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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: LIN-03-114-50114 Office: NEBRASKA SERVICE CENTER Date: SEP 27 2006

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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 sustained. The petition will be approved.

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a developmental disability specialist. A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the training required to qualify as a skilled worker in the occupation of developmental disability specialist, and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 22, 2002.

The I-140 petition was submitted on February 24, 2003. On the petition, in Part 2, Petition type, the petitioner checked box "e" for "a skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, Part 2). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of "+$20 Million," and to have a net annual income of "+$889,000." (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a September 21, 2004 decision, the director determined that the evidence failed to establish that the beneficiary's possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that the beneficiary's post-secondary education includes a Bachelor's degree in Biology and post-graduate studies in medical school, fields which counsel states have been found relevant to the position of developmental disability specialist by previous decisions of the AAO. The evidence newly submitted on appeal consists of a transcript of the beneficiary's studies in medical school.

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 the document newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

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

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

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

14.	Education (number of years)		
	Grade School		8
	High School		4
	College		4
	College Degree Required		Bachelor's**
	Major Field of Study		Any field
	Training - yrs		n/a
	Experience		
	Job Offered	Yrs	0
	Related Occupation	Yrs	0
	Related Occupation (specify)		None
15.	Other Special Requirements		** Bachelor's/ Foreign Equivalent/ Credential Evaluation which shows a combination of education, training and or work experience equivalency

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

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Far Eastern University Manila, Philippines	Biology	08/1987	03/1991	Bachelor of Science

[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
Waltermart Paranaque City, Philippines	Merchandiser	10/2000	10/2001	Merchandise Store

[remaining rows blank]

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

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

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

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

(ETA 750, Part A, block 13).

In his September 21, 2004 decision, the director determined that the evidence failed to establish that the beneficiary's possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

The director's decision to deny the petition was correct, based on the evidence which was in the record before the director. However, the evidence newly submitted on appeal is sufficient to overcome the decision of the director.

The record contains a copy of a diploma dated March 27, 1991 from the Far Eastern University, Manila, Philippines, granting the beneficiary a Bachelor of Science degree in Biology, with an accompanying course transcript.

The record also contains a copy of an academic evaluation for the beneficiary by Morningside Evaluations and Consulting, New York, New York dated February 19, 2003.

The beneficiary's course transcript from Far Eastern University shows no courses which are directly relevant to the position of developmental disability specialist. The transcript shows no courses in the fields of Education or Health Care. The transcript shows several courses in the field of science which could be shown to be at least indirectly relevant to the offered position, including General Zoology, General Chemistry, Organic Chemistry, Microbiology, General Psychology, Systematic Zoology, General Parasitology, and Systematic Botany. The beneficiary's transcript shows one or two such courses each semester. Over eight semesters of study, such courses are insufficient to establish at least two years of study relevant to the offered position.

The academic evaluation by Morningside Evaluations and Consulting finds that the beneficiary's degree from Far Eastern University is equivalent to a Bachelor of Science degree in Biology 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. However, the field of Biology cannot be considered to be sufficiently relevant to the position of developmental disability specialist to qualify as training for that position.

Counsel asserts that the beneficiary's education also includes post-graduate studies in medical school. The record contains a copy of an undated professional resume of the beneficiary, in which the section on the beneficiary's education includes an entry stating post-graduate studies at the Fatima College of Medicine from 1991-1993. That resume fails to satisfy the evidentiary requirements of the regulation at 8 C.F.R. § 204.5(g)(1). At the time of the director's decision the record contained no other documentation of the beneficiary's studies at Fatima College, and the director's decision made no reference to those studies.

On appeal, the petitioner has submitted a copy of a transcript of the petitioner's studies at Fatima College of Medicine, showing a total of twelve courses passed during the three school years of 1991-92, 1992-93 and 1993-94. That transcript conforms to the evidentiary requirements of the regulation at 8 C.F.R. § 204.5(g)(1). The total number of credits in the passed courses on the Fatima College of Medicine transcript is 71 credits. The beneficiary's undergraduate transcript and the academic evaluation in the record of the beneficiary's undergraduate studies indicate that a full-time course load at the undergraduate level in the Philippines is about 17 credits per semester. Assuming a similar course load for full-time studies in medical school would indicate that the beneficiary's studies at the Fatima College of Medicine were equivalent to about four semesters of full-time study. Studies in the field of medicine are considered by CIS to be relevant to the offered position of developmental disability specialist.

The beneficiary's studies in the field of medicine and his prior relevant courses toward his undergraduate degree in Biology are sufficient to establish that the beneficiary had more than two years of post-secondary education relevant to the offered position as of the priority date.

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 and the evidence submitted 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 petitioner's ability to pay the proffered wage.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 22, 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 October 9, 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 February 24, 2003. During the year 2003 the petitioner filed a total of one hundred twenty-five I-140 petitions, including the instant petition.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (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 October 22, 2002, which is about four months earlier than the February 24, 2003 date on which the I-140 petition was filed. It cannot be assumed that all of the I-140 petitions filed by the petitioner in 2003 also had priority dates in the year 2002. If four months is a typical period between the priority date and the filing of an I-140 petition by the petitioner, then the I-140 petitions filed from about May 1, 2003 through the end of 2003 probably were based on ETA 750's which were filed in the year 2003.

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 2003.

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 AAO will therefore use the proffered wage of $7.66 as the basis for estimating the petitioner's proffered wage commitments to the beneficiaries of the petitioner's other I-140 petitions. 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 2003 the petitioner filed one hundred twenty-five I-140 petitions, including the instant petition. At an estimated annual proffered wage level of $15,932.80 for each beneficiary, one hundred twenty-five I-140 petitions would result in a total estimated proffered wage commitment of $1,991,600.00 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 as statement. *See* 8 C.F.R. § 204.5(g)(2).

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

> I, [redacted], do hereby certify that I am the director of Resource Development for Swann Special Care Center, Inc., a corporation organized and existing under the laws of the State of Illinois.
>
> The corporation is now and will be for the expected future able to pay the wages offered to our employee.
>
> The corporation employs more than 140 people at our Champaign, Illinois facility.
>
> For the fiscal year ended June 30, 2002, Swann Special Care Center 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 Price Waterhouse.

> 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 [redacted] is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the content of that letter is not sufficient to establish the petitioner's ability to pay the proffered wage during the relevant time period. The letter states that the petitioner's net income is in excess of $889,974.24 per year. That amount of net income is less than the estimated $1,991,600.00 in proffered wage commitments which the petitioner has made in one hundred twenty-five I-140 petitions which it submitted in 2003, including the instant petition.

The letter from [redacted] refers to the petitioner as "Swann Special Care Center, Inc." No evidence in the record corroborates [redacted]'s assertion that that is the legal name of the petitioner. On the I-140 petition, the petitioner's name is stated as "Swann Special Care Center," with no concluding abbreviation "Inc." Other evidence in the record indicates that "Swann Special Care Center" is in fact a trade name for a corporation named "Hoosier Care, Inc." [redacted] assertion that the petitioner is "Swann Special Care Center, Inc." 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 (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. The record contains copies of the articles of incorporation, bylaws and the certificate of incorporation of Hoosier Care, Inc. which show its incorporation as a not-for-profit corporation in the State of Indiana in December 1988. The record also contains a copy of an Illinois Charitable Organization Annual Report of Hoosier Care, Inc., for the year beginning July 1, 2001 and ending June 30, 2002, which indicates that the corporation was carrying on activities in the State of Illinois that year.

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.

The record contains a copy of a Form 990 Return of Organization Exempt from Income Tax for 2001 of Hoosier Care, Inc. The employer identification number on that return matches the Internal Revenue Service tax number of the petitioner as shown on the I-140 petition. The Form 990 return is for a tax year beginning on July 1, 2001 and ending on June 30, 2002.

The I-140 petition was filed on February 24, 2003. As of that date, the petitioner's Form 990 for its 2002 tax year was not yet available, which presumably ran from July 1, 2002 until June 30, 2003. The director issued a request for additional evidence (RFE) dated April 17, 2003. The petitioner's response to the RFE was received by the director on July 9, 2003. As of that date, the petitioner's Form 990 for its 2002 tax year was not yet due. Therefore, when the record before the director closed on July 9, 2003, the petitioner's Form 990 for its 2001 tax year was the most recent tax return available.

The petitioner's Form 990 return for 2001 shows on line 18 an excess of revenue over expenses in the amount of $298,998.00. That figure may be considered to be the petitioner's net income. The amount of $298,998.00 is less than the estimated $1,991,600.00 in proffered wage commitments which the petitioner has made in one hundred twenty-five I-140 petitions which it submitted in 2003, including the instant petition. The petitioner's net income therefore fails to establish the petitioner's ability to pay the proffered wage in 2003.

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

The petitioner's Form 990 for 2001 contains a balance sheet in section IV of the return. The line items on the Form 990 balance sheet do not clearly distinguish between current assets and other assets or between current liabilities and other liabilities. In the assets section, only the items on lines 45 through 47 for cash, savings and accounts receivable can be clearly considered as current assets, and only the item on line 60 for accounts payable and accrued expenses can be clearly considered as current liabilities. Calculations based on those items yield a figure of $4,605,017.00 for year-end net current assets for the petitioner's 2001 tax year. As noted above, the petitioner's 2001 tax year ended on June 30, 2002.

The figure of $4,605.017.00 is many multiples of the petitioner's proffered wage of $15,932.80, and it therefore is sufficient to establish the petitioner's ability to pay the proffered wage in the year 2002, which is the year of the priority date.

The petitioner's figure for year-end net current assets of $4,605,017.00 is also greater than the estimated $1,991,600.00 in proffered wage commitments which the petitioner has made in one hundred twenty-five I-140 petitions which it submitted in 2003, including the instant petition. The petitioner's net current assets therefore are sufficient to establish the petitioner's ability to pay the proffered wage in 2003.

The record contains copies of audited combined financial statements of the petitioner, and of another corporation, Hoosier Care II, Inc. Notes to the accompanying audit report 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, 2001 and June 30, 2002. The audit report accompanying the financial statements is dated September 17, 2002.

That date suggests that the audit report for the year ended June 30, 2002 was the most recent audit report available when the record closed in the instant petition on July 9, 2003.

According to the Organizational Overview mentioned above, the petitioner 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 under which the instant petition was filed. The other corporation, Hoosier Care II, Inc., like the petitioner, is incorporated under the laws of the State of Indiana. It owns and operates three skilled nursing geriatric facilities in Indiana and it also has a lease for the operation of another healthcare facility in Indiana.

Most portions of the combined financial statements for the years ended June 30, 2001 and June 30, 2002 present combined financial information for the petitioner and for Hoosier Care II, Inc., with no separate figures for each corporation. However, for the year ended June 30, 2002 income and expenses statements and balance sheets are stated separately for each corporation.

The income and expense statement of the petitioner shows the information in the following table.

Year ending	Net income	Wage increases needed to pay the proffered wage	Surplus or deficit
6/30/02	$298,998.00	not applicable	not applicable
6/30/03	not submitted	$1,991,600.00*	no information

* The estimated total proffered wage commitments of the petitioner for the one hundred twenty five petitions submitted in 2003, including the instant petition.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2003.

Calculations based on the balance sheet information for the petitioner for the year ended June 30, 2002 yield the amount 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
6/30/02	$4,544,905.00	not applicable	not applicable
6/30/03	not submitted	$1,991,600.00*	no information

* The estimated total proffered wage commitments of the petitioner for the one hundred twenty five petitions submitted in 2003, including the instant petition.

The above information shows substantial net current assets as of June 30, 2002. The figure of $4,544,905.00 is significantly greater than the estimated total proffered wage commitments of the petitioner of $1,991,600.00 for the petitions submitted in 2003.

The information on the petitioner's audited financial reports is generally consistent with the information on the petitioner's Form 990 tax return discussed above. Both the audited financial reports and the Form 990 tax

return show substantial net current assets as of June 30, 2002. Both sets of documents therefore are sufficient to establish the petitioner's ability to pay the proffered wage in 2002, which is the year of the priority date, as well as in 2003.

The record also contains copies of quarterly wage reports of the petitioner for the fourth quarter of 2002 and the first quarter of 2003. Those reports appear to be generally consistent with other financial evidence in the record and they therefore provide some additional support to help establish the petitioner's ability to pay the proffered wage.

The record also contains copies of unaudited combined financial statements dated December 31, 2002 and March 31, 2003. 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 Hoosier Care II, Inc. 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). In the case of a nonprofit corporation, the fact that the members of its board of directors are also the members of the board of directors of another nonprofit corporation 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).

Although the unaudited financial statements provide no further support to help establish the petitioner's ability to pay the proffered wage, the information discussed above on the petitioner's net current assets as shown in its Form 990 tax return for 2001 and in its audited financial statements for the year ended June 30, 2002 is sufficient to establish the petitioner's ability to pay the proffered wage in 2002, which is the year of the priority date, as well as in 2003.

In summary, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director concerning the education of the beneficiary. Furthermore, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.