U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 22 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485) and based on an investigative report from the U.S. Consulate General in Guangzhou, China, the Texas Service Center Director (the director) consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigration Petition for Alien Worker (Form I-140). The subsequent motion to reopen was dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tour and travel agency. It seeks to employ the beneficiary permanently in the United States as an assistant manager pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) as a skilled worker. As required by statute, a Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted sufficient evidence in rebuttal to the director's NOIR and had not overcome the grounds for revocation. The director revoked the approval of the petition accordingly.

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

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

As set forth in the director's February 28, 2008 NOR, subsequent motion to reopen and the instant appeal, the primary issue in this matter is whether the petitioner has overcome the grounds of revocation in the director's NOIR and whether the director has good and sufficient cause to revoke the approval of the instant petition. Specifically, whether the petitioner established the beneficiary's requisite experience for the proffered position with regulatory-prescribed evidence.

Section 203(b)(3)(A)(i) of 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 nature, for which qualified workers are not available in the United States.

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[1] 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). However, counsel did not submit any new or additional evidence, but a brief in support of the appeal.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 was accepted on April 19, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, the Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of assistant manager. Item 14 requires that the beneficiary completed grade school and high school education, and possessed two years and six months of experience in the job offered. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A, a public record. Item 15 of Form ETA 750A does not reflect any special requirements. Item 17 also indicates that the beneficiary will supervise two employees in the proffered position.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 16, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she was unemployed from November 1998 to the present and from February 1998 to May 1998. The beneficiary also represented that she worked 40 hours per week as a tour operator for [redacted] in [redacted] from June 1998 to October 1998, 44 hours per week as a receptionist at [redacted] form January 1992 to October 1993, and 44 hours per week as a tour manager for [redacted] in [redacted] form February 1988 to December 1991. She did not provide any additional information concerning her employment background on that form.

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.

With the initial filing of the petition, the petitioner submitted two letters as evidence of the beneficiary's qualifying experience. The first letter is dated March 21, 2001 from [redacted] Vice-President of [redacted] This letter certifies that the beneficiary was employed as

Tour Operator at the company's San Francisco office from June 1998 to October 1998 and that her major responsibilities were to arrange local tours, including contact with hotel sales and help customer solve problems. The AAO finds that the duties performed by the beneficiary as a tour operator at [redacted] cannot qualify her to perform the duties for the proffered position set forth on the Form ETA 750 and that the letter only certifies the beneficiary's four months of experience. In addition, the record does not contain any documentation in support with the content of the letter. Instead, the California Secretary of State official website shows that this corporation was suspended, and this office cannot verify the writer's position in the company. Therefore, we cannot accept and consider this letter as primary evidence to establish the beneficiary's qualifying two years and six months of experience.

The second letter is dated February 24, 2001 from [redacted] General Manager of [redacted] February 24, 2001 letter). This is in Chinese language, on the [redacted] letterhead, with signature of [redacted] and the official seal of [redacted] and certified English translation. This letter certifies that the beneficiary was employed as the Tour Manager in their Tour Department of [redacted] at the [redacted] from February 1988 to December 1991. However, in response to the inquiry from the U.S. Consulate General in Guangzhou, China, [redacted] issued an official correspondence on February 27, 2006 stating that upon a careful review, they found that no one named [redacted] was employed by this company during the period from February 1988 to December 1999 ([redacted] February 27, 2006 letter).

Based on the result of the investigation, the director issued a NOIR. In response to the director's NOIR, the petitioner through its current counsel submitted a declaration dated February 13, 2008 from the beneficiary (the beneficiary's February 13, 2008 declaration). The declaration that has been provided in response to the director's NOIR is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Such an unsworn statement is not evidence and thus, as is the case with the arguments of counsel, is not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The beneficiary's February 13, 2008 declaration was submitted without any objective evidence to support the content of the declaration. Further, the declaration contained inconsistent information with the [redacted] February 27, 2006 letter in response to the consulate investigation. While the [redacted] February 27, 2006 letter clearly states that the beneficiary did not work for [redacted] during the period from February 1988 to December 1991, the beneficiary reaffirms her employment for that period. *Matter of Ho*, 19 I&N Dec. 582, 591-592

(BIA 1988) states: "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." The AAO finds that the record contains no independent objective evidence to support the beneficiary's declaration and resolve the inconsistency. Therefore, the petitioner failed to rebut the ground of the director's intent to revoke the approval of the petition with the beneficiary's February 13, 2008 declaration.

On a subsequent motion to reopen, counsel submitted a letter dated March 3, 2008 from [redacted] Assistant to General Manger of [redacted] March 3, 2008 letter). This is a faxed copy, on the company's letterhead, in Chinese language with English translation and translator's certificate. The English translation states in pertinent parts that:

> I, [redacted] (male) am the current Assistant to the General Manager of [redacted] I commenced employment in the office of the General Manager of [redacted] [in 2003], and since 2003 I have served in the position of Assistant to the General Manger.
>
> I understand that in 2006, a representative of the U.S. Immigration Service made an inquiry regarding the work experience of [the beneficiary] between February 1988 and December 1991. Based upon my understanding of our company's system for the maintenance of personnel records, the company does not retain old personnel records dating back to over ten years ago. Moreover, none of the current employees in the personnel department were working in the personnel department prior to 1992, and therefore, there is no one with personal knowledge of personnel matters dating to that time.
>
> In late 2007, [the beneficiary] contacted our company through friends in Guangzhou, hoping that we could verify her employment records, however, because we at this time no longer have personnel records going back to 15 years ago, therefore, we were unable to confirm her employment record.

This letter provides interpretation and explanation of [redacted] February 27, 2006 letter. Per the letter, [redacted] does not have any records to verify the beneficiary's employment with this company or support the statement in the [redacted] February 24, 2001 letter regarding the beneficiary's employment with [redacted] for the period from February 1988 to December 1991. Further, this letter does not indicate any organizational structure of [redacted] or business relationship between [redacted] and [redacted]

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[2] Although the translator translated the company's name as [redacted] the AAO still uses [redacted] to be consistent with the other documents in the record of proceeding.

The record also contains an investigative report from a private law firm in Guangzhou, China. The correspondence dated March 25, 2008 from a Chinese attorney, [redacted] of [redacted] Law Form ([redacted] March 25, 2008 investigative report) states in pertinent part that:

> [The beneficiary] entrusted us to obtain the records contained in the personnel files of [redacted] regarding the time that she worked there. Yesterday, I personally went to the company to conduct this investigation and, as [redacted] Head of the Personnel Office of [redacted] explained to me, because the personnel records which I was investigating were too old, they were no longer retained, and the investigation was unsuccessful.

Both [redacted] March 3, 2008 letter and the [redacted] March 25, 2008 investigative report indicate that the records of the beneficiary's employment with [redacted] from February 1988 to December 1991 are not available. However, the petitioner failed to submit regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years and six months of experience in the job offered prior to the priority date in this matter because the record does not contain any independent objective evidence to verify the beneficiary's employment with [redacted] which the [redacted] February 24, 2001 letter and the beneficiary's February 13, 2008 declaration alleged.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relating to qualifying experience or training be in the form of letter from current or former employer. This regulation further states that if such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. While the petitioner submitted documents showing that the record of the beneficiary's employment with [redacted] is not available because the company no longer maintains the personnel file for the beneficiary. However, a letter from a former supervisor the content of which cannot be verified by the former employer company does not meet the requirement set forth by the regulation. The record does not contain any other documentation relating to the beneficiary's experience from [redacted]

Upon a careful review of all evidence in the record including the [redacted] March 3, 2008 letter and the [redacted] March 25, 2008 investigative report submitted on motion, the AAO finds that the record does not contain sufficient solid evidence concluding that the petitioner submitted a fraud document or willfully misrepresented the beneficiary's qualifying experience to seek the immigrant benefits for the beneficiary in this matter. Therefore, the portion of the director's decision invalidating the underlying labor certification based on finding a fraud or willful misrepresentation of a material fact is herewith withdrawn.

However, the AAO concurs with the director's finding in the NOIR that the petitioner failed to establish the beneficiary's requisite qualification for the proffered position with the [redacted] February 24, 2001 letter. The AAO finds that the director properly issued the NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would

warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, that would warrant a denial if unexplained and unrebutted, and thus was properly issued for good and sufficient cause.

The AAO finds that no derogatory information which is unknown to the petitioner in this case has not be provided in the director's NOIR and utilized as grounds of the director's revocation. The director properly offered the petitioner opportunities to rebut the grounds of ineligibility, however, the petitioner through counsel did not submit sufficient evidence rebut the ground.

Counsel's assertions on appeal cannot overcome the ground of the director's revocation. The director's revocation based on the ground that the petitioner failed to establish the beneficiary's qualification and therefore, the petition was approved in error must be affirmed pursuant to Section 205 of the Act, 8 U.S.C. § 1155.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional ground of ineligibility and will discuss this issue. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 DOL. *See* 8 C.F.R. § 204.5(d).

The Form ETA 750 was accepted on April 19, 2001. The proffered wage as stated on the Form ETA 750 is $39,698 per year. On the petition the petitioner claims that it has been established in 1990, and has a gross annual income of $5,762,534.64, a net annual income of ($11,404.08), and nine employees. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 2002 through 2004. The beneficiary's W-2 forms show that the petitioner paid the beneficiary $9,900 in 2002, $29,700 in 2003 and $39,600 in 2004. The record also contains the petitioner's California Employment Development Department (EDD) ED 6 forms for 2001. However, these forms do not show that the petitioner employed and paid the beneficiary any compensation that year. The petitioner demonstrated that it paid the beneficiary a partial proffered wage in these three years, but failed to establish its ability to pay the full proffered wage of $39,698 through the examination of wages actually paid to the beneficiary from the priority date to the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS 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 proffer ed 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*, 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 1997 through 2000, 2002 and 2003. The petitioner's tax returns for 1997 through 1999 are not necessarily dispositive since the priority date in this matter falls on April 19, 2001. The tax return for the fiscal year 2000 covers from July 1, 2000 to June 30, 2001, and therefore, it is the petitioner's tax return for the year of the priority date. The petitioner's tax returns demonstrate its net income and net current assets for these relevant years as shown in the table below.

- In the fiscal year 2000 (7/1/00-6/30/01), the Form 1120 stated net income[4] of $18,190 and net current assets of ($133,451).
- In the fiscal year 2002 (7/1/02-6/30/03), the Form 1120 stated net income of ($171,092) and net current assets of ($111,934).
- In the fiscal year 2003 (7/1/03-6/30/04), the Form 1120 stated net income of $556 and net current assets of ($120,121).

For 2001, the petitioner did not employ and pay the beneficiary any amount of compensation, and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to

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[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[4] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

pay the beneficiary the full proffered wage of $39,698. However, the petitioner's tax return for the fiscal year 2000 shows that the petitioner did not have sufficient net income or net current assets to pay the beneficiary the proffered wage that year.

For 2002, the petitioner paid the beneficiary $9,900, and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $29,798 between wages actually paid to the beneficiary and the proffered wage for 2002. However, the petitioner did not submit its tax return for the fiscal year 2001. Without the petitioner's tax return for the fiscal year 2001, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to the beneficiary the difference of $29,798 between wages actually paid to the beneficiary and the proffered wage during this period.

For 2003, the petitioner paid the beneficiary $29,700, and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $9,998 between wages actually paid to the beneficiary and the proffered wage for 2003. However, the petitioner's tax return for the fiscal year 2002 shows that the petitioner did not have sufficient net income or net current assets to pay the beneficiary the difference that year.

For 2004, the petitioner paid the beneficiary $39,600, and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $98 between wages actually paid to the beneficiary and the proffered wage for 2004. The petitioner's tax return for the fiscal year 2003 shows that the petitioner had net income of $556 which was sufficient to pay the beneficiary the difference that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, and its net income or net current assets except for 2004.

The petitioner submitted its financial statements for the fiscal year 2001 (7/1/01-6/30/02). However, these financial statements are not audited. Counsel's reliance on unaudited financial records 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. 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 record also contains the petitioner's bank accounts. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank

statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record does not contain any regulatory-prescribed evidence of the petitioner's financial conditions for its fiscal year 2001. The petitioner was never profitable enough to hire one more additional employee and pay a single proffered wage in the relevant four years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa,* nor has it been established that all the three years 2001 through 2003 were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the director initially approved the petition in error on May 1, 2002. The AAO finds that the director has additional good and sufficient cause to revoke the approval of the instant petition.

The petition must be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The director's decision on February 28, 2008 is affirmed and the approval of the petition remains revoked.