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FILE: LIN-03-032-52358 Office: NEBRASKA SERVICE CENTER Date: **JAN 24 2007**

IN RE: Petitioner:   
Beneficiary: 

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 initially approved by the Director, Nebraska Service Center, but the approval was later revoked. The petition is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded to the director.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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 [REDACTED]” [REDACTED]. A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petition was approved on February 28, 2003. After a consular investigation and interview of the beneficiary, the director issued a notice of intent to revoke the petition's approval. The director determined that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and revoked the petition's approval 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 June 3, 2002.

The I-140 petition was submitted on December 4, 2002. 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 supporting evidence.

In a December 3, 2004 decision, the director determined that the offered position requires the services of a skilled worker and that the beneficiary lacked two years of education or training relevant to the offered position. The director accordingly revoked the petition's approval.

On appeal, counsel submits a brief and submits duplicate copies of some documents previously submitted for the record.

Counsel states on appeal that the beneficiary’s post-secondary education includes a Bachelor’s degree in Physical Therapy, a field which counsel states has been found relevant to the position of Developmental Disability Specialist by previous decisions of the AAO.

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, Citizenship and Immigration Services (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   | None<br>**Bachelor’s / Foreign Equivalent / Credential<br>Evaluation Equivalent |

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
[REDACTED]	Physical Therapy	4/1999	3/2000	B.S. in Physical Therapy
[REDACTED]	Physical Therapy	6/1994	3/1999	B.S. in Physical Therapy

[remaining rows 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:

Name and Address of Employer	Name of Job	From	To	Kind of Business
[REDACTED]	Medical Transcriptionist	8/2000	Present	Medical Transcription

[remaining rows blank]

The regulation at 8 C.F.R. § 204.5(1)(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 for the record 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 (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 a December 3, 2004 decision, the director determined that the offered position requires the services of a skilled worker and that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker for the offered position, and revoked the petition’s approval accordingly.

Based on the evidence in the record, the director’s decision to revoke the petition’s approval was incorrect.

The job duties described in the ETA 750 for the position of Developmental Disability Specialist are those of a skilled worker. The ETA 750 was certified by the Department of Labor with those job duties. The public Internet Web site of the Occupational Information Network contains information developed in coordination with the U.S. Department of Labor. On that Web site, the job title for the occupation with the OES code of 21-1093 is Social and Human Service Assistants. The summary report for that job category classifies the category as “Job Zone Three: Medium Preparation Needed.” The report states the following requirements for job training: “Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.” The report states a Specific Vocational Preparation

(SVP)Range of "6.0 to <7.0." Occupational Information Network, *O\*Net OnLine, Summary Report for : 21-1093 – Social and Human Service Assistants*, <http://online.onetcenter.org/link/summary/29-1125.00> (accessed December 14, 2006). The position of developmental disability specialist is discussed above in the decision of the AAO in LIN-03-110-55083, which 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 record contains a copy of a diploma dated March 30, 2000 from Laguna Northwestern College, San Pedro, Laguna, Philippines, granting the beneficiary a Bachelor of Science in Physical Therapy degree, with an accompanying course transcript. That transcript states that prior to entry at Laguna Northwestern College the beneficiary studied at De La Salle University, and it records courses taken at that university. The record also contains a copy of the beneficiary's course transcript from De La Salle University, Dasmarias, Cavite, Philippines. The Laguna Northwestern College transcript indicates that all of the beneficiary's courses from De La Salle University were credited as transfer courses toward the beneficiary's degree from Laguna Northwestern College.

The record also contains a copy of an academic evaluation for the beneficiary by [REDACTED] and New York, New York dated January 17, 2003.

The beneficiary's course transcripts from De La Salle University and Laguna Northwestern College shows many courses which are relevant to the position of Developmental Disability Specialist. The transcripts shows courses in Inorganic Chemistry, Physical Therapy Perspective, General Psychology, Physical Education, Guidance 1, Organic Chemistry, Socio-Anthropology, General Zoology, Comparative Anatomy, Biostatistics, Introduction to Patient Care, History Taking and Charting, Human Anatomy 1 & 2, Human Physiology 1 & 2, Kinesiology, Physical Therapy 3, and other relevant courses, as well as general education courses.

The academic evaluation by [REDACTED] finds that the beneficiary's degree from Laguna Northwestern College is equivalent to a Bachelor of Science in Physical Therapy degree from an accredited institution of higher education 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 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. Moreover, the field of Physical Therapy is sufficiently relevant to the position of Developmental Disability Specialist to qualify as training for that position.

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 is sufficient to establish that 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 are sufficient to overcome the decision of the director concerning the education of the beneficiary.

In his 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 June 3, 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 Sonegawa*, 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 May 17, 2002 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 November 12, 2002. During the year 2002 the petitioner filed a total of fifty-six 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 [REDACTED] 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.

CIS electronic records do not show the priority dates of all petitions filed by the petitioner. The priority date of the instant petition is June 3, 2002, which is about five months earlier than the November 12, 2002 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 2002.

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 \$7.66 per hour. As noted above, 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 2002 the petitioner filed fifty-six I-140 petitions, including the instant petition. At an estimated annual proffered wage level of \$15,932.80 for each beneficiary, fifty-six I-140 petitions would result in a total estimated proffered wage commitment of \$892,236.80 for the I-140 petitions filed 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 a 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 authorized to do business 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 employees.

The corporation employs more than 140 people at our Champaign location.

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). However, the content of that letter provides some evidence of 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 approximately equal to the estimated \$892,236.80 in proffered wage commitments which the petitioner has made in fifty-six I-140 petitions which it submitted in 2002, including the instant petition.

The letter from Mr. [REDACTED] refers to the petitioner as "[REDACTED]". No evidence in the record corroborates Mr. [REDACTED] 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 "Inc." Other evidence in the record 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 other evidence in the record. The Board of Immigration Appeals has stated, "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.

Several documents in the record indicate that the legal name of the petitioner is ██████████. The record in the instant case does not contain copies of the petitioner's tax returns. Nor does the record contain copies of audited financial statements or of annual reports, which are the two other alternative forms of required evidence as stated in the regulation at 8 C.F.R. § 204.5(g)(2).

The record contains copies of unaudited combined financial statements dated December 31, 2001 and December 31, 2002. The record also contains a copy of a Statement of Operations of the petitioner for the period ending September 30, 2002, which is another unaudited financial statement.

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. Moreover, the unaudited combined financial statements do not present any information separately for the petitioner, but rather present only combined figures for the petitioner and for another corporation named ██████████. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Although the records in other petitions submitted by the petitioner contain evidence explaining the relationship between the petitioner and ██████████, the record in the instant petition contains no such evidence. In any event, in the case of a nonprofit corporation, even if members of its board of directors are also the members of the board of directors of another nonprofit corporation that fact does not affect the independent legal status of either corporation. Nothing in the governing regulation at 8 C.F.R. § 204.5 allows CIS to consider the assets or resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at \*3 (D. Mass. Sept. 18, 2003).

The record also contains copies of quarterly wage and withholding reports of the petitioner for the fourth quarter of 2002, but those reports do not contain information on the petitioner's net income in 2002.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage. In the absence of a statement by a financial officer of the petitioner, the regulation at 8 C.F.R. § 204.5(g)(2) requires "copies of annual reports, federal tax returns, or audited financial statements" to establish the petitioner's ability to pay the proffered wage.

In his decision, the director did not address the issue of the petitioner's ability to pay the proffered wage. For that reason, the instant petition must be remanded to the director to determine whether the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period, as well as to pay the proffered wages to the beneficiaries of the other petitions filed by the same petitioner in 2002. On remand, the director may request updated financial information from the petitioner and may also request information on the number of any alternative petitions filed for beneficiaries in different preference categories. The petitioner is required to establish its ability to pay the proffered wage for each offered job for which a petition was filed during the year 2002. If the same job was the subject of two or more alternative petitions that year, the proffered wage for that job should be counted only once when calculating the petitioner's total wage commitments.

The record contains a copy of a memorandum from the United States Embassy in Manila which was written after the initial approval of the instant petition. The U.S. Embassy returned the petition to CIS for review because of concerns that the beneficiary did not meet the requirements of a skilled worker. The memorandum was written on October 20, 2003, a date prior to the issuance of the three AAO decisions discussed above concerning the same petitioner, which were issued on July 9, 2004. Although those decisions are not precedent decisions, the AAO is following the same reasoning in the instant decision, and has determined that education relied upon to qualify for a skilled worker position must be in a field of study which is relevant to the duties of the position. In the instant case, the evidence establishes that the beneficiary's field of study is relevant to the offered position.

In summary, the decision of the director concerning the education of the beneficiary is withdrawn. The petition is remanded to the director to evaluate the petitioner's ability to pay the proffered wage, as discussed above.

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