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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
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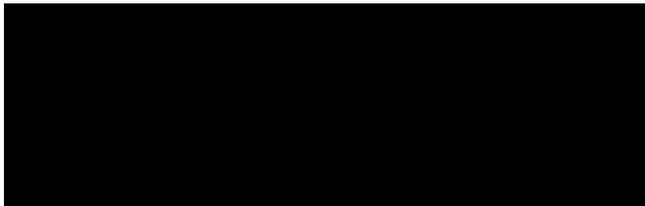
Date: APR 22 2004

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 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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a freight forwarding service. It seeks to employ the beneficiary permanently in the United States as a financial analyst. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not demonstrated that the beneficiary has the requisite employment experience as stated on the Form ETA 750.

On appeal, counsel submits a brief and additional evidence.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

8 CFR § 204.5(l)(3)(ii)(B) states, in pertinent part:

*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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Eligibility is also dependent on the beneficiary qualifying for the position pursuant to the terms of the Form ETA 750. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 14, 1998. The proffered wage as stated on the Form ETA 750 is \$49,518.56 per year. The Form ETA 750 states that the position requires a minimum of two years experience in the job offered or the related occupation of accounting.

With the petition counsel submitted a letter, dated May 1, 2002, from the petitioner's president. The letter cited the petitioner's gross receipts as evidence of its ability to pay the proffered wage.

Counsel also provided a photocopy of page one of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return. The return shows that the petitioner's 2000 fiscal year ran from November 1, 2000 to October 31, 2001. The return also shows that the petitioner declared a loss of \$56,983 as its taxable income before net operating loss deduction and special deductions for fiscal year 2000. Because the corresponding Schedule L was not provided, the petitioner's year-end net current assets could not be determined.

Further still, counsel submitted a copy of the petitioner's October 31, 2001 financial statements. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form.

The representations of management are insufficient to demonstrate the ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

As to the beneficiary's employment experience, counsel submitted a photocopy of an undated letter that purports to be from the president of Neris Machinery and Safety Products, Incorporated. The letter states that the beneficiary began her employment with that company during February 1985, but does not state how long that employment continued. The letter states that the beneficiary began work as an Operations Clerk but, based on her performance, was promoted to Operations Manager. The letter states that as Operations Manager the beneficiary supervised the company's operations including all aspects of the freight forwarding business, business communications, and preparation and negotiation of letters of credit.

The beneficiary's employment documentation did not state that the beneficiary performed accounting duties and did not state the length of her employment.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on November 19, 2002, requested additional evidence pertinent to that ability. The Service Center requested that the evidence be in the form of copies of annual reports, federal tax returns, or audited financial statements. The Service Center also specifically requested the petitioner's 1998, 1999, 2001, and 2002 tax returns.

The Service Center also noted that the duties described in the beneficiary's employment verification letter did not match the duties described on the Form ETA 750. The Service Center requested that the petitioner provide employment verification demonstrating that the beneficiary is qualified for the proffered position in accordance with the terms of the Form ETA 750.

The Service Center also requested that the petitioner submit the original employment verification letter from which the photocopy, submitted with the petition, was taken. The Service Center cautioned the petitioner not to send another photocopy and not to send an original letter different from the photocopy

submitted with the petition.

In response, counsel submitted copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for its 1997, 1998, 1999, and 2000 fiscal years. Counsel also submitted a Form 7004 Application for Automatic Extension showing that the petitioner's tax return for FY 2001 was not yet completed.

The 1997 return covers the fiscal year from November 1, 1997 to October 31, 1998. It states that the petitioner declared a loss of \$63,073 as its taxable income before net operating loss deduction and special deductions for that fiscal year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1998 return covers the fiscal year from November 1, 1998 to October 31, 1999. It shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,481 for that fiscal year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return covers the fiscal year from November 1, 1999 to October 31, 2000. It shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$7,616 for that fiscal year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 Schedule L, not submitted previously, shows that at the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

Counsel stated that the original of the beneficiary's employment verification letter no longer exists, but did not state how or when its existence had ceased. Counsel stated, but provided no evidence to demonstrate, that the beneficiary worked for Neris Machinery and Safety Products, Incorporated as Operations Clerk for approximately two and a half years and as Operations Manager for approximately nine and one half years. Counsel stated, but provided no evidence to demonstrate, that the beneficiary's work experience includes two years experience as a financial analyst or in accounting.

The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner is obliged to provide evidence of the beneficiary's qualifications for the proffered position, rather than merely alleging it.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director also found that the evidence did not establish that the beneficiary has the requisite two years of experience in accounting.

On May 5, 2003, the director denied the petition. In the decision, the director noted that the petitioner had not provided its 2001 and 2002 tax returns.

On appeal, counsel asserts both that the petitioner has demonstrated the ability to pay the proffered wage and that the petitioner has demonstrated that the beneficiary is qualified for the proffered position. Counsel provides additional evidence pertinent to both propositions. This office will address those issues seriatim.

Counsel asserts that the petitioner's total assets, gross receipts, total income, bank balances, and salaries paid demonstrate the petitioner's ability to pay the proffered wage.

Counsel further asserts that the beneficiary's employment with the petitioner also clearly evinces the petitioner's ability to pay the proffered wage. Counsel notes that, because of the tax advantage of reporting as little taxable income as possible, a petitioner's net income may not accurately reflect its ability to pay a proffered wage. Counsel states, but provides no evidence to demonstrate, that the petitioner's low net income does not evince an inability to pay the proffered wage, but is an indication of good tax planning.

Counsel states that a Deputy Executive Commissioner stated at a conference of immigration lawyers that gross income is a valid consideration in determining ability to pay a proffered wage. Counsel offered no evidence of this asserted statement, the context within which it was allegedly made, or that it was intended to apply to the situation of the instant case.

In the appeal, counsel contests the director's statement that the petitioner had not provided its 2001 and 2002 tax returns. Counsel states that the petitioner's returns are included with the appeal as exhibits five through eight.

Exhibit five is the petitioner's fiscal year 1997 return and covers the period from November 1, 1997 through October 31, 1998. Exhibit six is the petitioner's fiscal year 1998 return and covers the period from November 1, 1998 through October 31, 1999. Exhibit seven is the petitioner's fiscal year 1999 return and covers the period from November 1, 1999 through October 31, 2000. Exhibit eight is the petitioner's fiscal year 2000 return and covers the period from November 1, 2000 through October 31, 2001. The petitioner did not provide its fiscal year 2001 and fiscal year 2002 tax returns.

This office observes, however, that the request for evidence was issued on November 19, 2002. On that date, the petitioner's fiscal year 2001 had recently ended. The petitioner's 2001 tax returns for that fiscal year were not yet due and probably not yet prepared. In fact, counsel has submitted a Form 7004 Application for Automatic Extension of Time to file that fiscal year 2001 return until July 15, 2003. Further, because the petitioner's fiscal year 2002 had recently begun, its 2002 tax returns were certainly not available. The petitioner's case is not prejudiced by the absence of its 2001 and 2002 tax returns.

Counsel also provided copies of 1998, 1999, 2000, and 2001 Form W-2 Wage and Tax Statements showing wages the petitioner allegedly paid to the beneficiary for employment during those calendar years. Those W-2 forms purport to show that the petitioner paid the beneficiary \$40,850, \$41,856.15, \$43,124.98, and \$46,925 during those years, respectively. This office notes that those forms were not previously provided and that counsel offers no reason for their tardy submission.

Counsel also provides check stubs for the period from January 1, 2003 through June 15, 2003.<sup>1</sup> Those stubs show that the beneficiary had been paid \$25,200 as of June 15, 2003, an amount equivalent to \$50,400 annually.

Further still, counsel provides copies of the petitioner's California Form DE-6 Employer's Quarterly Wage Reports for all four quarters of 1998, 1999, 2000, 2001, and 2002, and the first quarter of 2003.

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<sup>1</sup> Although the check stubs for three pay periods were not included; this omission does not affect the evidentiary value of the remaining check stubs.

Those reports purport to show that the petitioner paid the beneficiary \$39,750 during 1998, \$42,746.15 during 1999, \$43,124.98 during 2000, \$46,925 during 2001, \$51,000 during 2002, and \$12,600 during the first quarter of 2003. Counsel offered no explanation for the discrepancy between the figures shown on the 1998 and 1999 wage reports and the figures shown on the beneficiary's W-2 forms for the same years.

Counsel's assertion that the petitioner has demonstrated the ability to pay the proffered wage by employing the beneficiary has some merit. If the petitioner had paid the beneficiary the entire proffered wage beginning on the priority date and continuing until the present, then the petitioner would, obviously, have demonstrated the ability to pay that amount during that period. If the petitioner had paid the petitioner half of the proffered wage, then the petitioner would be obliged to demonstrate the ability to pay the remaining half. Wages paid to the beneficiary demonstrate the ability to pay that amount of wages. If that amount is less than the proffered wage, then the petitioner is obliged to demonstrate the ability to pay the balance.

Counsel provided the first pages of the petitioner's checking account statements for each month from January 1998 through May 2003. Counsel cites the month-end balances shown on those statements as evidence of the petitioner's ability to pay the proffered wage.

Counsel's reliance on the petitioner's gross receipts, total income, salaries, total assets, and bank balances, is misplaced.

The petitioner's total assets are not a fund available to pay the proffered wage. Total assets include real estate and other illiquid assets not readily convertible to cash. Only the petitioner's current assets may be included in the calculation of the assets available to pay wages. Further, the amount of the petitioner's current assets must be reduced by the amount of the petitioner's current liabilities in order to show the petitioner's net current assets, the net amount of the petitioner's current assets actually available to pay wages.

The petitioner's year-end current assets are calculated by adding the assets shown on Schedule L, lines 1(d) through 5(d). The petitioner's year-end current liabilities are calculated by adding lines 15(d) through 17(d). The petitioner's year-end net current assets, the current assets net of the current liabilities, are calculated by subtracting the petitioner's current liabilities from its current assets.

Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, 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 returns. Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent and probative evidence of a petitioner's ability to pay a proffered wage.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>2</sup> or otherwise increased its net

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<sup>2</sup> The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages would then be available to pay the proffered wage.

income<sup>3</sup>, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. If the petitioner is relying on tax returns to demonstrate its ability to pay the proffered wage, then that remainder after all expenses is the petitioner's taxable income before net operating loss deduction and special deductions.

Counsel asserts that the petitioner's net income is a poor indicator of its ability to pay the proffered wage. For the reasons outlined above, the petitioner's net income is the only portion of its income that can be used to demonstrate the ability to pay the proffered wage. To argue that it is a poor indicator is to argue that the tax return itself is a poor indicator of the petitioner's ability to pay the proffered wage.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner was instructed to choose between annual reports, federal tax returns, and audited financial statements to demonstrate its ability to pay the proffered wage. The petitioner was not obliged to rely upon tax returns to demonstrate its ability to pay the proffered wage, but chose to. The petitioner might, in the alternative, have provided annual reports or audited financial statements, but chose not to.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns in assessing a petitioner's ability to pay a proffered wage. *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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS (then INS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should consider income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is May 14, 1998. That date fell within the petitioner's 1997 fiscal year. The proffered wage is \$49,518.56 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during fiscal year 1997, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 194 days of that 365-day fiscal year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 171 days. The proffered wage multiplied by 171/365<sup>th</sup> equals \$23,199.11, which is the amount the petitioner must show the ability to pay during its 1997 fiscal year.

During its 1997 fiscal year, the petitioner declared a loss of \$63,073. The petitioner ended the year with negative net current assets. The petitioner has not shown the ability to contribute any amount toward paying the proffered wage out of its income or its net current assets.

The petitioner submitted evidence to demonstrate that it paid wages to the beneficiary during the 1998,

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<sup>3</sup> The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

1999, 2000, 2001, 2002, and 2003 calendar years. As to some years, however, various items of the petitioner's evidence conflict as to the amount the petitioner paid to the beneficiary. Neither counsel nor the petitioner submitted any evidence or argument to reconcile the inconsistencies in the petitioner's evidence. The petitioner is obliged to resolve any inconsistencies in the record. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). As to each year for which conflicting evidence was submitted, even if this office finds that the petitioner has credibly demonstrated that it paid the beneficiary the lesser of the two competing amounts, the petitioner still has not demonstrated its ability to pay the proffered wage.

The 1998 Form DE-6 in the file states that during that calendar year the petitioner paid the beneficiary \$39,750 in wages. Of the 365 days in that calendar year, however, 303 fell within the petitioner's 1997 fiscal year, which ended on October 31, 1998. The remaining 62 days fell within the petitioner's 1998 fiscal year. Therefore, roughly 303/365<sup>th</sup>, or \$32,997.95, of the beneficiary's 1998 wages is attributable to the petitioner's 1997 fiscal year. That amount exceeds the amount the petitioner is obliged to show the ability to pay during its 1997 fiscal year. The petitioner has, therefore, demonstrated the ability to pay the salient amount of the proffered wage during the portion of its 1997 fiscal year after the priority date.

During fiscal year 1998 and each ensuing fiscal year, the petitioner is obliged to show that it was able to pay the entire amount of the proffered wage. During its FY 1998, the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,481. The petitioner ended that fiscal year with negative net current assets. The petitioner has demonstrated the ability to pay \$5,481 out of its income toward paying the proffered wage during that fiscal year. The petitioner has not demonstrated that it could have contributed any amount toward paying the proffered wage out of its net current assets during that fiscal year. The petitioner must demonstrate the ability to pay the remaining \$44,037.56.

As was demonstrated above, 62/365<sup>th</sup> of the wages the petitioner paid to the beneficiary during the 1998 calendar year are attributable to the petitioner's 1998 fiscal year. That amount, 62/365<sup>th</sup> of \$39,750, equals \$6,752.05.

A W-2 form in the record states that during the 1999 calendar year the petitioner paid the petitioner \$41,856.15. Again, 303/365<sup>th</sup> of that amount, or \$34,746.34, is attributable to the petitioner's 1998 fiscal year and 62/365<sup>th</sup> of it, or \$7,109.81, to the petitioner's 1999 fiscal year. The total wages the petitioner has demonstrated it paid to the beneficiary during its 1998 fiscal year is \$6,752.05 plus \$34,746.34, or \$41,490.39. That amount is less than the \$44,037.56 balance that the petitioner is obliged to demonstrate the ability to pay. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during its fiscal year 1998.

During its fiscal year 1999, the petitioner declared a taxable income before net operating loss deduction and special deductions of \$7,616. The petitioner ended that fiscal year with negative net current assets. The petitioner has demonstrated the ability to pay a total of \$7,616 out of its income and its net current assets. The petitioner must demonstrate the ability to pay the \$41,902.56 balance of the proffered wage.

The 2000 W-2 form in the record and the petitioner's 2000 quarterly wage reports concur that the petitioner paid the beneficiary \$43,124.98 during that year. The portion of the wages paid to the beneficiary during the 2000 calendar year that is attributable to the 1999 fiscal year is 304/366<sup>th</sup> of that amount, or \$35,819.66.<sup>4</sup> The portion of the beneficiary's 1999 wages attributable to the 1999 fiscal year

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<sup>4</sup> Calculations pertinent to attribution of wages paid during the 2000 calendar year are slightly different from other

equals \$7,109.79. Those two amounts, totaled, equal \$42,929.45. That amount exceeds the balance of the proffered wage that the petitioner is obliged to show the ability to pay. The petitioner has demonstrated the ability to pay the proffered wage during its fiscal year 1999.

During its fiscal year 2000, the petitioner declared a loss of \$56,983. The petitioner ended that fiscal year with negative net current assets. The petitioner has not shown that it was able to contribute any amount out of its income or its net current assets toward paying the proffered wage.

The portion of the wages paid to the beneficiary during calendar year 2000 that are attributable to the petitioner's 2000 fiscal year equals \$7,305.32.

The 2001 W-2 form in the record and the petitioner's 2001 quarterly wage reports concur that the petitioner paid the beneficiary \$46,925 during that year. The amount of those wages attributable to the petitioner's 2000 fiscal year is 303/365<sup>th</sup> of the total, or \$38,954.18. That amount, plus the \$7,305.32 portion of the beneficiary's 2000 earnings attributable to the petitioner's 2000 fiscal year, totals \$46,259.50, an amount less than the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during its 2000 fiscal year.

Because the petitioner's tax returns for its 2001 and 2002 fiscal years were unavailable when the request for evidence was issued, the ability of the petitioner to pay the proffered wage during those fiscal years will not be analyzed.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during its 1998 and 2000 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's qualifications, counsel asserts that the beneficiary has more than a decade of experience in accounting, which considerably exceeds the requisite two years of experience. As additional evidence that the beneficiary's employment with Neris Machinery & Safety Products, Inc. is qualifying accounting experience, counsel provides a sworn affidavit from the beneficiary. In that sworn statement, the beneficiary states that Neris Machinery & Safety Products, Inc., no longer exists, and describes duties she claims to have performed when she worked for that company. Counsel also provides descriptions of accounting positions from the Dictionary of Occupational Titles (DOT) issued by the U.S. Department of Labor. The beneficiary's description of her duties with Neris Machinery & Safety Products, Inc. closely matches the duties of the DOT accountancy positions.

The employment verification letter submitted with the petition was manifestly insufficient. Contrary to the requirements of 8 C.F.R. 204.5(l)(3)(ii), the letter does not state the nature of the beneficiary's experience. It did not state, nor even imply, that the petitioner's duties were even remotely related to accountancy. Counsel now seeks to remedy that shortcoming with a statement from the beneficiary. Just as the representations of the petitioner are insufficient to demonstrate its ability to pay the proffered wage, the representations of the beneficiary, even representations given under oath, are insufficient to demonstrate that she possesses the requisite work experience. The evidence submitted does not demonstrate that the beneficiary possesses the minimum experience demanded by the Form ETA 750.

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years because 2000 was a leap year.

Counsel asserts the following:

[W]here the petitioner specifically requested, prior to the expiration of the rebuttal period, an opportunity to cure any defects that [CIS] still deemed to exist, [CIS] should not (Emphasis in the original.) have issued a Notice of Decision, denying the [petition]. This denial, without first offering the Employer an opportunity to cure, constitutes an abuse of discretion. Since the Petitioner could not predict whether its rebuttal evidence will [sic] be persuasive, the Petitioner offered to cure a defect in the event that [CIS] concluded that the evidence was not persuasive. Therefore, upon determination that the Petitioner's evidence was not persuasive, [CIS] should have allowed the Petitioner to present further documentation.

The petitioner was put on notice of its burden of proof and the evidentiary requirements for the immigration benefit sought. 8 C.F.R. § 204.5(g)(2) states that a petition must be **accompanied** by evidence that the prospective United States employer has the ability to pay the proffered wage. 8 CFR § 204.5(l)(3)(ii)(B) states that the petition must be **accompanied** by evidence that the alien meets the requirements of the individual labor certification.

The Request for Evidence issued in this case noted that the petitioner had not provided evidence that the petitioner had the continuing ability, beginning on the priority date, to pay the proffered wage. The Request for Evidence further noted that the petitioner had not provided evidence sufficient to demonstrate that the beneficiary has the experience that the Form ETA 750 demands as a prerequisite for entry into the position. Although that evidence should have been provided with the petition, the request for evidence accorded the petitioner a second chance to satisfy the requirements of the regulations. Counsel now asserts that a third chance was due the petitioner, but provides no authority for that assertion.

Counsel's assertion is unpersuasive. Neither the Act nor the regulations require CIS to issue an additional request for evidence when counsel fails to respond adequately to the first. The petitioner was accorded notice of what evidence was required. The director did not err by not issuing an additional request for evidence.

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.