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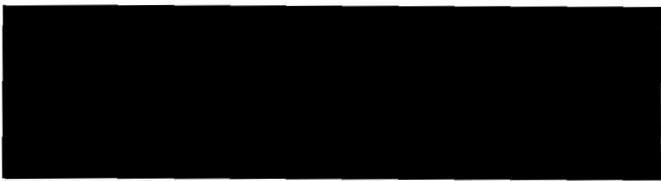
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: LIN-03-025-51142 Office: NEBRASKA SERVICE CENTER Date: SEP 06 2006

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, Nebraska Service Center, but the approval was later revoked. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

The petitioner is a health care facility for handicapped children. It seeks to employ the beneficiary permanently in the United States as a developmental disability specialist. 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 revoked 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 May 10, 2002.

The I-140 petition was submitted on December 4, 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 5). In Part 5 of the petition, Additional information about the petitioner, the petitioner claimed to have been established in 1975, to currently have 140 employees, to have a gross annual income of “+\$20 Million,” and to have a net annual income of “+\$889,000.” (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

In a December 3, 2004 decision the director determined that the evidence failed to establish that the beneficiary’s post-secondary education was relevant to the occupation of developmental disability specialist. The director therefore found that the beneficiary did not meet the regulatory definition of skilled worker, and revoked the petition.

On appeal, counsel submits a brief and additional evidence consisting of copies of training certificates of the beneficiary and certificates of volunteer service of the beneficiary. 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.

Counsel states on appeal that the beneficiary has relevant post-secondary education, namely a Bachelor's degree in Communication with 1 ½ years post-secondary experience as a care giver.

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 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).

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 Eval Equivalent

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

<u>Schools, Colleges and Universities, etc.</u>	<u>Field of Study</u>	<u>From</u>	<u>To</u>	<u>Degrees or Certificates Received</u>
[REDACTED]	Communication Arts	06/1996	12/1999	Bachelor of Arts

[remaining rows blank]

On the ETA 750B in block 15, for information on the beneficiary's work experience the beneficiary states the following:

<u>Name and Address of Employer</u>	<u>Name of Job</u>	<u>From</u>	<u>To</u>	<u>Kind of Business</u>
[REDACTED]	Customer Service Supervisor	07/2000	03/2001	Freight Forwarding
[REDACTED]	Import-Export Documentation Trainee	05/2000	07/2000	Freight Forwarding
[REDACTED]	Research Production Coordinator	02/2000	04/2000	TV / Video Production

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.

The record contains a copy of a Bachelor of Arts awarded to the beneficiary on December 20, 1999 by De La Salle University, Manila, Philippines, with supporting course transcript. The record also contains a copy of an academic evaluation dated December 17, 2002 by Morningside Evaluations and Consulting, New York, New York, which finds that the beneficiary's degree is the equivalent of a Bachelor of Arts degree in Communications from an accredited institution of higher education in the United States.

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(1)(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).

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).

The instant petition was initially approved on January 13, 2003. The petition was one of multiple petitions by the same petitioner in which the beneficiaries are citizens of the Philippines who have sought immigrant visas at the United States Embassy in Manila. The record contains a copy of a memorandum dated October 20, 2003 from the Chief, Immigrant Visa Branch, Consular Section, U.S. Embassy Manila to the Director, Nebraska Service Center.

The embassy memorandum states that visa petitions for eleven named beneficiaries are being returned to the director because consular officers at the embassy have no method to ensure that the petitioner is hiring skilled workers for specific jobs. The memorandum mentions that the degree requirements do not require study in any specific discipline.

The memorandum then goes on to state the following:

Equally problematic is what appears to post to be a pattern of recruitment by the petitioner based on attributes other than labor skills. Applicants [Beneficiary A] and [Beneficiary B] provided a sworn statement to a consular officer indicating that they paid the petitioner's attorney \$9,000 to process I-140 petitions on their behalf (*Annex 2*). [Beneficiary B] stated that a friend approached the petitioner to file petitions on her and her son, [Beneficiary A's] behalf.

Based on visa application interviews, subject beneficiaries invariably made the first contact and approached the petitioner through a stateside relative or friend or while visiting the United States seeking employment.

(Memorandum from Chief, Immigrant Visa Branch, U.S. Embassy, Manila, October 20, 2003, at 2).

The beneficiary in instant petition is one of the eleven beneficiaries named on the cover sheet of the memorandum.

Following receipt of the memorandum, the director issued a notice dated September 21, 2004 informing the petitioner that the U.S. Consulate in Manila had returned the petition for further review and revocation because there are no specialized skills, training, or experience requirements indicated on the Form ETA 750 and because the Consulate's interview with the beneficiary did not reveal any particular academic need for a Bachelor's degree.

In a letter dated October 8, 2004 submitted in response, counsel states that the U.S. Department of Labor has certified the position of developmental disability specialist as a skilled position. Counsel also states that relevant post-secondary education may be considered as training for the purpose of qualifying as a skilled worker. Counsel also states that the beneficiary studies leading to her Bachelor's degree included courses in General Psychology, Introduction to Sociology with Family Planning, and numerous media classes. Counsel also states that the beneficiary's resume shows her experience in an orphanage and child day care facility caring for infants and teaching pre-schoolers, experience which is relevant to the offered position. Counsel's submissions in response to the September 21, 2004 notice were received by the director on October 12, 2004.

In his December 3, 2004 revocation decision, the director incorporated the reasoning of the AAO decisions mentioned above. The director found that the beneficiary's education in the field of special education was not of sufficient duration to meet the regulatory requirement of two years of training. The director therefore revoked the approval of the petition.

The director's decision with regard to the adequacy of the beneficiary's education and experience will be evaluated based on the evidence in the record, and not on the memorandum from the Chief, Immigrant Visa Branch, at the U.S. Embassy in Manila, or on any implications of that memorandum.

Based on the evidence in the record, the director's decision to revoke the approval of the petition was correct. The beneficiary's course transcript of her studies toward her Bachelor's degree shows only one course directly relevant to the offered position of developmental disability specialist, a course in General Psychology. Another course may be indirectly relevant to the offered position, a course named Introduction to Sociology with Family Planning. Each of those courses was a one-semester course taken in the first semester of the 1997-1998 school year. The transcript shows that the beneficiary also took five other courses that semester, which shows that her studies relevant to the offered position were a minor part of her course load that semester.

The record contains a copy of an undated professional resume of the beneficiary. In the section of the resume titled "Experience" the beneficiary lists the same positions as are shown on the ETA 750, Part B, block 15, none of which are relevant to the offered position of developmental disability specialist. On the resume in a section titled "Related Information" the resume states that as a volunteer in November 1998 the beneficiary participated in hours of community service in an orphanage and child day care facility in Manila, and states that she cared for infants and assisted in teaching pre-schoolers. The resume does not state the beneficiary's number of hours of service in that facility, but in any event, it states only one month of service in that facility.

Moreover, even if the beneficiary's resume had contained additional information about her experience at the orphanage and child day care facility, a resume is not an acceptable form of evidence to establish qualifying experience.

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.

In the instant petition, the record before the director included no letter from the orphanage and child day care facility where the beneficiary claimed to have worked, and no evidence indicating that a letter or similar evidence was unavailable. The beneficiary's resume therefore fails to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(g)(1) concerning the form of evidence needed to establish relevant experience.

The record before the director contained no other evidence of relevant education or experience of the beneficiary. Therefore the evidence established only one trimester of part-time studies and one month of unspecified hours of volunteer service as relevant education and experience. The evidence therefore failed to establish that the beneficiary had at least two years of training and/or experience relevant to the offered position.

On appeal, the petitioner submits copies of letters and training certificates of the beneficiary. One of those certificates, by an official of De La Salle University, describes the beneficiary's community service hours at an orphanage and child day care facility in Manila, supervised by the Asociacion de Damas Filipinas, of Manila. The certificate states that the service hours were required as part of a course in Christian Social Teachings/Business Ethics taken by the beneficiary during the second trimester of the 1998-1999 school year. The certificate provides no information on the number of hours of service provided by the beneficiary. A second certificate, by an official of Asociacion de Damas Filipinas, states that the beneficiary's services as volunteer were performed from September to December 1998. However, that certificate does not state the number of hours of service provided by the beneficiary.

Neither of the two foregoing certificates establishes the amount of experience of the beneficiary as a volunteer with the orphanage and child day care facility in 1998.

The documents submitted on appeal also include copies of a letter and of certificates showing training of the beneficiary which began after the May 10, 2002 priority date. The training courses stated on those documents therefore are not relevant to the instant petition, since they occurred after the priority date. Moreover, the certificates themselves raise evidentiary inconsistencies, since the dates in each of the claimed training courses taken by the beneficiary overlap with the dates in one or more other claimed courses.

The dates of claimed training on the various certificates are as follows.

Four Months Modular Certificate in Elderly Care, from May 8, 2003 to September 8, 2003. [REDACTED]
[REDACTED] Certificate of Completion, September 12, 2003).

Training as a volunteer teacher aide, from June 3, 2003 to October 15, 2003. ([REDACTED]
[REDACTED] of Manila, Philippines, Recommendation and Certification, each dated October 15,
2003).

Caregiver Training Program, from July 15, 2003 to January 15, 2004. ([REDACTED] Specialist,
Inc., Certificate of Completion, January 19, 2004).

Supervised field placement for Caregiver Training from September 30, 2003 to November 15, 2003.
(Department of Social Welfare and Development, Manila, [#1, undated]).

First Aid Training, Standard, November 3-6, 2003 (Philippine National Red Cross, November 5, 2003).

Basic Life Support – Healthcare Provider, November 7-8, 2003 (Philippine National Red Cross,
November 7, 2003).

On the job training for Caregiver Training, November 12-15, 2003. (Department of Social Welfare and
Development, Manila, [#2, undated]).

Each of the above certificates asserts training dates of the beneficiary which overlap with the training dates on one or more other certificates.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), 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.” The record contains no explanations for the inconsistent training dates in the certificates submitted on appeal.

For the foregoing reasons, the evidence newly submitted on appeal fails to establish that beneficiary had two years of relevant education or experience 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), (2). 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 assertions of counsel on appeal and the evidence submitted on appeal therefore fail to overcome the decision of the director concerning the education of the beneficiary.

In his revocation 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 May 10, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 29, 2003, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has been employed by the petitioner.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and

therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner has filed a total of 302 I-140 petitions since 1996. The great majority of those petitions have been filed since 2002. The number of I-140 petitions filed was 4 in 1996, 9 in 1997, 2 in 1998, 5 in 1999, 7 in 2000, 11 in 2001, 56 in 2002, 125 in 2003, 66 in 2004, 5 in 2005, and 12 in 2006, through August 22, 2006.

As noted above, the instant petition was filed on November 1, 2002. During the year 2002 the petitioner filed a total of fifty-six I-140 petitions, including the instant petition.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from 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.

The record in the instant case contains some information about the proffered wages for the beneficiaries of the other petitions submitted by the petitioner. The copies of three previous AAO decisions submitted by counsel on appeal state that the proffered wages to the beneficiaries of those petitions. The proffered wages were \$7.88 per hour in two petitions and \$7.66 per hour in the third petition. 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 rate 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. An hourly wage of \$7.66 for a 40-hour work week is equivalent to an annual wage of \$15,932.80.

In the year 2002 the petitioner filed fifty-six I-140 petitions, including the instant petition. Therefore, in addition to the instant petition, the petitioner filed fifty-five I-140 petitions that year. At an estimated annual proffered wage level of \$15,932.80 for each beneficiary, fifty-five additional I-140 petitions would result in an additional wage commitment of \$876,304.00 by the petitioner in the year 2002. Adding that amount to the proffered wage of \$15,932.80 for the beneficiary of the instant petition produces a total estimated proffered wage commitment of \$892,236.80 in the year 2002.

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 2, 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 employees.

The corporation employs more than 140 people at our Champaign, Illinois facility.

For the fiscal year ended June 30, 2002, [REDACTED] had revenue in excess of \$20,319,662.00 and net income in excess of \$889,974.24. Our 2001 financial statements were audited by [REDACTED]

I hereby certify that the information provided herein, as of this date is true, accurate and complete in every material respect.

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

The letter from [REDACTED] does not state that Mr. [REDACTED] is a financial officer of the petitioner, as required by the regulation at 8 C.F.R. § 204.5(g)(2). 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 slightly less than the estimated \$892,236.80 in proffered wage commitments which the petitioner has made in fifty-six I-140 petitions which it submitted in 2002, including the instant petition.

Even if the amount of net income asserted by Mr. [REDACTED] might be considered sufficient to pay substantially all of the petitioner's proffered wage commitments in 2002, the letter lacks sufficient detail to permit an evaluation of the credibility of the financial assertions made by Mr. [REDACTED] and no supporting documentation has been submitted for the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The letter from Mr. [REDACTED] refers to the petitioner as [REDACTED]. No evidence in the record corroborates Mr. [REDACTED]'s assertion that that is the legal name of the petitioner. On the I-140 petition, the petitioner's name is stated as [REDACTED] with no concluding abbreviation [REDACTED]. Evidence in the records of other petitions submitted by the same petitioner indicates that [REDACTED] is in fact a trade name for a corporation named [REDACTED]. Mr. [REDACTED]'s assertion that the petitioner is [REDACTED] is inconsistent with evidence in other cases submitted by the same petitioner. As noted above, "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.

The record in the instant petition, however, contains no evidence of the petitioner’s net income, other than the assertion in the August 6, 2002 letter from [REDACTED] discussed above. The letter lacks copies of annual reports, audited financial reports, or federal tax returns, which are the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2).

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.

In the instant petition, however, the record contains no financial evidence on which to base any calculations of the petitioner’s net current assets.

For the above reasons, the evidence 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.

Another issue not considered by the director in his revocation decision concerns the petitioner’s intention to offer permanent 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.

The memorandum dated October 20, 2003 mentioned above from the Chief, Immigrant Visa Branch, Consular Section, U.S. Embassy Manila to the Director, Nebraska Service Center states,

Equally problematic is what appears to post to be a pattern of recruitment by the petitioner based on attributes other than labor skills. Applicants [Beneficiary A] and [Beneficiary B] provided a sworn statement to a consular officer indicating that they paid the petitioner's attorney \$9,000 to process I-140 petitions on their behalf (*Annex 2*). [Beneficiary B] stated that a friend approached the petitioner to file petitions on her and her son, [Beneficiary A's] behalf.

Based on visa application interviews, subject beneficiaries invariably made the first contact and approached the petitioner through a stateside relative or friend or while visiting the United States seeking employment.

If the petitioner is recruiting beneficiaries "based on attributes other than labor skills," as found by the Immigrant Visa Branch at the U.S. Embassy in Manila, that practice would indicate that the petitioner's motivation in filing I-140 petitions is not related to its intention to employ those beneficiaries in permanent positions. Moreover, in the instant petition, the evidence shows that the beneficiary had minimal education and experience relevant to the instant petition as of the priority date. In addition, the certificates claiming relevant training of the beneficiary after the priority date contain numerous inconsistencies in the dates of training, as described above.

The Department of Labor certified the ETA 750 supporting the instant petition with qualification requirements including a bachelor's degree in "any field." (ETA 750, Part A, block 14). However, the certification by the Department of Labor is not sufficient to satisfy the petitioner's burden of establishing that it is an employer within the meaning of the regulation at 8 C.F.R. § 204.5(c). Nor does the evidence in the record in the instant petition establish that the petitioner is a U.S. employer "desiring and intending" to employ the beneficiary in the skilled position of developmental disability specialist as required by that regulation. Evidence of such intent could include records showing the continued employment of beneficiaries of previously approved petitions. But no such evidence has been submitted in the instant petition.

In summary, the decision of the director to revoke the approval of the petition was correct, based on the lack of evidence of training and/or experience of the beneficiary relevant to the offered position as of the priority date. Beyond the decision of the director, the evidence 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 evidence also fails to establish that the petitioner is a U.S. employer "desiring and intending" to employ the beneficiary in the skilled position of developmental disability specialist.

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.