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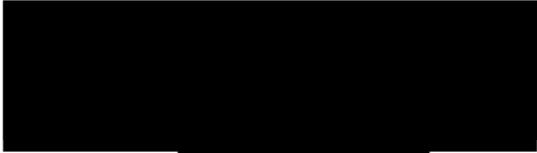
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

SRC 05 054 50193

Office: TEXAS SERVICE CENTER

Date: **AUG 20 2007**

IN RE:

Petitioner:  
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:



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, Texas Service Center. The petitioner filed a motion to reopen and reconsider that was reviewed by the director. The director denied the motion and affirmed her decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a general manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience, and, that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's November 8, 2005 denial of the petition and the director's February 2, 2006, denial of the petitioner's motion to reopen and reconsider, the two issues in this case are whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position, and whether or not the petitioner has established that it had the continuing ability to pay the proffered wage. Regarding the beneficiary's qualifications, the director noted inconsistencies in information pertaining to the beneficiary's employment experience.

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 nature, for which qualified workers are not available in the United States.

#### The beneficiary's qualifications

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 16, 2003. The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as assistant manager in a related field.

Relevant evidence concerning the beneficiary's qualifications in the record includes the following: a corrected Citizenship and Immigration Services (CIS) Form G-325A signed by the beneficiary dated August 9, 2005; a CIS Form I-485 dated October 12, 2004 with Supplement A; a CIS Form G-325A<sup>1</sup> signed by the beneficiary dated October 12, 2004; explanatory letters from counsel dated December 10, 2004, and August 12, 2005; a letter dated August 10, 2005, from the petitioner; an affidavit from the beneficiary attested August 10, 2005; copies of the beneficiary's passport pages and personal information; and an employment reference dated May

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<sup>1</sup> While, the AAO has no jurisdictional authority to determine or review adjustment of status matters, these documents provide evidence relating to the beneficiary's qualifications.

30, 1996, from [redacted] a of [redacted], of Fort Washington, Pennsylvania.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

On appeal, counsel submits a statement from the beneficiary attested February 24, 2006.

On appeal, counsel asserts that the director’s decision was not supported by the facts; that “consideration of documents would differ the outcome of the matter;” that the decision was made “on typo error on I-485 application of the beneficiary for above captioned I-140 petition, is baseless;” that “the denial decision does not reconsider the fact that the beneficiary has mentioned his status and it was beyond his control,” that his request is genuine; and that the director’s decision “is arbitrary, capricious and bad in law and facts.”

To determine whether a beneficiary is eligible<sup>3</sup> for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of general manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education .....	
	Grade School	<u>0</u>
	High School	<u>0</u>
	College	<u>0</u>
	College Degree Required	<u>0</u>
	Major Field of Study	<u>0</u>

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> Counsel makes a statement in a letter dated December 10, 2004, that the beneficiary was the recipient of an (another) approved labor certification in New Jersey, and, therefore the beneficiary qualifies to be “grandfathered” as the prior Alien Employment Application for Permanent Residence was filed before April 30, 2001. The AAO has no jurisdictional authority in adjustment of status determinations other than to state that another labor certification obtained by another employer, not the petitioner here, is not relevant in the present proceeding relating to the I-140 petition.

The applicant must also have two years of experience in the job offered or two years of experience as an assistant manager in a related field. The duties of the proffered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A lists no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on March 25, 2003, 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, he represented that he was self-employed at odd jobs from June 1998 to present. Prior to that, he stated he was general manager at ██████████, Somers Point, New Jersey from April 1996 to May 1998. Before that experience, the beneficiary stated he worked as an assistant general manager at the ██████████ at Fort Washington, Pennsylvania from April 1990 to April 1994. He does not provide any additional information concerning his employment background on that form.

The CIS Form I-485, related to the subject I-140 petition, submitted by the beneficiary as signed by him dated October 12, 2004, stated that the beneficiary does not have a social security number and that he had not previously applied for permanent residence status in the United States. According to the record of proceeding, the beneficiary does have a social security number evident on the W-2 statements found in the record and he had previously applied for permanent residence status in the United States.

On a prior CIS Form I-485 signed by the beneficiary as dated October 25, 1997, found in the record of proceeding, the beneficiary was the beneficiary of a marriage based immigrant preference petition filed by his U.S. citizen wife, ██████████. The marriage between the beneficiary and ██████████ took place on September 19, 1997 in Punta Gorda, Florida. There is no record or submission of a divorce decree in the record of proceeding relative to the beneficiary's marriage to ██████████ although on the Form I-485 dated October 12, 2004, the beneficiary stated he is single.

The CIS Form I-485, related to the subject I-140 petition, submitted by the beneficiary as signed by him dated October 12, 2004, does not provide information concerning the beneficiary's wife or prior wives and under family name for wife is typed "none." According to the record of proceeding the beneficiary was married once previously<sup>4</sup> before his marriage to ██████████. According to the beneficiary's affidavit attested August 10, 2005, he had provided this information to his attorney who mistakenly omitted the "lists of [his] previous marriages and wives." Therefore from the above recitations, the beneficiary has at various time in sworn documents before CIS provided different and contradictory information concerning his marital status and history of immigrant petitions filed.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

As the director pointed out in the decision, the beneficiary's prior marriages are not relevant to the substantive issues of qualifying employment experience and the ability to pay, but the veracity of the beneficiary before CIS is an element that may be taken into consideration in these matters.

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To ██████████, last name believed to be ██████████, sometime before May of 1993 then divorced by decree dated May 10, 1993 in Philadelphia, Pennsylvania as recorded in the Court of Common Pleas of Philadelphia County, Family Court Division at No. ██████████ December Term 1992.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

According to the CIS Form G-325A signed by the beneficiary as dated October 25, 1997, the beneficiary was employed by Econo Lodge in Somers Point, New Jersey from March 1995 to April 1997, and prior to that work experience, was employed by Ramada Inn in Fort Washington, Pennsylvania, from April 1990 to March 1995. The dates provided by the beneficiary in the CIS Form G-325A as dated October 25, 1997 conflict with the employment dates provided in the subject labor certification.

In this case, the petitioner submitted an employment reference dated May 30, 1996, from [REDACTED] of [REDACTED] of Fort Washington, Pennsylvania. [REDACTED] stated the beneficiary performed the duties of an assistant general manager that generally followed those stated in the labor certification from April 1990 to April 1994. There is approximately a year's difference between the dates the beneficiary has stated in the G-235A and the dates provided in the experience letter.

To substantiate this work experience, five earning statements from the [REDACTED] p. to the beneficiary stating year-to-day earnings in 1992 of \$13,200.00 and in 1993 of \$9,900.00 were submitted into evidence. Furthermore, three Wage and Tax Statements (W-2) from [REDACTED] to the beneficiary were submitted for years 1991, 1992 and 1993 stating wages paid of \$11,550.00, \$13,500.00 and \$15,000.00 respectively. No W-2 statement was submitted for work done in 1994 or 1995. Based on the wage evidence submitted, the beneficiary was employed by [REDACTED] p. in 1991, 1992 and 1993. Therefore, the wage evidence, the dates provided by the beneficiary in the CIS Form G-325A as dated October 25, 1997, and the employment dates provided in the subject labor certification all conflict.

The beneficiary stated in the labor certification that he was general manager at Econo Lodge, Somers Point, New Jersey from April 1996 to May 1998. To substantiate this work experience, the beneficiary's Wage and Tax Statement (W-2) for tax year 1996 from [REDACTED] of Somers Point, New Jersey, was submitted into evidence stating wages paid to the beneficiary of \$12,250.00. There is no employment reference in the record from [REDACTED] to substantiate his work experience as general manager. According to the CIS Form G-325A signed by the beneficiary as dated October 25, 1997, the beneficiary was employed by Econo Lodge in Somers Point, New Jersey from March 1995 to April 1997. These two statements made by the beneficiary conflict, there is no employment reference substantiating any dates of employment, and, there is only evidence of wages paid in 1996.

Further, in both prior employment instances above mentioned, the total amount of yearly wages paid for all four years equals an hourly rate of \$6.29 per hour that does not equate with the proffered wage of \$55,500.00 per year (\$26.68 per hour) for the occupations of general manager or assistant general manager which raises doubt that the beneficiary actually was employed in a managerial capacity as a general manager, or assistant general manager in those instances and not in a substantially lesser capacity that has not been disclosed by the beneficiary.

For the reasons stated above we do not find the petitioner's evidence of the beneficiary's prior employment experience credible.<sup>5</sup>

*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 petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not established that the beneficiary acquired two years of experience as a general manager or as an assistant general manager from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Ability to pay the proffered wage

Another issue present in the proceeding is the ability of the petitioner to pay the proffered wage. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department

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<sup>5</sup> The director also questioned if the beneficiary did work at odd jobs for the period from June 1998 to present (i.e. March 25, 2003), why there was no evidence of compensation received by the beneficiary for that period submitted in the record.

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 16, 2003. The proffered wage as stated on the Form ETA 750 is \$55,500.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 25, 2003, the beneficiary did not claim to have worked for the petitioner.

Relevant evidence concerning the petitioner's ability to pay the proffered wage in the record includes the following: a summary sheet for the petitioner's bank balances in 2003; 12 monthly bank statements of the petitioner's business checking account; a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; the beneficiary's Wage and Tax Statements (W-2) for years 1991, 1992, and 1993 from the [REDACTED], Pennsylvania; the beneficiary's Wage and Tax Statements (W-2) for tax year 1996 from [REDACTED], of Somers Point, New Jersey; five earning statements from the [REDACTED] to the beneficiary stating year-to-date earnings in 1992 of \$13,200.00 and in 1993 of \$9,900.00; a letter dated September 12, 2005, from accountant [REDACTED] of the accounting firm of LedgerPlus of Murdock, Florida, stating, inter alia, that from March 2004, the petitioner utilized an employee leasing company that paid the petitioner's employees; the petitioner's 2003 and 2004 U.S. federal tax returns Form 1120S; the petitioner's Internal Revenue Service (IRS) Form W-3 statements for 2003 and 2004; and, nine Wage and Tax Statements (W-2) for years 2003 and 2004 for the petitioner's employees.

The petitioner must establish that its job offer to the beneficiary is a realistic one.<sup>6</sup> 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.

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<sup>6</sup> The director questioned if an owner of the petitioner was related to the beneficiary. That owner [REDACTED] denied that there was a familial relationship with the beneficiary. In a prior marriage based immigration petition filed by a U.S. citizen for the beneficiary, [REDACTED] of Port Charlotte, Florida filed a Form I-864 affidavit of support on behalf of the beneficiary. On the Form I-864, [REDACTED] stated that the beneficiary was his cousin. Along with the submission of Form I-864 for the beneficiary, signed by [REDACTED] on March 16, 1998, [REDACTED] submitted U.S. personal federal income tax Form 1040 returns for tax years 1994, 1995 and 1996, Schedule K from U.S. federal income tax Form 1065, and an Internal Revenue Tax form 941. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Director 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). In a response to the director's inquiry if Suresh Patel and the beneficiary were related [REDACTED] stated there was no such relationship. He also stated in a letter dated August 10, 2005, that he did not recall submitting any affidavit of support "for previous I-485" on behalf of the beneficiary. If this matter is pursued, this matter should be investigated further.

§ 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120S stated net income<sup>7</sup> of <\$21,936.00>.
- In 2004, the Form 1120S stated net income of \$259,321.00.

Since the proffered wage is \$55,500.00 per year, the petitioner did not have the ability to pay the proffered wage from an examination of its net income for year 2003.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

On motion counsel contended that the current assets and current liability for years 2003 and 2004 demonstrate sufficient funds to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines

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<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S, 2003*, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, *Instructions for Form 1120S, 2002*, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

1 through 6 and include cash-on-hand. 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 petitioner's net current assets during 2003 and 2004 were \$25,604.00 and \$105,147.00 respectively.

Therefore, for tax year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for year 2004.

Counsel submitted a motion to reopen and reconsider to the director dated December 6, 2005. With the motion counsel submitted a statement from the beneficiary attested February 24, 2006; and a statement with exhibits which are the following: an explanatory statement by the petitioner's accountant dated December 6, 2005; the director's decision dated November 8, 2005; the petitioner's U.S. federal income tax returns Form 1120S for 2003 and 2004; an excerpt from [redacted]'s "Immigration Bulletin;" and an undated affidavit of [redacted].

According to the Form I-290B filed by counsel on March 3, 2006, counsel stated that he would submit a legal brief and/or evidence to the AAO within 30 days. Since counsel had not made a submission, the AAO on June 21, 2007 requested same from counsel. A legal brief without additional evidence was received on June 26, 2007.

On motion counsel asserted that the pay stubs and Wage and Tax Statements (W-2) submitted in the record are all the beneficiary's documents despite clerical and typographical errors. We have accepted the documents as the beneficiary's wage evidence despite the errors since the social security number given which has been identified as the beneficiary's number is consistent throughout.

On motion counsel asserted that the petitioner has the ability to pay the proffered wage according to previously submitted documents as well as evidence submitted with the motion.

Counsel asserted that the personal income of the owner of the petitioner is sufficient to pay the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Further counsel contends that “the Service did not consider the income of [REDACTED] the 100% shareholder and sole owner of the “S” corporation [REDACTED] ....” Counsel’s statement is contrary to the petitioner’s corporate tax returns that stated on the Schedule K-1 to the 2003 and 2004 corporate returns that there are three equal shareholders of the petitioner, who are [REDACTED], 33.3333% of the corporate stock ownership, [REDACTED] 33.3333% of the corporate stock ownership, and [REDACTED], 33.3333% of the corporate stock ownership. Counsel goes on to allege that [REDACTED] “enjoys” all the income of the “S” corporation. Again, the share ownership stated on the tax returns, together with the Schedule K-1 statements, refute counsel’s statement.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The 2003 U.S. federal corporate tax return, Form 1120S, was submitted without complete Schedule K-1 statements. The Schedule K-1 for [REDACTED] is missing although there is a “2003 Shareholder Summary” that stated the three equal shareholder ownerships mentioned above. 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)).

In support of the motion, counsel submitted a letter statement from [REDACTED], the petitioner’s accountant, that included transactions, final accounts, balance sheets, bank statements and the petitioner’s U.S. federal income tax returns Form 1120S for 2003 and 2004. Counsel stated that the statement of [REDACTED] was reviewed and on examination we find it is not audited.<sup>9</sup> 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. 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.

Further, counsel’s reliance on the balances in the petitioner’s bank account 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

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<sup>9</sup> As there is no accountant’s report accompanying these statements, the AAO cannot conclude that it is an audited statement. We will accept counsel’s statement that the statement submitted is reviewed. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS deliberations in these matters. The statements presented were not audited. Audited financial statements are not compiled or reviewed statements. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A compilation is the management’s representation of its financial position. A compilation is limited to presenting in the form of financial statements information that is the representation of management. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA’s (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews.

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 in determining the petitioner’s net current assets.

On motion counsel submitted a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, that states that “If the required initial evidence does not establish ability to pay, the CIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit.” Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and therefore the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.