the position of developmental disability specialist:

To develop and implement a continuous active treatment program for each profoundly mentally and physically handicapped resident to enable each individual to function as independently as possible and prevent skill regression. Observe, instruct and play with resident and confer with professionals and parents to obtain information relating to child's mental and physical development. Develop individual teaching plan covering self-help, motor, social, cognitive and language skills development. Revises teaching plan to correspond with child's rate of development. Consults and coordinates plans with other professionals.

(ETA 750, Part A, block 13).

In his November 16, 2004 decision, the director determined that the evidence failed to establish that the beneficiary's possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

Based on the evidence in the record, the director's decision to deny the petition was correct.

The record contains a copy of a course transcript of the beneficiary's studies at Adamson University, Manila, Philippines, with a final notation that the beneficiary graduated with the degree of Bachelor of Science in Mining Engineering in March 1979.

The record also contains a copy of a certificate from the Office of the University Registrar, University of the Philippines, dated February 25, 1997, certifying the graduation of the beneficiary from the U.P. College Baguio with the degree of Master of Management (Public Management) on November 3, 1996. The record also contains a copy of a course transcript for the beneficiary's studies leading to that degree.

The record also contains a copy of an academic evaluation for the beneficiary by Morningside Evaluations and Consulting, New York, New York dated January 29, 2003.

The beneficiary's course transcript from Adamson University shows no courses which are directly relevant to the position of developmental disability specialist. The transcript shows two lecture courses in General Chemistry with accompanying laboratory courses in General Chemistry which may be indirectly relevant to the offered position. The beneficiary's course transcript from the University of the Philippines shows no courses which are directly or indirectly relevant to the offered position.

The academic evaluation by Morningside Evaluations and Consulting finds that the beneficiary's courses at the foregoing two universities are equivalent to a Bachelor of Science Degree in Engineering and a Master of Arts degree in Management from an accredited institution of higher education in the United States. Neither of those fields of study are relevant to the offered position.

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 or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In the instant petition, the academic evaluation by Morningside Evaluations and Consulting is a reasonable analysis of the beneficiary's academic qualifications. However, since that evaluation finds the beneficiary's

studies to be equivalent to degrees in Engineering and in Management, that evaluation fails to establish that the beneficiary has post-secondary education relevant to the offered position.

Counsel states on appeal that the beneficiary's post-secondary education is not relevant to the offered position under the standards of previous AAO decisions in petitions submitted by the petitioner. But counsel states that the AAO should defer to the judgment of the Department of Labor which certified the instant petition with job qualifications which do not require post-secondary education to be in any particular field. However, in the instant I-140 petition, the petitioner checked box "e," seeking a visa for the beneficiary as "a skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, Part 5). No evidence in the record indicates that the offered position is for a professional. Therefore the petition must be evaluated as one for a skilled worker. The petition is therefore subject to the definition of skilled worker in the regulation at 8 C.F.R. § 204.5(l)(2).

Counsel's assertions regarding the effect of a certification by the Department of Labor are not supported by the language of the Act. Under the Act, a certification of an ETA 750 by the Department of Labor is a certification that there are not sufficient available workers to perform the labor of the offered position and that the employment of the alien beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed. See Act § 212(a)(5)(B).

Notwithstanding counsel's assertions, the Department of Labor's certification of the Form ETA 750 does not preclude CIS from evaluating the evidence submitted to establish that the petition is approvable, and that process includes an evaluation of whether the beneficiary is qualified for the preference category under which the petition was filed. The qualification of the beneficiary as a skilled worker is a determination which is properly made by CIS. See 8 C.F.R. § 204.5(l)(2).

Counsel also states that the petitioner has a constitutionally protected property right in the employment of its workers. Counsel states that the CIS has determined that the position offered to the beneficiary qualifies for no employment-based classification, and that such a determination is a violation of due process guaranteed to the employer and is not supported by applicable regulations.

The instant petition seeks classification of the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Act. The record contains no evidence to indicate whether the petitioner may have also submitted an alternative petition for the same beneficiary under the "other worker" classification, section 203(b)(3)(A)(iii) of the Act, as an unskilled worker. The eligibility of the beneficiary for classification as an "other worker" is not now before the AAO on appeal. Counsel's argument has always been that the beneficiary is qualified as a skilled worker. To change the petition on appeal to one for an other worker would represent a material change to the application. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).<sup>1</sup>

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<sup>1</sup> It may be noted that whether a petition is filed for a for a skilled worker or for an "other worker," the petitioner still has the burden to establish that it intends to offer permanent full-time employment to the beneficiary. The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

In the instant petition, the job qualifications for the offered position bear little relation to the duties to be performed by a developmental disability specialist as stated on the ETA 750, Part A, block 13. The only required qualifications are a Bachelor's degree in "Any field," or "Bachelor's/ Foreign Equivalent/ Credential Evaluation which shows a combination of education, training and or work experience equivalency." (ETA 750, Part A, blocks 14, 15). In the instant petition,

Counsel cites several federal court decisions declaring general principles of constitutional law pertaining to deprivation of property rights without due process of law. Counsel asserts that the failure to approve a visa petition for the beneficiary is a denial of due process of law. However, counsel cites no authority in support of his position that the petitioner has a constitutionally-protected property right to receive a visa petition approval on behalf of a specific beneficiary. In any event, the instant petition is governed by CIS regulations, and counsel has cited no authority to limit the applicability of any regulatory provision on the basis of alleged due process claims.

Counsel also states that the petitioner and the beneficiary have relied on prior approvals by CIS of similar petitions and that under the guidelines in the April 23, 2004 memorandum by William R. Yates, the same analysis should be applied by CIS to the instant petition. On appeal, the petitioner submits a list of names of beneficiaries of approved I-140 petitions submitted by the petitioner, including receipt numbers, approval dates, and college degrees of the beneficiaries. Some of the degrees shown on the list are in fields of study which appear to have no relevance to the offered position of developmental disability specialist, including, for example, a Bachelor's degree in History, a Master's degree in Business Administration, and a Bachelor's degree in Fishery Education.

The April 23, 2004 memorandum by William R. Yates advises CIS officers adjudicating petitions for extensions of non-immigrant status to defer to the approval decisions made on the original non-immigrant visa petitions, absent material error in the previous decisions or a substantial change in the circumstances affecting the alien's non-immigrant status. Nothing in that memorandum pertains to immigrant visas, nor is the reasoning of that memorandum inconsistent with CIS procedures on denying immigrant visa petitions. Even if previous petitions based on similar evidence have been approved, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Therefore, the April 23, 2004 memorandum by William R. Yates provides no support for the petitioner's position in the instant appeal.

Counsel also states that the beneficiary is in the United States and that after receiving her employment authorization card she was given a six-week training course by the petitioner. Counsel states that the beneficiary is a diligent and hard-working employee who has been unnecessarily harmed by the "re-adjudication" of the instant petition. (I-290B Addendum, at 2). As noted above, however, the instant petition is governed by CIS regulations. Any alleged reliance by the beneficiary on decisions in visa petitions on behalf of other beneficiaries provides no ground to avoid the applicability of any regulatory provision in the instant petition. Nor is any claim of hardship to the beneficiary a factor relevant to the instant petition.

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the petitioner has offered the position of developmental disability specialist to a beneficiary who is highly qualified as a professional in fields completely unrelated to the offered position. The lack of relevance of the beneficiary's qualifications to the offered position could support an inference that the petitioner has no realistic desire and intention to employ the beneficiary in a permanent full-time position as a developmental disability specialist.

To decide the instant appeal it is not necessary to make any determination concerning the applicability of the regulation at 8 C.F.R. § 204.5(c) to the instant petition, since the matters discussed above are sufficient grounds to deny the petition for classification as a skilled worker. Moreover, the director's decision in the instant petition makes no findings concerning that regulation. But it should be noted for any employment-based visa petition, including any petition seeking classification as a skilled worker and any petition seeking classification as an "other worker," it is necessary for the petitioner to establish that it is a United States employer "desiring and intending" to employ the beneficiary in a permanent full-time position in the United States. 8 C.F.R. § 204.5(c)

As noted above, 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 (Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The evidence in the record fails to establish that as of the priority date the beneficiary had at least two years of post-secondary education which was relevant to the position of developmental disability specialist as of the priority date.

For the foregoing reasons, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director concerning the education of the beneficiary.

In his decision, the director did not discuss the petitioner's ability to pay the proffered wage.

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). The priority date in the instant petition is September 30, 2002. The proffered wage as stated on the Form ETA 750 is \$7.66 per hour, which amounts to \$15,932.80 annually.

It may be noted that it has been approximately four years since the Application for Alien Employment Certification has been accepted and the proffered wage established. The employer certification that is part of the application states, "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." (ETA Form 750 Part A, Section 23 b).

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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources 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 February 7, 2003, the beneficiary claimed to have worked for the petitioner from January 14, 2003 until January 21, 2003. On appeal, counsel states that the beneficiary remains an employee of the petitioner. 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). No evidence in the record corroborates the assertions of counsel concerning the beneficiary's employment. Moreover, no evidence in the record indicates the amount of any compensation paid by the petitioner to the beneficiary.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed a total of 302 I-140 petitions since 1996. The great majority of those petitions have been filed since 2002. The number of I-140 petitions filed was 4 in 1996, 9 in 1997, 2 in 1998, 5 in 1999, 7 in 2000, 11 in 2001, 56 in 2002, 125 in 2003, 66 in 2004, 5 in 2005, and 12 in 2006, through August 22, 2006.

As noted above, the instant petition was filed on February 18, 2003. During the year 2003 the petitioner filed a total of one hundred twenty-five I-140 petitions, including the instant petition.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore the certified ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

The record in the instant case contains some information about the proffered wages for the beneficiaries of the other petitions submitted by the petitioner. The copies of three previous AAO decisions submitted by counsel on appeal state that the proffered wages to the beneficiaries of those petitions. The proffered wages were \$7.88 per hour in two petitions and \$7.66 per hour in the third petition. The petitioner has submitted no list of proffered wages for each of the beneficiaries of the other I-140 petitions it has filed. The AAO will therefore use the rate of \$7.66 as the basis for estimating the petitioner's proffered wage commitments to the beneficiaries of the petitioner's other I-140 petitions. An hourly wage of \$7.66 for a 40-hour work week is equivalent to an annual wage of \$15,932.80.

In the year 2003 the petitioner filed one hundred twenty-five I-140 petitions, including the instant petition. Therefore, in addition to the instant petition, the petitioner filed one hundred twenty-four I-140 petitions that year. At an estimated annual proffered wage level of \$15,932.80 for each beneficiary, one hundred twenty-four additional I-140 petitions would result in an additional wage commitment of \$1,975,667.20 by the petitioner in the year 2003. Adding that amount to the proffered wage of \$15,932.80 for the beneficiary of the instant petition produces a total estimated proffered wage commitment of \$1,991,600.00 in the year 2003.

The instant I-140 petition states that the petitioner was formed in 1975 and employs "140+" employees. (I-140 petition, Part 5). The regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner 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. The language "may accept" in the above regulation indicates that CIS is not required to accept such a statement, but rather may exercise its discretion not to accept such as statement. See 8 C.F.R. § 204.5(g)(2).

The record contains a copy of a letter dated August 6, 2002 from a Director of the petitioner which states as follows:

I, [REDACTED] do hereby certify that I am the director of Resource Development for [REDACTED] a corporation organized and existing under the laws of the State of Illinois.

The corporation is now and will be for the expected future able to pay the wages offered to our employee.

The corporation employs more than 140 people at our Champaign, Illinois facility.

For the fiscal year ended June 30, 2002, [REDACTED] had revenue in excess of \$20,319,662.00 and net income in excess of \$889,974.24. Our 2001 financial statements were audited by [REDACTED]

I hereby certify that the information provided herein, as of this date is true, accurate and complete in every material respect.

(Letter from [REDACTED] Director, August 6, 2002).

The letter from [REDACTED] does not state that Mr. [REDACTED] is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the content of that letter is not sufficient to establish the petitioner's ability to pay the proffered wage during the relevant time period. The letter states that the petitioner's net income is in excess of \$889,974.24 per year. That amount of net income is less than

the estimated \$1,991,600.00 in proffered wage commitments which the petitioner has made in one hundred twenty-five I-140 petitions which it submitted in 2003, including the instant petition.

Moreover, the letter from [REDACTED] lacks sufficient detail to permit an evaluation of the credibility of the financial assertions made in the letter, and no supporting documentation showing the sources for Mr. [REDACTED]'s figures has been submitted for the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The letter from Mr. [REDACTED] refers to the petitioner as "[REDACTED]" No evidence in the record corroborates Mr. [REDACTED]'s assertion that that is the legal name of the petitioner. On the I-140 petition, the petitioner's name is stated as [REDACTED] with no concluding abbreviation [REDACTED]. Evidence in the records of other petitions submitted by the same petitioner indicates that [REDACTED] is in fact a trade name for a corporation named [REDACTED]. Mr. [REDACTED]'s assertion that the petitioner is "[REDACTED]" is inconsistent with evidence in other cases submitted by the same petitioner. As noted above, "It is incumbent on 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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.

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 corporate 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. If a corporation'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.

The record contains copies of unaudited financial statements of [REDACTED], which is the legal corporate name of the petitioner, according to information in the records of other petitions submitted by the petitioner. The financial statements consist of a Statement of Operations for the period ended September 30, 2002 and a Balance Sheet as of September 30, 2002. The Statement of Operations does not specify the beginning date of the period, but several columns present figures for the year to date in certain categories. Those figures suggest that the period covered by the Statement of Operations consists of the first three months of a fiscal year, from July 1, 2002 through September 30, 2002.

Although financial statements of [REDACTED], could be relevant to the instant petition, 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.

The record in the instant petition contains no other financial evidence on the petitioner. The record lacks copies of annual reports, audited financial reports, or federal tax returns, which are the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2). The record therefore lacks any acceptable evidence to support any findings on the petitioner's net income or net current assets.

For the above reasons, the evidence 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 summary, the decision of the director to deny the petition was correct, based on the lack of evidence of training and/or experience of the beneficiary relevant to the offered position as of the priority date. Beyond the decision of the director, the evidence 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.