

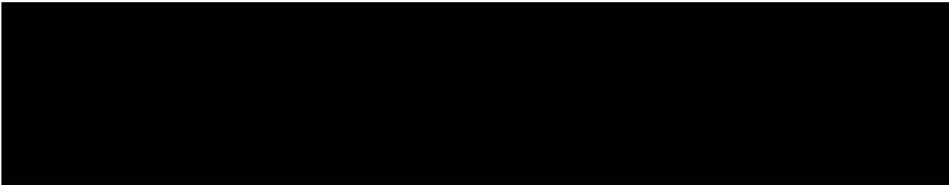
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

32



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

**MAY 28 2008**

LIN-06-193-50077

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition<sup>1</sup> was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a nursing registry. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for a blanket labor certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted an Application for Alien Employment Certification (Form ETA 750) with the Immigrant Petition for Alien Worker (Form I-140). The director determined that the petitioner had failed to submit a valid Prevailing Wage Determination (PWD) that meets the requirements of 20 C.F.R. §§ 656.10 and 656.15. The director denied the petition accordingly. The director also noted that the petitioner failed to submit an attestation to include the use of in-house media and evidence that the beneficiary has received a certificate from Commission on Graduates of Foreign Nursing Schools (CGFNS), or has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN), and that the petitioner failed to submit Application for Permanent Employment Certification (ETA Form 9089) in duplicate in conjunction to the filing of Form I-140.

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.

As set forth in the director's January 17, 2007 denial, the primary issue in this case is whether or not the petitioner has filed the petition with a valid PWD under the requirements of the regulations.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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

---

<sup>1</sup> The instant petition is identical to a prior petition filed by the petitioner on behalf of the beneficiary for the same position. The previous immigrant petition (EAC-03-015-53158) was filed by the petitioner on behalf of the beneficiary with the Vermont Service Center on October 1, 2002 and approved on March 24, 2003. However, the beneficiary's application for adjustment of status (EAC-03-015-53061) concurrently filed with the I-140 petition EAC-03-015-53158 was denied on February 16, 2005 based on ineligibility under section 245 of the Immigration and Nationality Act (the Act).

evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel submits a New York State Department of Labor (NYDOL) Prevailing Wage Request form, and an ETA Form 9089. Other relevant evidence in the record includes the beneficiary's registered nurse license for New York State, posting notice and an employment contract entered between the petitioner and the beneficiary.

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 May 23, 2006.

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 Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor 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.

The regulation at 20 C.F.R. § 656.40(c) states:

*Validity period.* The SWA [State workforce Agency] must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their applications or begin the recruitment required by §§ 656.17(d) or 656.21 within the validity period specified by the SWA.

---

<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).

The director found that the petitioner did not submit a PWD with the petition, and therefore, the director denied the petition. On appeal counsel asserts that because of latent confusion as a result of the transition from the traditional process for labor certification to the process under the PERM guidelines, such a minor issue should properly have been addressed in a request for evidence (RFE) but the petition was denied without a prior RFE. Counsel also submits a copy of a request to NYDOL for a prevailing wage determination and asserts that a response from NYDOL has not been received yet.

The regulation expressly requires a valid PWD from the SWA. A request for prevailing wage is not a valid PWD and thus cannot meet the requirement. In addition, a PWD is valid only during its validity period specified by the SWA for 90 days to one year from the determination date. To use a SWA PWD, employers must file their applications within this validity period. In the instant case, the petitioner filed the petition on May 23, 2006, however, counsel did not submit a request for prevailing wage until March 14, 2007. Therefore, the petitioner could not have submitted a valid SWA PWD for the instant petition even if the director had issued a RFE before he denied the petition.

Therefore, counsel's assertion on appeal cannot overcome the director's decision and the evidence submitted does not demonstrate that the petitioner filed the instant petition with a valid PWD as required by the regulation.

The regulation at 20 C.F.R. § 656.15(c)(2) provides:

An employer seeking a Schedule A labor certification for an alien to be employed as a professional nurse (Sec. 656.5(a)(2)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing in the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN).

The director noted that the petitioner failed to submit evidence that the beneficiary has received a certificate from CGFNS, or has passed the NCLEX-RN. On appeal, counsel argues that the petitioner submitted the beneficiary's license to practice nursing in the State of New York, which establishes the beneficiary's qualifications for registered nurse. Pursuant to the regulation quoted above, the petitioner can establish the beneficiary's qualifications by evidence either that the beneficiary has received a CGFNS certificate, passed NCLEX-RN or holds a full and unrestricted license to practice nursing in the state of intended employment. At the time the petition was filed, the beneficiary held a license to practice as a registered professional nurse in the State of New York. Therefore, the AAO concurs with counsel's assertion that the petitioner established the beneficiary's qualifications for the proffered position as a registered nurse with his New York State nurse license.

However, as previously noted, the PERM regulation applies to the instant case since the labor certification application was filed after March 28, 2005 and the labor certification application for a *Schedule A* occupation

required by the regulation at 20 C.F.R. § 656.15 is the ETA Form 9089. The petitioner did not submit the ETA Form 9089 before the director's decision.<sup>3</sup> Therefore, the petition cannot be approved.

Moreover, the petitioner failed to demonstrate that it published notice of filing an application for permanent employment certification in any and all of its in-house media in accordance with the normal procedures used for the recruitment of similar positions in its organization, an additional requirement set forth at 20 C.F.R. § 656.10(d)(1)(ii). Current regulations mandate that the petitioner provide evidence that it published notice of filing the application for permanent employment certification in its in-house media. The AAO concurs with the director's determination that the record contains no evidence that the petitioner ever published notice of filing an application for permanent employment certification for a registered nurse position in its website or in any other of its in-house media in accordance with the normal procedures used for the recruitment of registered nurses in the petitioner's organization, as required by the regulations. See 20 C.F.R. § 656.10(d)(1)(ii).

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

Pursuant to 20 C.F.R. § 656.15, a Schedule A application shall 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 prescribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d)(1) provides in relevant part:

In applications filed under §§ 656.15 (Schedule A), 656.16 (Shepherders), . . . 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...
- (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 must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while

---

<sup>3</sup> It is noted that the ETA Form 9089 submitted on appeal is not signed by the alien, the petitioner or counsel and was not submitted in duplicate as required by the PERM regulation.

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 29 CFR 516.4 or occupational safety and health notices required by 29 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.

According to the regulation at 20 C.F.R. § 656.10(d)(3):

The notice of the filing of an Application for Permanent 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 record reflects that the petitioner posted notice of filing an application for permanent employment certification from January 23, 2006 through February 3, 2006. The AAO notes that Monday, January 23, 2006 was a Federal holiday, and thus, the notice was posted for only nine consecutive business days. One of the new changes in the PERM regulation is that a notice of filing must be posted "ten business days" instead of "ten days" under the prior regulation. The regulation at 29 C.F.R. § 2510.3-120(e) defines a "business day" as "any day other than Saturday, Sunday or any other day designated as a holiday by the Federal Government." The regulation expressly provides that a business day is not defined on whether the petitioner operates on that day, but defined as any day other than Saturday, Sunday or Federal holiday. Therefore, the petitioner posted the notice of filing for nine business days prior to the priority date, and thus the posting does not meet the requirements for posted notices to the employer's employees as set forth at 20 C.F.R. § 656.10(d)(1)(ii).

In addition, the petitioner must submit evidence that the job posting was posted at the facility or location of the employment in accordance with 20 C.F.R. § 656.10(d)(ii). CIS interprets the "facility or location of the employment" referenced at 20 C.F.R. 656.20(g)(1)(ii) to mean the place of physical employment. In the instant case, the petitioner provided inconsistent information on the location of employment: the Form ETA 750A at Item 7, Address Where Alien Will Work, indicates "work performed in different institution;" the employment contract between the petitioner and the beneficiary provides that the petitioner "wishes to employ the [beneficiary] to perform nursing service for the [petitioner] and its nursing and rehab facility" without a specific location indicated; the notice of posting indicates the job location in "New York, NY;" and

the petition, the prevailing wage request form and ETA Form 9089 show the worksite as the same address as the petitioner's, that is [REDACTED]. The notice of posting itself does not indicate where the notice of posting was posted and the record does not contain any evidence showing the place(s) of physical employment in the instant case and the place(s) the notice was posted. Therefore, the petitioner failed to submit evidence that the notice was posted in accordance with 20 C.F.R. § 656.10.

Moreover, the petitioner also failed to provide the address of the appropriate Certifying Officer in the notice of posting required by the regulation at 20 C.F.R. § 656.10(d)(3)(iii). The addresses provided in the notice of posting in the instant case are not the addresses of the appropriate certifying officer under the PERM regulation. The address for the New Jersey Department of Labor at P.O. Box 053, Trenton, NJ 08625 is not the address of the appropriate certifying officer even under the prior to March 28, 2005 regulation since the record does not show that the beneficiary would work in the State of New Jersey. Since the petitioner failed to post the notice in compliance with regulations prior to the filing, any subsequent effort by the petitioner to correct the notice of posting would constitute a material change to the petition. If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Com. 1971.)

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 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].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. 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 [CIS]." 8 C.F.R. § 204.5(d). Here, the priority date is May 23, 2006. The proffered wage is \$30.00 per hour (\$56,160 per year<sup>4</sup>). The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B, however, on the Form G-325A concurrently filed with his application for adjustment of status, the beneficiary claimed to have worked for the petitioner as a nurse since September 2000.

---

<sup>4</sup> Based on working 36 hours per week as set forth on the Form ETA 750A. It is noted that the petition shows the proffered wage of \$1,035 per week which equals to an annual salary of \$53,820. The AAO considers \$56,160 as the proffered annual salary in accordance with the Form ETA 750 in the instant case.

On the petition, the petitioner claimed to have been established in 1999, and to currently employ 150 workers. The regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers. However, the record does not contain any evidence to support that the petitioner had 150 employees at the time of filing and the petitioner did not submit any statement from a financial officer of the petitioner to establish the petitioner's ability to pay the proffered wage. In addition, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from a financial officer of the petitioner.

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 any evidence showing that it paid the beneficiary any amount of compensation during the relevant years. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2006 onwards.

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 its gross income and gross profit on appeal 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 an alternative method, CIS will also 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. The record contains a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2004.<sup>6</sup> The 2004 tax return is not necessarily dispositive in the instant case because the priority date falls in 2006. However, this office will examine the petitioner's tax return for 2004 to determine whether the petitioner had the ability to pay the proffered wage.

The petitioner's 2004 tax return shows that the petitioner had a net income<sup>7</sup> of \$198,263 and net current assets of \$0. Therefore, for the year 2004 the petitioner did not have sufficient net current assets to pay the

---

<sup>5</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.

<sup>6</sup> The petitioner's 2004 tax return is incomplete and numerous items are missing (i.e., Schedule B is blank, Schedule L is incomplete, etc.).

<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 1120S 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. For example, an S corporation's **rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of**

proffered wage, while the petitioner had sufficient net income to pay the proffered wage to the instant beneficiary.

However, the record contains CIS approvals of multiple Form I-140 immigrant petitions filed by the petitioner. Among them there are 36 approved petitions with a priority date in 2004. Therefore, the petitioner must show that it had sufficient net income or net current assets to pay at least 36 proffered wages in 2004. The petitioner's tax return for 2004 shows that the petitioner had net income of \$198,263. With this amount, the petitioner could pay only four beneficiaries the proffered wages at the same level as the instant beneficiary. Therefore, the petitioner failed to establish its ability to pay all the proffered wages in 2004.

The record contains the petitioner's financial statements for 2004 and the nine months of 2005. 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 accountant's report that accompanied those financial statements states that: "A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole, accordingly, I do not express such an opinion." The accountant's report makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns, or audited financial statements, for 2006 through the present. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Without these regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present. The petitioner failed to establish its continuing ability to pay the proffered wage since the priority date because it failed to submit these documents.

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.