U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 29 2006

LIN-03-144-50069

IN RE: Petitioner: [redacted]
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:

[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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a "Developmental Disability Specialist [redacted] OES 21-1093)." 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.

The ETA 750 for the position of Developmental Disability Specialist specifies minimum qualifications as a Bachelor's degree in any field, a foreign equivalent, or a credential evaluation which shows a combination of education, training and/or work experience equivalency to a Bachelor's degree.

The I-140 petition was submitted on March 28, 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).

The file transmitted on appeal contains a second I-140 petition filed by the same petitioner on behalf of the same beneficiary, filed on February 17, 2005, approximately four months after the Form I-290B notice of appeal was filed in the instant appeal. A new Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The new ETA 750 states that the offered position is "Habilitation Aide (Mental Retardation Aide [redacted] The second ETA 750 specifies no minimum qualifications for that position.

On the second I-140 petition, in Part 2, Petition type, the petitioner checked box "g" for "Any other worker (requiring less than two years of training or experience)." (Second I-140 petition, Part 2).

The second I-140 petition was approved on June 21, 2005.

The petition on appeal before the AAO is the first I-140 petition. Although the second I-140 petition is for the same beneficiary as the first I-140 petition, the appeal of the first I-140 petition did not become moot upon the approval of the second I-140 petition, since the two petitions are in different preference categories. The approval of the second I-140 petition is in the other worker preference category, while the I-140 petition on appeal is in the skilled worker and professional preference category.

According to the September 2006 Visa Bulletin of the United States Department of State, for visa applicants from the Philippines, visas in the third preference categories for skilled workers and professional are available for approved petitions with priority dates of March 1, 2002 or earlier while visas in the third preference category for other workers are currently unavailable. Bureau of Consular Affairs, U.S. Department of State, *Visa Bulletin for September 2006*, http://travel.state.gov/visa/frvi/bulletin/bulletin_3009.html (August 10, 2006).

The priority date in the instant I-140 petition is October 22, 2002. Therefore, no visa would be available immediately to the beneficiary if the instant I-140 petition is approved. The Visa Bulletin for 2006 warns that anticipated backlog reductions by the Department of Labor and other factors may cause large numbers of person to become eligible for third preference immigrant visas, which may require a retrograde of the third preference cut-off dates in coming months.

Concerning visas based on petitions in the other worker category, the Visa Bulletin for 2006 states that the annual supply of visas remains reduced from its normal level of 10,000 per year to 5,000 per year because of offsets required by legislation pertaining to the NACARA program (the Nicaraguan Adjustment and Central American Relief Act of 1997). *Id.*

It should be noted that the petitioner has not withdrawn the instant I-140 petition or the instant appeal. For the reasons discussed above, the instant petition is not moot. Therefore, the appeal will be considered on its merits.

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). As noted above, the priority date in the instant petition is October 22, 2002.

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

The I-140 petition was submitted on March 28, 2003. On the petition, in Part 2, Petition type, the petitioner checked box "e" for "a skilled worker (requiring at least two years of specialized training or experience) or professional." (I-140 petition, Part 2). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of "+$20 Million," and to have a net annual income of "+$889,000." (I-140 petition, Part 5). With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. With the petition, the petitioner also submitted supporting evidence.

In a September 20, 2004 decision, the director determined that the evidence failed to establish that the beneficiary possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

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

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

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

The 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
[redacted]	Evaluation	/2003		U. S. Bachelor's Equivalency
	Economics	06/1975	04/1979	Bachelor's in Economics

[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]	Senior Account Specialist	12/1998	present	Semiconductor testing and packaging
	Customer Service Representative	06/1993	01/1995	Telephone Assembly

[remaining row 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.

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

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

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

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

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

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

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

language skills development. Revises teaching plan to correspond with child's rate of development. Consults and coordinates plans with other professionals.

(ETA 750, Part A, block 13).

In his September 20, 2004 decision, the director determined that the evidence failed to establish that the beneficiary's possessed two years of post-secondary education relevant to the position of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and denied the petition.

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

The record contains a copy of a diploma dated April 1, 1979 from the Centro Escolar University, Manila, Philippines, granting the beneficiary a Bachelor of Arts degree, with an accompanying course transcript. The transcript states that the beneficiary's major field of study was economics.

The record also contains a copy of an academic evaluation for the beneficiary by Morningside Evaluations and Consulting, New York, New York dated February 24, 2003.

The beneficiary's course transcript from Centro Escolar University shows two semesters of study at the University of Santo Tomas during the 1975-76 academic year, followed by two semesters of study each year at Centro Escolar University for the next three years, through the 1978-79 academic year. The transcript shows two courses which are directly relevant to the position of developmental disability specialist, a course in General Psychology and course in Child Psychology. The transcript also shows three courses in the field of science which could be shown to be at least indirectly relevant to the offered position, namely General and Inorganic Chemistry, General Zoology, and General Principles of Sociology. All of those courses were taken at the University of Santo Tomas. None of the courses taken at the Centro Escolar University are relevant to the position of developmental disability specialist. From the course titles on the transcript it appears that the beneficiary was pursuing studies in a field of biological sciences at the University of Santo Tomas, but then transferred to Centro Escolar University and changed his major field of study to economics.

The five relevant courses taken and passed by the beneficiary at the University of Santo Tomas during the 1975-76 academic year were among the fifteen courses taken and passed by the beneficiary that year. Therefore the relevant courses consisted of less than half-time study for a single academic year. Those courses therefore fail to satisfy the regulatory requirement for two years of relevant post-secondary education.

The academic evaluation by Morningside Evaluations and Consulting finds that the beneficiary's degree from Far Eastern University is equivalent to a Bachelor of Arts degree in Economics 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 Economics cannot be considered to be sufficiently relevant to the position of developmental disability specialist to qualify as training for that position. The evaluation therefore fails to establish that the beneficiary has post-secondary education relevant to the offered position.

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

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

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

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

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

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

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

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

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

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

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

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.

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qualifications to the offered position could support an inference that the petitioner has no realistic desire and intention to employ the beneficiary in a permanent full-time position as a developmental disability specialist.

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

1971). The evidence in the record fails 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 fail to overcome the decision of the director concerning the education of the beneficiary.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is 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 March 5, 2003, 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 March 28, 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 [redacted], a corporation organized and existing under the laws of the State of Illinois.
>
> The corporation is now and will be for the expected future able to pay the wages offered to our employee.
>
> The corporation employs more than 140 people at our Champaign, Illinois facility.
>
> For the fiscal year ended June 30, 2002, [redacted]r had revenue in excess of $20,319.662.00 and net income in excess of $889,974.24. Our 2001 financial statements were audited by [redacted]
>
> I hereby certify that the information provided herein, as of this date is true, accurate and complete in every material respect.

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

The letter from [redacted] does not state that Mr. [redacted] is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Moreover, the content of that letter is not sufficient to establish the petitioner's ability to pay the proffered wage during the relevant time period. The letter states

that the petitioner's net income is in excess of $889,974.24 per year. That amount of net income is less than the estimated $1,991,600.00 in proffered wage commitments which the petitioner has made in the one hundred twenty-five I-140 petitions which it submitted in 2003, 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]r," with no concluding abbreviation "Inc." Other evidence in the beneficiary's file indicates that '[redacted]' is in fact a trade name for a corporation named '[redacted]." Mr.[redacted]ssertion 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 (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.

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.

Several documents in the record indicate that the legal name of the petitioner [redacted] The record contains a copy of a quarterly wage report for the fourth quarter of 2002 of [redacted] which the Federal Identification Number matches the Internal Revenue Service tax number as shown on the I-140 petition.

The record in the instant petition also contains copies of unaudited financial statements of [redacted] 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, some of the unaudited financial statements in the record do not present any information separately for the petitioner, but rather present only combined figures for the petitioner and for another corporation, [redacted] 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).

The record in the instant petition contains no other financial evidence pertaining to the petitioner. Therefore, the record lacks a sufficient basis to determine the petitioner's net income or net current assets in any year at issue.

As noted above, the file contains a second I-140 petition by the same petitioner, which was approved by the director on June 21, 2005. That I-140 petition is supported by extensive financial evidence pertaining to the petitioner, including copies of audited financial statements for the petitioner for its fiscal years ending June 30, 2003 and June 30, 2004. The proffered wage in that petition is $7.20 per hour, equivalent to $14,976.00 per year, which is somewhat less than the proffered wage in the instant petition of $7.66 per hour, equivalent to $15,932.00 per year. The priority date in that petition is September 20, 2001.

The director evidently determined that the financial evidence submitted in support of the second I-140 petition was 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.

For the purpose of deciding the instant appeal, it is not necessary to evaluate the audited financial statements submitted in support of the second I-140 petition, since the failure of the evidence in the instant petition to establish that the beneficiary had sufficient relevant education to qualify for the skilled position of developmental disability specialist is a sufficient reason to deny the instant petition. Nonetheless, should any future motion be filed in the instant petition, any such motion should be supported not only by evidence relevant to the beneficiary's education, but also by financial evidence 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.

In summary, the evidence fails to establish that the beneficiary had at least two years of post-secondary education relevant to the offered position, as required by the definition of skilled worker in the regulation at 8 C.F.R. § 204.5(l)(2). Beyond the decision of the director, the evidence in the record of the instant petition fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.