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U.S. Citizenship  
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Services

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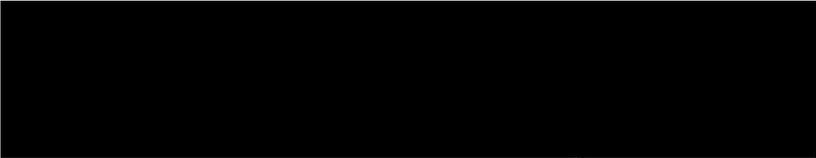


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 01 2007**  
WAC 04 067 50151

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 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*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. On May 2, 2006, the AAO faxed counsel explaining that the brief was not received by this office and requesting that if counsel had indeed filed a brief, that counsel provide a duplicate copy of that brief within five business days. As of today, more than 9 months later, this office has received no further communication from counsel. Therefore, a decision will be determined based on the record, as it is currently constituted.

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

As set forth in the director's December 30, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 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 CFR § 204.5(d). The priority date in the instant petition is September 11, 1996. The proffered wage as stated on the Form ETA 750 is \$1,263.60 per month or \$15,163.20 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes counsel's statement.

Other relevant evidence in the record includes: copies of the 2002 and 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, for I [REDACTED] San Carlos, California; copies of the petitioner's owner's 1997 through 2001 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business; copies of the petitioner's 1999 and 2000 Forms 941, Employer's Quarterly Federal Income Tax Returns, attached to which are lists of the petitioner's employees that include the wage paid each employee; copies of the Forms 941 for certain quarters of 1996<sup>2</sup>; and copies of the beneficiary's 1995 through 1998 and 2002 Forms W-2, Wage and Tax Statements. The record also includes the petitioner's unaudited balance sheets and profit and loss statements. The 2000 Form 1040 for a [REDACTED] as well as the 2000 Form W2 for a [REDACTED] are included in the record.<sup>3</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2002 and 2003 Forms 1120S in the record are not those of the petitioner [REDACTED] in San Mateo, California. Rather, they are the tax returns for I [REDACTED] d/b/a [REDACTED], San Carlos, California. The record indicates that the petitioner's owners also own [REDACTED], but it does not contain evidence to support a finding that [REDACTED] and the petitioner are the same entity or are successors-in-interest to each other. These forms reflect ordinary incomes or net incomes of \$412,594 for 2002 and \$80,571 for 2003. These Forms 1120S also reflect net current assets of -\$3,213,164 for 2002 and -\$3,064,645 for 2003.

The Forms 1040 in the record indicate that the petitioner filed as a sole proprietorship in 1997 through 2000. However, the Schedule C of the Form 1040 for the year 2001 does not list profit or loss for the petitioner, but for [REDACTED] California. There is no evidence in the record to support a finding that the petitioner and [REDACTED] are the same entity or that they are successors-in-interest to each other. There is no evidence in the record to indicate that the petitioner filed taxes as a sole proprietorship in the year 2001.<sup>4</sup>

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> It is noted that these forms include information that pertains to a business other than the petitioner. Also, these forms do not have attachments that include lists of employees paid during those quarters. These forms will not be considered further.

<sup>3</sup> The financial information of [REDACTED] of Palo Alto, California does not appear to be relevant to the instant petition. Items pertaining to [REDACTED] and [REDACTED] will not be considered further.

<sup>4</sup> This office notes that the Forms 1040 for 1998, 1999 and 2000 each include two Schedules C. One Schedule C for On [REDACTED] (in 1998 and 1999), one Schedule C for [REDACTED] (in 2000), both of Burlingame, California, in addition to a Schedule C for a [REDACTED] at the same address as the petitioner for the years 1998, 1999 and 2000. For purposes of this analysis, this office, in its discretion, will treat San Mateo Villa and the petitioner [REDACTED] as if they are the same entity without requiring further documentation of such from the petitioner. When listing figures from the Schedule C, Profit or Loss from

The petitioner's owner's 1997 through 2001 Forms 1040 reflect an adjusted gross income (loss) of \$67,911 for 1997, \$64,648 for 1998, \$11,204 for 1999, -\$216,741 for 2000, and \$71,594 for 2001.

The petitioner's owner's Schedule C reflects a net profit of \$21,958 for 1997, a net profit of \$13,059 for 1998, a net profit (loss) of -\$3,245 for 1999, and a net profit (loss) of -\$37,693 for 2000 for the petitioner for each respective year. The petitioner's owner's Schedule C reflects a net profit (loss) of -\$11,508 for 2001 for [REDACTED], California.

The petitioner's Form 941, Employer's Quarterly Federal Tax Return, for each quarter of 1999 reflect wages paid to the beneficiary by the petitioner of \$1,610 each quarter or \$6,440 annually in 1999. The petitioner's 2000 Forms 941 reflect no wages paid to the beneficiary by the petitioner in any quarter of 2000.

There are two 1995 Forms W2 for the beneficiary in the record. Neither one of these forms was issued by the petitioner. One was issued by [REDACTED], California. Nothing in the record indicates that this business is the same as the petitioner or that the petitioner and this entity are successors-in-interest to each other. That Form W2 indicates that [REDACTED] paid the beneficiary \$618.16 during 1995. The other 1995 Form W2 for the beneficiary in the record was issued by [REDACTED] a business which has the same address as the petitioner. There is nothing in the record to confirm that [REDACTED] is the same business as the petitioner or that this entity and the petitioner are successors-in-interest to each other. This Form W2 reflects that [REDACTED] paid \$1800 to the beneficiary during 1995.

The 1996 Form W2 for the beneficiary, which is included in the record, reflects that [REDACTED] of Burlingame, California paid the beneficiary \$9600 during 1996. There is no evidence in the record that Ivanka's [REDACTED] California is the same business as the petitioner or that this entity and the petitioner are successors-in-interest.

The 1997 and 1998 Forms W2 for the beneficiary in the record were issued by the petitioner's owners located at the same address as the petitioner. These appear to be records of wages paid to the beneficiary by the petitioner during 1997 and 1998. The 1997 Form W2 indicates that the petitioner paid the beneficiary \$7611 during that year. The 1998 Form W2 indicates that the petitioner paid the beneficiary \$8,136 during 1998.

There are two 2002 Forms W2 for the beneficiary in the record. One was issued by [REDACTED] located on [REDACTED] in San Mateo, California. [REDACTED] may be an abbreviated name for the petitioner. However, there is no evidence in the record to link the petitioner to an address on [REDACTED]. This Form W2 indicates that [REDACTED] paid the beneficiary \$600 during 2002. The other 2002 Form W2 for the beneficiary in the record was issued by [REDACTED] in Omaha, Nebraska, which may be the payroll company for an unspecified business in California. This form reflects that [REDACTED] paid the beneficiary \$18,766 during 2002.

On appeal, counsel states that the director erred in not considering that the "beneficiary had already been paid on the payroll of the petitioner. Hence, there is no doubt that the petitioner can pay the proffered wage. At present, the petitioner had already expanded another facility by which demonstrate (sic) the capacity to pay of the petitioner."

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a Business, in this analysis, this office will use the figures found on the Schedules C for [REDACTED]. For the year 2001, however, this office will use figures from the only Schedule C submitted into the record, that of [REDACTED]

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 beneficiary's proffered 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 October 7, 1997, the beneficiary did not claim the petitioner as a past or present employer. However, in a supplement to the Assessment Supervisor, Alien Labor Certification Office, signed by the beneficiary on October 28, 1997, the beneficiary claimed to have been employed by the petitioner from May 1997 to the present. Counsel submitted the beneficiary's 1995 through 1998 and 2002 Forms W-2. However, as noted above, only the 1997, 1998 and one of the 2002 Forms W2 for the beneficiary in the record appear to have been issued by the petitioner and as such may be seen to represent the funds available to the petitioner to pay the proffered wage during those years. In addition, counsel submitted copies of the petitioner's 1999 Forms 941 showing wages that it paid the beneficiary in 1999.

As outlined above, there is no evidence in the record that the various other employers listed on the Forms W-2 in the record are the same as the petitioner or are successors-in-interest to the petitioner. If they are the petitioner, then the petitioner is obligated to document that for the record. This office would note, however, that even if all the funds paid to the beneficiary as documented by the Forms W2 in the record were paid by the petitioner, the petitioner is still obligated to demonstrate that it had sufficient funds to pay the difference between the proffered wage of \$15,163.20 and the actual wages paid to the beneficiary during the relevant years. In the instant case, those differences would be \$5,563.20 for 1996, \$7,552.20 for 1997, \$7,027.20 for 1998, and \$8,723.20 for 1999. The amounts on the two 2002 Forms W2 in the record when combined indicate that the beneficiary was paid more than the proffered wage during that year.<sup>5</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the entire relevant period of analysis, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*,

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<sup>5</sup> The Form W-2 for 1995 is not included in this analysis as 1995 was before the priority date of September 11, 1996 and as such is not directly relevant when considering the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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).

Regarding the year 1996, neither the petitioner's federal tax return nor the petitioner's owner's federal tax return was submitted into the record. There is no other reliable evidence in the record regarding the petitioner's ability to cover the wage in 1996 (or the \$5,563.20 balance of the wage, were the petitioner able to demonstrate that the 1996 Form W2 for the beneficiary in the record reflects funds which the petitioner paid.)

The record indicates that in 1997 through 2000 the petitioner was organized as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the record indicates that the sole proprietor supported a family of two. The petitioner's owner's 1997 through 2000 tax returns reflect an adjusted gross income (loss) of \$67,911 in 1997, \$64,648 in 1998, \$11,204 in 1999, and -\$216,741 in 2000.

It appears that the petitioner's owner had sufficient funds in his 1997 adjusted gross income (\$67,911) to pay the difference between the proffered wage of \$15,163.20 and the actual wages paid of \$7,611, or \$7,552.20, and still have sufficient funds left to cover living expenses for a family of two in 1997.<sup>6</sup>

In addition, it appears that the petitioner's owner had sufficient funds in his adjusted gross income to pay the balance of the proffered wage in 1998 (\$7,027.20), and still support a family of two out of his adjusted gross income of \$64,648.

However, the petitioner's owner did not have sufficient funds to do so in 1999 or 2000. That is, in 1999, the owner's \$11,204 in adjusted gross income would have covered the difference between the proffered wage and the \$6,440 paid to the beneficiary that year or \$8,723.20. However, that would have left the petitioner's owner with only \$2,480.80 with which to support himself and his spouse for the year. It is not reasonable to

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<sup>6</sup> The petitioner failed to provide and the director failed to request copies of the petitioner's owner's monthly personal household expenses. However, this office finds it reasonable to conclude that the petitioner's owner would have been able to support himself and his wife on the amount left after deducting \$7,552.20 from his 1997 adjusted gross income of \$67,911 and after deducting \$7,027.20 from his 1998 adjusted gross income of \$64,648.

conclude that he could have done so. In 2000, the petitioner's owner had no funds available as adjusted gross income with which to pay any of the wage or to cover his household expenses.

As explained above, the record also includes the petitioner's owner's Form 1040 for 2001. However, there is no evidence on the corresponding Schedule C or elsewhere in the record to indicate that the petitioner filed as a sole proprietor during that year. This office would note though that if the petitioner were able to demonstrate that it filed as a sole proprietor in 2001 then the petitioner's owner's adjusted gross income for that year might be considered when analyzing the petitioner's ability to pay the wage. Yet, the petitioner's owner's tax return reflects an adjusted gross income (loss) of -\$71,594 in 2001. Thus, in 2001, the petitioner's owner had no funds available as adjusted gross income with which to pay any of the wage or to cover his household expenses.

As discussed above, the tax forms for 2002 and 2003 submitted into the record do not appear to be those of the petitioner. It is noted that if the petitioner were able to reliably document that the financial information on the Forms 1120S for 2002 and 2003 in the record is that of the petitioning business, that information would support a finding that the petitioner had the ability to pay the wage from its net income during 2002 and 2003.

Specifically, if the petitioner could show that these 2002 and 2003 tax returns were filed on its behalf, then the petitioner was structured as an S Corporation during those years. Again, where a petitioner does not establish by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during the relevant period, as an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, 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 CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The Form 1120S tax returns in the record demonstrate a net income of \$412,594 in 2002, and \$80,571 in 2003. If it can be shown that these respective net incomes are those of the petitioner, then the petitioner could have paid the proffered wage of \$15,163.20 in 2002 and 2003 from its net income.

As noted above, on appeal, counsel states that the director erred in not considering that the "beneficiary had already been paid on the payroll of the petitioner. Hence, there is no doubt that the petitioner can pay the proffered wage. At present, the petitioner had already expanded another facility by which demonstrate (sic) the capacity to pay of the petitioner."

Counsel is mistaken in his assertion that if a petitioner has placed the beneficiary on its payroll, this supports a finding that the petitioner has the continuing ability to pay the proffered wage. The mere fact that the petitioner paid the beneficiary some amount in the past does not establish the petitioner's continuing ability to

pay the full proffered wage of \$15,163.20 from the priority date onwards. Counsel provided copies of the beneficiary's Forms W-2 for 1995 through 1998 and 2002, as well as the petitioner's 1999 quarterly wage statements, which document that the petitioner paid the beneficiary in 1999. However, as discussed above, the record does not indicate that the Forms W2 for 1995, 1996 or 2002 reflect wages paid by the petitioner. Further, even if all the wages listed on the Forms W2 for the beneficiary in the record reflect funds that the petitioner paid, only the two 2002 Forms W2 in the record indicate that the beneficiary was paid the full proffered wage. The record includes no evidence to indicate that the beneficiary was paid the full proffered wage in any year besides 2002 beginning at the priority date and continuing until the record closed in November 2004, when counsel submitted a response to the director's request for evidence.

The petitioner has only clearly established its ability to pay the proffered wage in 1997 and 1998, not in any other years since the September 11, 1996 priority date onwards.

Even if the petitioner could demonstrate that all the various tax returns in the record relate to the petitioning business and could demonstrate that all the Forms W2 for the beneficiary in the record reflect funds paid by the petitioner, the petitioner still has failed to provide evidence that it could pay the proffered wage in 1996, 1999, 2000 and 2001.

With regard to counsel's statement that "the petitioner had already expanded another facility by which demonstrate (sic) the capacity to pay of the petitioner," it is not clear that an expansion would favorably impact the petitioner's ability to pay the wage and counsel has not provided any evidence that the petitioner has expanded. 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). 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)).

Finally, any reliance on the unaudited balance sheets and other unaudited financial statements in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.