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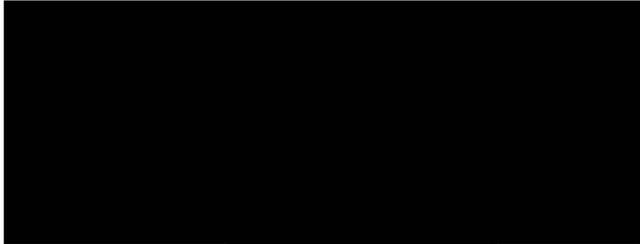
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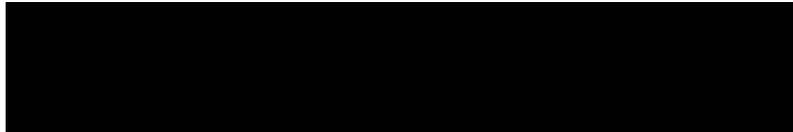
Office: TEXAS SERVICE CENTER

Date: JAN 31 2008

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:

SELF-REPRESENTED

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

The petitioner is a contract therapy management company. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) accompanied the petition. The director determined that the petitioner had failed to comply with the Department of Labor (DOL)'s notification requirements and that the petitioner had failed to establish its continuing ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

The instant petition was represented by [REDACTED] of [REDACTED], as a non-attorney representative. A review of recognized organizations and accredited representatives reported in October 2007 by the Executive Office for Immigration Review at <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed January 10, 2008), does not mention [REDACTED] or [REDACTED]. Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. Thus, the petitioner is considered self-represented in this matter.

As set forth in the director's October 30, 2006 denial, the main issues in this case are whether or not the petitioner has posted the notice of filing in compliance with the requirements of the regulations, and whether or not the petitioner has established its ability to pay the proffered wage as of the priority date.

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 regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Form I-140, must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [Citizenship and Immigration Services (CIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is July 24, 2006.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, the petitioner submits a letter dated November 3, 2006 from its CEO [REDACTED], a letter dated October 31, 2006 from the petitioner's accountant and a new posting notice. Other relevant evidence in the record pertinent to the notice of filing includes a posting notice, a statement dated July 5, 2006 from [REDACTED], a contract for services between the petitioner and [REDACTED] ContinueCare Hospital at Mother Frances Hospital; and other evidence related to the petitioner's ability to pay includes the petitioner's unaudited financial statements for the year of 2005 and the period ended on August 31, 2006, Form 1120S U.S. Income Tax Return for an S Corporation filed by [REDACTED] for 2005, Form W-2 Wage and Tax Statement issued by [REDACTED] to its 80 employees in 2005, and Form 941 Employer's Quarterly Federal Tax Return filed by [REDACTED] for the first two quarters of 2006. The record does not contain any further evidence regarding the notice of filing and ability to pay.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

The regulation at 20 C.F.R. § 656.15 states in pertinent part:

- (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
- (b) *General documentation requirements.* A *Schedule A* application must include:
 - (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
 - (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as proscribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

- (1) In applications filed under Section 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:
 - (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation

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).

may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(3) The notice of the filing of an Application for Alien Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The petitioner must submit evidence that the job posting was posted for at least 10 consecutive business days at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(1)(ii). In the instant case, the petitioner is a contract therapy management company. The record does not show that the petitioner is engaged in healthcare services at its headquarters located at [REDACTED] Tulsa, Oklahoma. Instead, the Form I-140, the ETA Form 9089, the contract for services and the petitioner's submission letter indicated that the beneficiary will provide professional nurse services at [REDACTED] Tyler, Texas. CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. § 656.10(d)(1)(ii) to mean the place of physical employment. **Therefore, the petitioner must post the notice of filing at the facility located at [REDACTED] [REDACTED], Texas instead of the petitioner's headquarters in Tulsa, Oklahoma.** With the initial filing, the petitioner submitted a posting notice and a statement from its CEO indicating that the petitioner posted a notice of filing at its company's location. The AAO concurs with the director's determination that the notice of filing had not been posted at the correct location.

On appeal, the petitioner submits a letter dated November 3, 2006 from [REDACTED] states in this letter that:

Back in August 10, 2006, we realized the error in our posting notices and re-posted at all of our Texas facilities listing the Texas workforce agency, the regional department of labor and the national processing center over the state of Texas. We have continuous posting notice at

all of our facilities. Since [the beneficiary] will work at [redacted] Tyler, TX 75701 we enclosed the posting notice from [redacted] Tyler, TX 75701 facility.

The new posting notice submitted on appeal indicated it was posted from August 10, 2006 to August 23, 2006. As quoted above, the regulation requires that the notice of the filing of an Application for Alien Employment Certification must be provided between 30 and 180 days before filing the application. The instant application with the immigrant petition was filed on July 24, 2006. The new posting notice was posted after the filing. Therefore, the petitioner failed to post the notice of filing between 30 and 180 days before filing the application, and thus, the new posting notice is not posted in compliance with the requirements of the regulations. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

The regulation requires the notice of the filing must state any person may provide documentary evidence bearing on the application to the Certifying Office and provide the address of the appropriate Certifying Officer. The posting notice submitted with the initial filing contains an address of U.S. Department of Labor, Employment and Training Administration, [redacted] Chicago, IL 60611 as the appropriate Certifying Officer's address. The director determined that the petitioner failed to provide a correct address of the appropriate certifying officer because DOL's regional office with jurisdiction over Texas is in Dallas, Texas, not Illinois. As previously noted, the PERM regulation was effective as of March 28, 2005, and applies to the instant case. While the certifying officer in the DOL's regional office in Region 4 at [redacted] Dallas, Texas 75202 was the appropriate certifying officer with jurisdiction over a Texas worksite under the old DOL regulations, the certifying officer at Chicago National Processing Center is the appropriate certifying officer with jurisdiction over Texas, Oklahoma among other states under the PERM regulations. The petitioner provided the correct address of the appropriate certifying officer in its posting notice in the instant case. Therefore, this portion of the director's decision is withdrawn.³

The petitioner's assertion and evidence submitted on appeal cannot overcome the director's decision and are not sufficient to prove that the petitioner had posted a notice of filing in compliance with 20 C.F.R. §§ 20 C.F.R. § 656.10(d)(1)(ii) and (3)(iv).

The second issue in the director's decision to be discussed is whether or not the petitioner had demonstrated its ability to pay the multiple beneficiaries the proffered wages from the priority date to the present.

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 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

² We assume this is a typo. The Form I-140 and ETA Form 9089 indicate that the beneficiary will work at [redacted]

³ The director erred in stating the correct address of the appropriate certifying officer; however, this error does not alter the ultimate outcome of the appeal.

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 [CIS].

Here, the ETA Form 9089 was accepted on July 24, 2006. The proffered wage as stated on the ETA Form 9089 is \$20.00 - \$25.00 per hour (\$41,600 - \$52,000 per year). On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$2,500,000, to have a net annual income of \$60,000, and to currently employ 50 workers. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

In response to the director's request for evidence (RFE) dated August 21, 2006, the petitioner claimed that: "[the petitioner] is the parent company to [redacted] and [redacted], all with the same ownership." The petitioner submitted a tax return, W-2 forms and Form 941 of [redacted] as evidence to establish the petitioner's ability to pay the proffered wage during the relevant years.

However, the record contains no evidence that the petitioner is the parent company to [redacted] and [redacted]. Nor is there evidence to demonstrate that the petitioner, [redacted] and [redacted] are the same entity. The petitioner submitted an organizational chart to support its assertion. However, claiming same entity status requires supporting documentary evidence. The fact that the petitioner is doing business at the same location as the other business entities does not establish that they are the same business entity. 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)). Instead, the Oklahoma Secretary of State's official website for business entity data indicates that each of [redacted] (the petitioner in the instant case), [redacted] and [redacted] is a legal Oklahoma domestic for profit business corporation.⁴ The petitioner claimed its federal employer identification number (FEIN) on the petition which is different from the one [redacted] claimed on its tax return. [redacted]'s tax return for 2005 shows that it is structured as an S corporation with five shareholders ([redacted] 30%, [redacted] 30%, [redacted] 20%, [redacted] 10% and [redacted] 10%). The tax return does not support the petitioner's assertion that the petitioner is the parent company of [redacted]. The record does not contain any evidence pertinent to the petitioning corporation's ownership. Therefore, the petitioner failed to establish that it is the same entity as Kruse [redacted] and/or [redacted] with evidence in the record.

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. Because each of the petitioner, [redacted] and [redacted] are separate and distinct legal entities, the assets 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

⁴ See https://www.sooneraccess.state.ok.us/corp_inquiry/corp_inquiry-find.asp?:Norder_item_type_id=22&submit=submenu (accessed on January 9, 2008).

have no legal obligation to pay the wage.” Therefore, the AAO cannot consider the financial documents and information of [REDACTED], in determining the petitioner’s ability to pay the proffered wage in the instant case.

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 did not submit the beneficiary’s W-2 form, 1099 form or any other documentary evidence showing the petitioner paid the beneficiary in 2006 and onwards. Therefore, the petitioner failed to establish its ability to pay through examination of wages paid to the beneficiary from 2006, the year of 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, CIS 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 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. 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 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. Reliance on the petitioner’s depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

As alternative method, 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 including real estates 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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.

However, the petitioner did not submit any regulatory-prescribed evidence, such as an annual report, tax return or audited financial statement, to demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present. Without the regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2006 and onwards. The petitioner failed to establish its ability to pay the proffered wage.

The AAO also notes that the petitioner would have failed to establish its ability to pay with [REDACTED] Inc.'s net income or net current assets even if it had established its ability to rely on [REDACTED]'s evidence. [REDACTED]'s 2005 tax return shows that [REDACTED] had net income of \$(5,494) and net current assets of \$(270,199), neither which was sufficient to pay the beneficiary the proffered wage of \$41,600.

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 or approved 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 or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed eight (8) I-140 immigrant petitions including the instant petition in 2006.⁶ Therefore, the petitioner must establish its ability to pay the proffered wages for at least the eight beneficiaries of the petitions filed in 2006. The record of proceeding does not contain any evidence showing that the petitioner has established its continuing ability to pay the proffered wages to each of these beneficiaries as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence through the examination of wages already paid to these beneficiaries in the relevant year. Presumably, the petitioner has filed the petitions on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we

⁵According 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.

⁶ The petitioner filed two (2) immigrant petitions under the name of [REDACTED], three (3) petitions under the name of Kruse & Assoc Inc., two (2) under [REDACTED] and one (1) under [REDACTED]

examine only the salary requirements relating to the I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of \$332,800.⁷ The petitioner failed to establish its ability to pay the proffered wages to the beneficiaries of all the petitions filed in 2006.

The record contains the petitioner's financial statements for the year of 2005 and for the eight months of 2006 ended on August 31, 2006. However, they are not audited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner failed to establish its ability to pay the beneficiaries all the proffered wages at the time the petition was filed and failed to continue to have such ability until the present.

The petition will 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.

⁷ Assuming that the same or similar proffered annual salary of \$41,600 in the instant case is offered to all the beneficiaries of the petitions filed in 2006.