

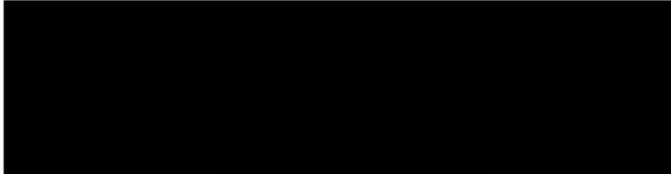


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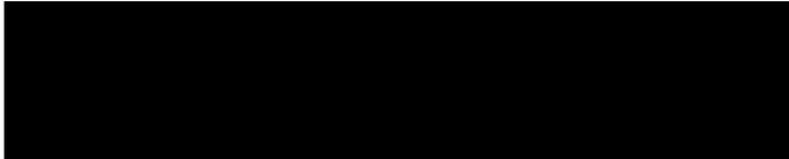


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: FEB 13 2007
LIN-05-098-51209

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other Worker 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 remanded to the director.

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a “Habilitation Aide (Mental Retardation Aide 355.377-018).” A photocopy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. No original ETA 750 is found in the record. The director determined that the petition had been improperly filed in the “other worker” preference category, for an unskilled worker. The director accordingly denied the petition.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 July 28, 2003.

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 (March 7, 1996).

The I-140 petition was submitted on February 11, 2005. On the petition, in Part 2, Petition type, the petitioner checked box “g” for “any other worker (requiring less than two years of specialized training or experience).” (I-140 petition, Part 2). *See* Act, § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

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 supporting evidence. With the petition, the petitioner also submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the beneficiary on February 4, 2005, the beneficiary did not claim to have worked for the petitioner.

In a June 21, 2005 decision, the director determined that the offered position requires the services of a skilled worker and that the petition had been filed in the “other worker” preference category, for an unskilled worker. The director accordingly denied the petition.

On appeal, counsel submits no brief, but submits an addendum to the I-290B notice of appeal. Counsel also submits additional evidence consisting of a copy of a page from what appears to be the Dictionary of Occupational Titles, of the U.S. Department of Labor.

Counsel states on appeal that the instant petition differs from other petitions previously submitted by the same petitioner, in that it is for the position of Habilitation Aide, a position certified by the U.S. Department of Labor in a job category which corresponds to a position for an unskilled worker. Counsel states that the petition therefore has been properly filed in the "other worker" preference category.

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.

It must be noted that the order of documents in the beneficiary's A-file does not clearly reflect the order in which documents were filed by the petitioner. The petitioner has filed two previous I-140 petitions for the same beneficiary. A petition with receipt number LIN-03-088-51195 was filed on January 23, 2003. That petition was denied on December 30, 2004, and no appeal was taken from that decision. A petition with receipt number LIN-03-279-51032 was filed on September 29, 2003. An appeal from a denial of that petition is being adjudicated concurrently with the appeal in the instant petition.

The photocopy of the ETA 750A relevant to the instant petition is found in the beneficiary's A-file immediately below the I-140 petition with receipt number LIN-03-088-51195, filed on January 23, 2003.

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 Habilitation Aide. In the photocopy of 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 | 0 |
| High School | 0 |
| College | 0 |
| College Degree Required | None Required |
| Major Field of Study | n/a |
| Training - yrs | n/a |

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

15. Other Special Requirements None

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>
[REDACTED]	Live-in Care	08/2001	02/2002	Certificate
[REDACTED]	Commerce	08/1972	06/1978	B.S. in Commerce Live-in Caregiver
[REDACTED]	High School	06/1968	03/1972	Diploma
[REDACTED]	Elementary	06/1962	03/1968	(completed)

[remaining row blank]

On the ETA 750B submitted with the instant petition, in block 15, 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>
[REDACTED]	Collection Supervisor	07/1978	03/1986	Cooperative

[remaining rows blank]

The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part:

Definitions. As used in this part:

Other worker means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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.

The beneficiary's file contains copies of three AAO decisions which were submitted by the petitioner in support of another petition on behalf of the same beneficiary. Counsel states that those decisions are not relevant to the instant petition, since the offered position is Habilitation Aide, rather than Developmental Disability Specialist, which was the position at issue in those three AAO decisions. Counsel states that the position of Habilitation Aide is clearly a position for an unskilled worker, unlike the position of Developmental Disability Specialist, which the AAO found to be a position for a skilled worker. Nonetheless, in her decision the director relied on the reasoning in those decisions. Therefore those decisions will be considered.

The three AAO decisions in question 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(1)(2). Each of those decisions 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 (7th 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(1)(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).

Concerning a suggestion by counsel that the classification of denied cases could be changed to that of unskilled workers, the AAO stated the following.

The difficulty with accepting counsel's argument that [the] beneficiary should be considered as an "other worker" arises from the evidence already in the record with respect to the job duties and DOL's reliance upon that information in issuing the labor certifications.

As noted previously, the petitioner is seeking to employ the beneficiary in the position of Developmental Disability Specialists (aka Teacher-Home Therapy). The Department of Labor, in the course of reviewing the offered position including the description of duties to be performed and the education, training, and experience required, classifies the position under the applicable Industry and Occupational Codes, and designates the appropriate Occupational Title. (See DOL endorsement on Part A of the ETA 750).

As counsel has noted in the response submitted to the Service Center's Notice of Intent to Deny (NOID), the requirements specified for the position of DDS [Developmental Disability Specialist] were certified by the DOL indicating that those requirements were consistent with "those defined for the job in the Dictionary of Occupational Titles (DOT) including those for subclasses of jobs" citing 20 C.F.R. § 656.21(b)(2). Counsel further noted in her response that "[g]enerally positions in the Labor Department's Dictionary of Occupational Titles with a Specific Vocational Preparation (SVP) code of seven or greater will be qualified as skilled" noting that the position of DDS has an SVP code of 7.

(AAO decision in LIN-03-110-55083, at 10).

The AAO then discussed an explanation of SVP code 7 in Appendix C of the Dictionary of Occupational Titles and stated the following:

The appendix goes on to note that a position which has been assigned an SVP code of 7 is one which requires "over 2 years up to and including 4 years." Counsel also attached the Dictionary of Occupational Titles description corresponding to the DDT [sic] position which clearly provides an SVP code of 7.

The fact that the position, as contemplated by DOL through its classification process, is one that requires a certain amount of vocational preparation, leads us to conclude that it cannot at one time be a position for which there are requirements that lead DOL to assign it a fairly high SVP code of 7, yet can simultaneously be considered ones requiring no skills or training – and

presumably a low SVP rating. Counsel herself acknowledges this when she states in response to the NOID, "we assert that the position of Developmental Disability Specialist is most appropriately classified as a 203(A)(b)(3)(i) skilled worker." Counsel's desire to have the petition considered under the unskilled worker category results not from an assessment that this is the correct petition category, but out of an understandable desire to address the client's needs. However, having made certain representations regarding the type of position and its requirements, counsel cannot now modify those representations. Furthermore, CIS has the obligation to ensure that the position is filled with a qualified worker. Because we conclude that the position's requirements corresponds [sic] to a skilled worker, and the beneficiaries do not have the necessary qualifications, the unskilled worker category cannot be used to accomplish the outcome that is otherwise unavailable.

(AAO decision in LIN-03-110-55083, at 10-11).

In the instant I-140 petition, the ETA 750 specifies the following duties for the position of Habilitation Aide (Mental Retardation Aide 355.377-018):

Assists in providing self-care training and therapeutic treatments to residents of pediatric mental retardation center. Interacts with residents to reinforce positive behaviors and to promote social interaction. Serves meals and eats with residents to act as role model. Aids staff in administering therapeutic activities, such as physical exercises, occupational arts and crafts, and recreational games, to residents. Restrains disruptive residents to prevent injury to themselves and others. Observes and documents residents' behaviors, such as speech production, feeding patterns, and toilet training, to facilitate assessment and development of treatment goals. Attends to routine health-care needs of residents under supervision of medical personnel.

(ETA 750, Part A, block 13).

In his September 16, 2004, decision, the director determined that the offered position requires the services of a skilled worker and that the petition had been filed in the "other worker" preference category, for an unskilled worker. The director accordingly denied the petition.

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

The public Internet Web site of the Occupational Information Network contains information developed in coordination with the U.S. Department of Labor. That site is referred to as "O*Net." The information on that Web site replaces information previously contained in the Department of Labor's Dictionary of Occupational Titles (DOT).

The record on appeal contains a copy of a page apparently from the DOT which includes an entry for the position with the occupational code of 355.377-018 and the job title of Mental-Retardation Aide. That code matches the code in the ETA 750 in the instant petition for the offered position of Habilitation Aide. On the Final Determination letter from the Employment and Training Administration accompanying the certified ETA 750, the job title is stated as Mental Retardation Aide.

The Internet Web site of the Employment and Training Administration, Department of Labor, provides a cross-index between the occupational codes in the DOT and the new occupational titles and codes in the Occupational

Information Network. See Employment and Training Administration, U.S. Department of Labor, *FLC Data Center - Frequently Asked Questions*, <http://www.flcdatacenter.com/faq.aspx> (accessed February 5, 2007).

A search on the index labeled "cross walk" at that Web site by the DOT occupational code of 355.377-018, produces a link to the OES/SOC code in O*NET of 31-1013, Psychiatric Aides.

The summary report for that job category classifies the category as "Job Zone Two: Some Preparation Needed." The report states the following requirements for job training: "Employees in these occupations usually need anywhere from a few months to one year of working with experienced employees." The report states a Specific Vocational Preparation (SVP) Range of "4.0 to <6.0." Occupational Information Network, *O*Net OnLine, Summary Report for : 21-1093 – Social and Human Service Assistants*, <http://online.onetcenter.org/link/summary/31-1013> (accessed February 5, 2007).

The decision of the AAO in LIN-03-110-55083 discusses the position of Developmental Disability Specialist, and states that in the Labor Department's Dictionary of Occupational Titles the position of Developmental Disability Specialist was assigned an SVP of 7, which corresponds to a job requiring from two to four years of experience. (AAO decision in LIN-03-110-55083, at 10). The AAO decision discussed above in LIN-03-110-55083 indicates that an SVP of less than 7 would at most require up to two years of experience. (AAO decision in LIN-03-110-55083, at 10). The category which could require up to two years of experience would presumably be SVP 6.

In the instant petition, the SVP as stated in the copy of a page from the DOT gives the SVP for the position of Mental Retardation Aide as 6. The job duties for the offered position of Habilitation Aide as stated on the Form ETA 750, block 13, are stated in language which is for the most part identical to the typical job duties for a Mental Retardation Aide in the DOT. However, two very significant duties listed at the end of the Mental Retardation Aide duties are not among the duties of the Habilitation Aide position. Those are "May give medications as prescribed by physician," and "May train parents or guardians in care of deinstitutionalized residents." (DOT excerpt, page 257). The omission of those duties from the position of Habilitation Aide indicates that the position of Habilitation Aide has a significantly lower level of responsibility than the maximum responsibilities typical for a Mental Retardation Aide. Therefore the fact that the position of Habilitation Aide does not require two years of experience, as stated on the ETA 750 summarized above, raises no inconsistencies with the DOT listing for Mental Retardation Aide, nor with the information at the O*NET Internet Web site for Psychiatric Aide, which is the current job title for that position used by the Employment and Training Administration of the Department of Labor.

The instant petition was filed under the "other worker" visa preference classification, rather than under the classification for skilled workers and professionals. The ETA 750 requires no minimum education, training or experience, and no other special requirements. The ETA 750 was certified by the Department of Labor in that form, with the job title of Mental Retardation Aide on the final determination letter. The position is appropriately classified as a position for an unskilled worker on the I-140 petition, which is the correct preference classification. Since the ETA 750 specifies no minimum job requirements, it is not necessary to consider the education, training and experience of the beneficiary as stated on the ETA 750B.

In her decision, the director evaluated the job requirements for the offered position and found that the position must be considered to be one for a skilled worker. The director then stated that the unskilled worker category cannot be used to accomplish an outcome for the petition which is otherwise unavailable. The director stated that "[i]n view of the fact that the position in which the beneficiary will be employed has been shown to require the service of a skilled worker, the beneficiary cannot be accorded status as an unskilled worker simply to facilitate

approval of the petition.” (Director’s decision, at 4). The director found that the qualifications of the beneficiary to perform the duties of the position are irrelevant, and concluded that since the offered position requires the services of a skilled worker, the beneficiary cannot be accorded the “other worker” visa classification.

The decision of the director was therefore incorrect in stating that the position was one for a skilled worker. For the reasons discussed above, the assertions of counsel on appeal are sufficient to overcome the decision of the director on that issue.

In her decision, the director did not discuss the issue of the petitioner’s ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 July 28, 2003. The proffered wage as stated on the Form ETA 750 is \$7.06 per hour, which amounts to \$14,684.80 annually.

It may be noted that it has been more than three years since the Application for Alien Employment Certification was 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 4, 2005 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.

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 11, 2005. During the year 2005 the petitioner filed a total of 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 (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.

CIS electronic records do not show the priority dates of all petitions filed by the petitioner. The priority date of the instant petition is July 28, 2003, which is about one year and six months earlier than the February 11, 2005 date on which the I-140 petition was filed.

CIS electronic records do not contain sufficient information on priority dates on which to base estimates of the effect of multiple petitions beginning with each petition's priority date. Therefore an estimate of the total wage commitment the petitioner for multiple petitions will be made beginning in the year of the I-140 filing, which in the instant petition is 2005.

The record in the instant case contains no direct information about the proffered wages for the beneficiaries of the other petitions submitted by the petitioner. The petitioner has submitted no list of proffered wages for each of the beneficiaries of the other I-140 petitions it has filed. The proffered wage as stated on the ETA 750 in the instant petition is \$7.06 per hour. As noted above, an hourly wage of \$7.06 for a 40-hour work week is equivalent to an annual wage of \$14,684.80.

In the year 2005 the petitioner filed five I-140 petitions, including the instant petition. At an estimated annual proffered wage level of \$14,684.80 for each beneficiary, five I-140 petitions would result in a total estimated proffered wage commitment of \$73,424.00 for the I-140 petitions filed in the year 2005.

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. In the instant petition, however, the petitioner has submitted no statement from a financial officer of 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 (9th 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 (7th 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.

Several documents in the record indicate that the legal name of the petitioner is Hoosier Care, Inc. A document in the record titled Organizational Overview states that Hoosier Care, Inc., is a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. According to the Organizational Overview the petitioner was incorporated in Indiana in December 1988, and it owns and operates three skilled nursing-pediatrics facilities in Illinois and one such facility in Indiana. One of the facilities in Illinois is Swann Special Care Center, which is the trade name which appears as part of the petitioner's name in the instant petition. The Organizational Overview also describes a second corporation, Hoosier Care II, Inc. It states that Hoosier Care II, Inc., is also incorporated under the laws of the State of Indiana, and that it owns and operates three skilled nursing geriatric facilities in Indiana and that it has a lease for the operation of another healthcare facility in Indiana.

The record in the instant case does not contain copies of the petitioner's tax returns, but it does contain copies of audited financial statements. Audited financial statements are among the forms of acceptable evidence stated in the regulation at 8 C.F.R. § 204.5(g)(2). The audited financial statements in the record are combined statements of the petitioner and of another corporation, Hoosier Care II, Inc. Notes to the audit reports accompanying the statements state that both corporations are among eight subordinate obligated group companies

of Hoosier Care Group and that members of the board of directors of Hoosier Care Group also serve on the boards of directors of the subordinate obligated entities, in some cases with other individuals.

The combined financial statements of the petitioner and of Hoosier Care II, Inc. are for the years ended June 30, 2003 and June 30, 2004. The audit report accompanying the financial statements for the latter year is dated August 25, 2004. The instant petition was filed on February 11, 2005. The audited financial statements for the year ended June 30, 2004 are therefore the most recent statements available as of the date on which the I-140 petition was filed.

Most portions of the combined financial statements for the year ended June 30, 2003 and June 30, 2004 present combined financial information for the petitioner and for Hoosier Care II, Inc., with no separate figures for each corporation. However, sections of the financial statements titled supplemental information contain statements on income and expenses and balance sheets which present information separately for each corporation.

The income and expense statements of the petitioner show the information in the following table.

Year ending	Net income	Wage increases needed to pay the proffered wage	Surplus or deficit
6/30/03	\$1,225,798.00	not applicable	not applicable
6/30/04	\$1,612,084.00	\$73,424.00*	\$1,538,660.00

* The estimated total proffered wage commitments of the petitioner for the five I-140 petitions submitted in 2005, including the instant petition.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in the year 2005.

Calculations based on the balance sheet information for the petitioner for the years ended June 30, 2003 and June 30, 2004 yield the amounts for year-end net current assets as shown in the following table.

Year ending	Net current assets	Wage increase needed to pay the proffered wage	Surplus or deficit
6/30/03	\$5,793,797.00	not applicable	not applicable
6/30/04	\$2,136,973.00	\$73,424.00*	\$2,063,549.00

* The estimated total proffered wage commitments of the petitioner for the five I-140 petitions submitted in 2004, including the instant petition.

The information on the petitioner's net current assets as of June 30, 2004 provides further evidence to establish the petitioner's ability to pay the proffered wage in the year 2005.

As noted above, CIS electronic records do not contain sufficient information on priority dates on which to base estimates of the effect of multiple petitions beginning with each petition's priority date. The petitioner's financial statements for the year ending June 30, 2003 cover the period from July 1, 2002 through June 30, 2003, a period beginning 25 days after the June 5, 2002 priority date. The Supplemental Information section

of those statements shows that as of July 1, 2002 the petitioner had cash and cash equivalents of \$228,639.00. That amount is many multiples of the proffered wage of \$15,932.80.

The petitioner's financial statements for the year ending June 30, 2004 cover the period from July 1, 2003 through June 30, 2004, a period which includes the July 28, 2003 priority date. Those statements show net income and net current assets which are many multiples of the proffered wage of \$14,684.80 and many multiples of the \$73,424.00 in total wage commitments of the petitioner for the five I-140 petitions submitted in 2005. The foregoing information is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date in 2003 as well as in 2004. The evidence in the record therefore establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the petitioner obtains lawful permanent residence.

Although the evidence in the record is sufficient concerning the preference category and the beneficiary's qualifications and concerning the petitioner's ability to pay the proffered wage, the evidence presently in the record is insufficient to support an approval of the petition. As noted above, no original ETA 750 is found in the record. An original labor certification is required by the regulation at 8 C.F.R. § 204.5(g)(1). The instant petition is for a substituted beneficiary and the beneficiary's A-file does not contain the original labor certification. The original certified ETA 750 may have been submitted in support of a different I-140 on behalf of another beneficiary and perhaps will be found in that beneficiary's A-file or in a record of proceeding of any such I-140 petition. An original certified ETA 750 is required for approval of the instant I-140 petition in order to assure that the same ETA 750 is not used as the basis for another I-140 petition on behalf of another beneficiary as a substituted beneficiary.

For the foregoing reasons, the petition must be remanded to the director is to ascertain whether an original certified ETA 750 has been filed, and if so, to assure that the original ETA 750 will be used in support of the instant I-140 petition and no other I-140 petition.

In summary, the evidence is sufficient to establish that the petition was submitted under the proper preference category and that the beneficiary is qualified for the position. The evidence also establishes the petitioner's ability to pay the proffered wage during the relevant period. The decision of the director is withdrawn. The petition must be remanded to the director to consider matters concerning the original ETA 750, as discussed above.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for actions consistent with the decision above.