

identifying data deleted to  
prevent identity unwarranted  
disclosure of personal privacy

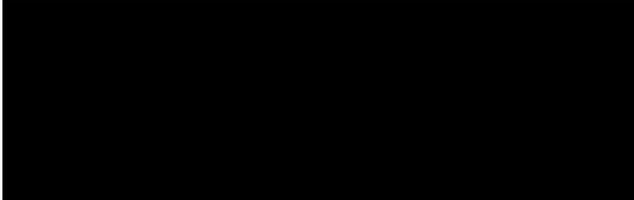
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC INFORMATION

BA



FILE: WAC-02-210-50926 Office: CALIFORNIA SERVICE CENTER Date: APR 04 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

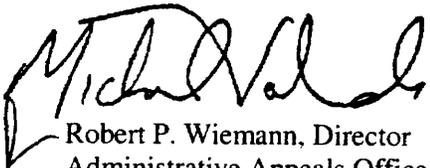
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, 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 (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a property management firm. It seeks to employ the beneficiary permanently in the United States as a track maintenance supervisor. 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 the beneficiary had the required two years of experience in general construction as required on the Form ETA 750, and denied the petition accordingly.

On appeal, counsel states that in reaching his decision the director relied on information in an investigator's report which the petitioner was not given an opportunity to rebut. Counsel states that the evidence submitted by the petitioner sufficiently corroborates the beneficiary's claim of at least two years of experience in general construction.

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

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 14, 1998.

The Form ETA 750 states that the position of track maintenance supervisor requires no minimum education or training, and requires two years of experience in the offered position or in the related occupation of general construction. On the Form ETA 750B, signed by the beneficiary on January 13, 1998, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on June 17, 2002. On the petition, the petitioner claimed to have been established in June 1986, to have a gross annual income of \$163,000.00, to have a net annual income of \$110,000.00, and to currently have 16 employees.

In support of the petition, the petitioner submitted unsigned copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for its 1998 and 1999 tax years; and a signed copy of petitioner's Form 1120 U.S. Corporation Income Tax Returns for its 2000 tax year. Each tax return indicates that the petitioner's tax year begins on the first of July and ends on the thirtieth of June the following year.

In a request for evidence (RFE) dated October 18, 2002, the director requested additional evidence relevant to the petitioner's ability to pay the proffered wage and additional evidence relevant to the beneficiary's experience. The director specifically requested signed copies of the petitioner's tax returns for 1998, 1999 and 2001. Concerning the beneficiary's experience, the director stated the following: "Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person

verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week."

In response to the RFE, the petitioner's previous counsel submitted a letter dated December 18, 2002 and the following evidence: a letter dated November 11, 2002 from [REDACTED] Representative, [REDACTED] of Mexicali, Mexico, stating the beneficiary's employment from March 1987 until November 1989, with certified English translation; copies of three canceled checks dated August 16, 2001, March 6, 2002, July 29, 2002, paid to the petitioner by [REDACTED] California; and signed copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for its 1998, 1999 and 2000 tax years. The letter in the name of the petitioner's previous counsel was signed on his behalf by [REDACTED]. [REDACTED] was also the person who certified the accuracy of the English translation of the letter [REDACTED].

In a notice of intent to deny (ITD) dated April 8, 2003, the director stated that Citizenship and Immigration Services (CIS) intended to deny the petition. The director determined that the petitioner had failed to provide a copy of its tax return for 2001 as requested, and requested evidence of the petitioner's ability to pay the proffered wage in 2001. The director specifically requested certified Internal Revenue Service computer printouts for the year 2001.

In reply to the ITD, present counsel submitted a letter dated May 5, 2003 stating that the petitioner's previous attorney of record had died on December 30, 2002. With his letter, present counsel submitted the following documents: a letter dated May 5, 2003 from the petitioner's president; two new Form G-28 Notices of Entry of Appearance as Attorney or Representative signed by present counsel, one co-signed by the petitioner's president and dated April 9, 2003, and the other co-signed by the beneficiary and dated May 5, 2003; a copy of an Internal Revenue Service computer printout showing transactions under the petitioner's employer identification number on October 24, 2001, September 15, 2002 and October 21, 2002; a copy of the petitioner's Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return for the tax year of July 1, 2001 to June 30, 2002; a copy of a facsimile transmittal dated December 31, 2002 from the petitioner's president to the petitioner's previous counsel; a printout of an Internet Web page dated January 16, 2003 containing an obituary for the petitioner's previous counsel; copies of the petitioner's signed Form 1120 U.S. Corporation Income Tax Returns for its 1998, 1999, 2000 and 2001 tax years; and a copy of the Form 1120 U.S. Corporation Income Tax Return of Carlsbad Raceway Corporation for its 2001 tax year of August 1, 2001 through July 31, 2002.

In a second ITD, dated August 20, 2003, the director again stated the intention of CIS to deny the petition. The director stated that a field investigation had been requested by the California Service Center concerning the beneficiary's claimed former employment. The director stated that according to a CIS investigation of Construcciones Miram, no record of the beneficiary's employment with that company exists and that, according to the report, the representatives of that company were unable to produce any record or evidence of the beneficiary's employment with that company. The director determined that the beneficiary was not clearly eligible for the benefit sought and afforded the petitioner thirty days to submit additional information, evidence or arguments to support the petition.

In response to the second ITD, counsel submitted a letter dated September 16, 2003 and the following evidence: a letter dated September 15, 2003 from the petitioner's president; an affidavit dated September 16, 2003 by the beneficiary; an affidavit dated September 15, 2003 by [REDACTED] brother of the beneficiary; a letter from [REDACTED] foreman for the Miram construction company, with certified English translation, a letter dated September 10, 2003 from [REDACTED] of Mexicali, Mexico,

with certified English translation; and a letter from [REDACTED] of Mexicali, Mexico, with certified English translation.

In a decision dated October 8, 2003, the director noted that CIS had requested an investigation to verify the beneficiary's claim of prior employment with [REDACTED]. The director stated, "The investigators [sic] report reveals no records exist to substantiate the beneficiary's claim of employment with [REDACTED]" (Director's Decision, page 3). The director determined that the petitioner's evidence submitted in response to the second ITD was insufficient to rebut the information in the investigator's report. The director found that the evidence in the record failed to establish that the beneficiary had met the minimum requirement of experience listed on the Form ETA 750 at the time the request for certification was filed. The director stated, "Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." (Director's Decision, page 3). The director cited *Matter of Treasure Craft*, 14 I&N Dec. 190 (Reg. Comm. 1972) as authority for that proposition. The director therefore denied the petition.

On appeal, counsel submits a brief in the form of a three-page attachment to the Form I-290B, and no additional evidence. On the I-290B, signed by counsel on November 6, 2003, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. However, no further documents have been received by the AAO to date.

In his brief, counsel states that the director's reliance on *Matter of Treasure Craft*, 14 I&N Dec. 190, was misplaced. Counsel distinguishes that case as one in which the petitioner "failed to provide quantifiable proof that the beneficiaries would not displace U.S. workers but instead made 'self-serving assertions' regarding displacement." (Brief, page 1). Counsel states, that, in contrast, the petitioner in the instant case submitted a letter of employment experience from the former employer, a letter from the former employer's supervisor reverifying the information, and additional documentary evidence verifying the beneficiary's residence in the city and during the period of foreign employment.

Counsel states that in reaching his decision the director relied on information in an investigator's report, a copy of which was not provided to the petitioner. Counsel states that the petitioner was therefore not given an opportunity to rebut the information in that report, as required by 8 C.F.R. § 103.2(b)(16)(i). Counsel states that the petitioner had conducted its own investigation, and that a full account of the visit of the CIS investigator to [REDACTED] revealed facts in support of the beneficiary's claim of prior experience with that company.

Counsel states that the evidence submitted by the petitioner sufficiently corroborates the beneficiary's claim of at least two years of experience in general construction. Counsel states that the director's decision recites the procedural history of the case, including the labor certification process, in a manner which evidences a bias on the part of the director. Counsel states that innuendos and comments in the director's decision are further evidence of the director's bias.

Finally, counsel states that the petitioner's prior counsel, now deceased, was inexperienced in the labor certification and visa petition process, and that for that reason many amendments were required on the labor certification before it was approved by the Department of Labor. Counsel states that the lack of experience of prior counsel was further evidenced by the failure of prior counsel to submit any evidence of the beneficiary's employment experience with the initial submission of the petition.

Counsel asserts that the director's decision is arbitrary and capricious and is a denial of due process.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The ETA 750, as approved by the U.S. Department of Labor, states the minimum qualifications for the offered job as two years of experience in the offered job or two years of experience in the related occupation of general construction. The only documentation in the ETA 750 of the beneficiary's experience relevant to those requirements is in a letter dated May 25, 1999 signed by the beneficiary, amending the ETA 750B. In that letter, the beneficiary states that for the past three years he has been working in construction in the San Diego area, as a self-employed day laborer and handyman. That amendment was incorporated into the ETA 750B by the Department of Labor prior to its approval of the labor certification.

Concerning the evidence needed to establish a beneficiary's experience under an I-140 petition, the regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The procedural history of the petition summarized above shows that no documentation corroborating the beneficiary's claimed work experience in the field of construction was submitted with the I-140 when initially filed. After the director issued an RFE, the petitioner submitted a letter from the legal representative of [REDACTED] stating that the beneficiary had worked for that company from March 1987 until November 1989. The letter is on the printed letterhead of Construcciones Miram, which includes the company's address, and the letter also shows the name and title of the writer, as required by the regulation quoted above. The letter gives a description of the beneficiary's duties, rendered in the English translation as "he realized/achieved various tasks of a building worker, demonstrating to be an honest and dedicated person in his work." [sic]. The letter does not specify the number of hours per week worked by the beneficiary, as had been requested in the RFE. The regulation, however, does not require such a letter to state the number of hours worked by a beneficiary.

The director suspected the letter on behalf of [REDACTED] to be fraudulent and requested the American Embassy in Mexico City to conduct an investigation of the beneficiary's employment claim. The director's memorandum to the American Embassy, a copy of which is found on the non-record side of the file, states, "Fraud is suspected in this case." The memorandum gives no reasons for the suspected fraud. It appears that the omission from the ETA 750B of any information on the beneficiary's experience with [REDACTED] was the principal reason for the director's suspicion that the letter submitted later from that company was fraudulent. In his later decision denying the petition, the director repeatedly referred to the omission of that experience from the ETA 750B as grounds for discounting the petitioner's claim of experience with [REDACTED]. In his decision, the director also noted the lack of detail in the letter from the legal representative of [REDACTED] concerning the beneficiary's duties. However, the letter in question does comply with the regulation cited above. The director's extra attention to this piece of evidence suggests that the letter was the suspected source of fraud.

Notwithstanding the director's concern over the omission of information about [REDACTED] on the ETA 750B, a careful examination of the Form ETA, Parts A and B, including attached letters amending Parts A

and B of the Form ETA 750, indicates that the omission of the beneficiary's experience with Construcciones Miram from the ETA 750B was arguably correct when the ETA 750 was initially submitted.

On the ETA 750A as originally submitted the only job qualification requirement was for two years of *training*. For that reason, the beneficiary's *experience* with Construcciones Miram was not directly related to the required qualifications on the ETA 750A as originally submitted. A later amendment to the ETA 750A deleted the requirement for two years of *training* and substituted a requirement for two years of *experience* in general construction. That change was one of the amendments made by a letter dated May 25, 1999 signed by the petitioner's president, written in response to an Assessment Notice of April 14, 1999 from the Employment Development Department Alien Labor Certification Office, Sacramento, California. With that amendment adding a job qualification of two years experience in general construction, the beneficiary's prior experience with Construcciones Miram became directly relevant to the ETA 750.

No amendment was made to the ETA 750B adding the beneficiary's experience with Construcciones Miram. The only amendment to the beneficiary's work history was made in the letter mentioned above dated May 25, 1999 and signed by the beneficiary, also written in response to the Assessment Notice of April 14, 1999. That Assessment Notice apparently had sought information on the beneficiary's most recent three years of experience. In his letter of May 25, 1999 the beneficiary states as follows:

With regard to your request for a clarification of my work history, be advised that for the past three years, I have been self-employed as a day-laborer, handyman, etc., in the construction trade in and around San Diego County. The employers were and continue to be only known on a first name basis and addresses are unknown.

(Letter of May 25, 1999 signed by the beneficiary).

The Department of Labor had no reason to be aware of any earlier experience of the beneficiary in the field of construction and therefore had no basis for further inquiries about any such experience. In any event, no further amendment to the ETA 750B was submitted by the petitioner or by the beneficiary, and the ETA 750 was approved by the Department of Labor with no further changes.

The omission of any reference in the ETA 750B to the beneficiary's experience with [REDACTED] was one of the main reasons stated by the director in his decision for his finding that the evidence failed to establish that the beneficiary had two years of experience in the field of general construction, one of the two alternative experience requirements on the amended ETA 750A, block 14. The director made no reference to the amendments to that block, and nothing in the decision nor in any of the director's earlier communications to the petitioner indicates that the director had considered the significance of those amendments, nor the date on which those amendments were made. The above analysis, however, indicates that the omission of information from the ETA 750B about the beneficiary's experience with [REDACTED] should be given minimal adverse weight.

The director's memorandum to the American Embassy requesting an investigation of the beneficiary's work experience was dated March 31, 2003. Without waiting for the results of that investigation, the director issued his first ITD, dated April 8, 2003, in which the director made no mention of any need for further evidence concerning the beneficiary's work experience, but rather cited a lack of sufficient evidence of the petitioner's ability to pay the proffered wage.

In response to the first ITD, present counsel submitted a letter dated May 5, 2003, along with extensive financial information on the petitioner. Present counsel also presented documentation concerning the death of the petitioner's previous counsel on December 31, 2002.

In a memorandum of investigation dated June 4, 2003, a CIS investigator presented the results of the investigation which had been requested by the director. That memorandum is found on the non-record side of the file.

In his second ITD, dated August 20, 2003, the director stated the following concerning the results of the CIS field investigation:

The Investigator traveled to Mexicali, Mexico to visit the company [REDACTED]. Upon arrival at the business the Investigator spoke with [REDACTED] (company administrative assistant) and [REDACTED] (Legal Representative). The results of the investigation revealed no record of previous employment of the beneficiary with [REDACTED] exists. The Investigator's report states, "[REDACTED] were not able to produce any record or evidence of employment issued to SUBJECT-[beneficiary]".

The director's summary of the CIS investigator's report is silent with regard to any statements made to the investigator by either [REDACTED] the company administrative assistant, or by [REDACTED] the company's legal representative. The investigator's report on the non-record side of the file is similarly silent with regard to any statements made to the investigator by [REDACTED].

Any statements made by company representatives to the CIS investigator in response to the investigator's questions about the beneficiary's claimed prior employment with that company would of course be highly relevant to the question under investigation, namely whether the claim that the beneficiary worked with [REDACTED] from March 1987 to November 1989 was fraudulent. The investigator's report fails to state the circumstances of the conversation or conversations with [REDACTED] or to state whether they verbally confirmed or denied the beneficiary's past employment with the company. The omission from the investigator's report of any description of what was said to the investigator by company representatives renders that report deficient as a basis for any conclusions about the beneficiary's claim of past experience with [REDACTED]. Without such description of what was said, the report serves only to confirm that [REDACTED] could not produce any record of the beneficiary's employment.

In response to the second ITD, counsel submitted a letter dated September 16, 2003 and the following evidence: a letter dated September 15, 2003 from the petitioner's president; an affidavit dated September 16, 2003 by the beneficiary; an affidavit dated September 15, 2003 by [REDACTED] letter from [REDACTED] de Abila, a foreman for [REDACTED] with certified English translation; a letter dated September 10, 2003 from [REDACTED] of Mexicali, Mexico, with certified English translation; and a letter from [REDACTED] Mexicali, Mexico, with certified English translation.

The information in the petitioner's evidence submitted in response to the ITD is consistent with the information in the letter submitted previously from [REDACTED] Legal Representative of [REDACTED]. In his letter dated September 15, 2003, the petitioner's president states that his company contacted a brother of the beneficiary, [REDACTED] who lives and works in the Mexicali, Mexico area, for assistance in investigating the beneficiary's prior employment. In his letter, the petitioner's president summarizes

the results of the petitioner's investigation. Concerning the visit by the CIS investigator to the offices of Construcciones Miram, in Mexicali, Mexico, the petitioner's president states the following:

Apparently the "field investigator" works at the Calexico Port of Entry, or some other Bureau office in the Imperial Valley. We are informed that the field investigator did in fact appear at the offices of Construcciones Miram, totally unannounced, and without giving the company any prior notice of what information or documentation might be expected of them. According to the information we have received, the field investigator arrived at the business office at a time when the administrative assistant, [REDACTED] was present, but when [REDACTED] was absent. The officer was informed by [REDACTED] that he would need to speak to [REDACTED] the legal representative, who would have personal knowledge about the matter. The officer left a telephone number where [REDACTED] could contact him. [REDACTED] Munoz apparently did place a telephone call to the filed [sic] investigator, and did cooperate with the investigation.

Our understanding is that [REDACTED] confirmed to the officer that the beneficiary had in fact worked for the company during the period indicated, March 1987 to November 1989, as Mr. [REDACTED] had confirmed in his letter dated November 14, 2002.

Our understanding is that [REDACTED] further informed the field investigator that as over 14 years had passed since the beneficiary worked for his company, and as he worked as a laborer and was paid in cash, the custom for all such construction laborers, he may or may not be able to obtain additional evidence to corroborate the employment through his business records. Our understanding is that [REDACTED] told the field investigator that his company generally did not keep business records, including the laborer payroll records in question, for over 5 to 7 years, as they served no accounting or legal purpose beyond that period, and that in all likelihood he would not have kept the records in question beyond that period of time. We understand that he told the field investigator that the November 14, 2002 employment verification letter was in fact based on fact, per his recollection and per the personal knowledge of his foreman, who had been the beneficiary's direct supervisor while employed at Construcciones Miram.

(Letter dated September 15, 2003 from the petitioner's president, page 2)

The other evidence submitted by the petitioner in response to the second ITD is consistent with the summary in the letter from the petitioner's president. The evidence includes a letter from [REDACTED] foreman for the Miram construction company, with certified English translation. In that letter [REDACTED] states that he was the beneficiary's direct supervisor at Construcciones [REDACTED] and states the years of the beneficiary's employment as from 1987 to 1989. [REDACTED] states that the beneficiary was paid in cash at the job sites for his work. In an affidavit [REDACTED] a brother of the beneficiary living in Mexicali, Mexico, describes his investigation made at the request of the petitioner concerning the beneficiary's employment with Construcciones [REDACTED] describes his conversations with [REDACTED] and with [REDACTED] affidavit gives further details about the visit of the CIS investigator to the office of Construcciones Miram, including the fact [REDACTED] offered to try to locate documentation on the beneficiary's employment, and that his offer to do so was declined by the investigator. [REDACTED] states in his affidavit that the information therein is based on his personal interviews with [REDACTED] also attests to the good reputation of the firm Construcciones Miram, apparently based on his own knowledge as a resident of that area.

The other evidence submitted by the petitioner in response to the second ITD includes letters from a former landlord of the beneficiary in Mexicali, Mexico, and from a dentist in Mexicali who treated the beneficiary when he was living there. Those letters provide further corroboration of the beneficiary's residence in Mexicali, Mexico, during the period of claimed employment with Construcciones [REDACTED]

Since the report of the CIS investigator failed to describe any of the conversations the investigator had with Mr. [REDACTED] and with [REDACTED] only accounts of those conversations are those found in the petitioner's evidence submitted in response to the second ITD. According to the petitioner's evidence, Mr. [REDACTED] verbally confirmed the beneficiary's prior employment to the CIS investigator. Nothing in the investigator's report disputes the petitioner's evidence on that point.

The petitioner's evidence also states that no documentary corroboration was immediately available to the investigator on the day of his unannounced visit to the offices of Construcciones [REDACTED]. The investigator's report is consistent with the petitioner's evidence on that point. But the investigator's report concludes that no documentary evidence exists, while the petitioner's evidence states that the legal representative suggested that a further search might be made with the possibility of locating such documentation, an offer which the investigator declined. Nonetheless, the failure of the petitioner to submit documentation dating from the period of the beneficiary's claimed employment with Construcciones Miram when later given an opportunity by the director in the second ITD to submit further documentation suggests that no such documentation dating from that period now exists.

In the record of the instant petition, the only documentation in the petitioner's evidence corroborating the beneficiary's claimed experience with Construcciones Miram consists of the letters and affidavits described above. The director noted the absence of other documentation with the following language: "It is interesting to note the petitioner submits as evidence statements from five individuals, rather than attempting to obtain the business records or other form of corroborating evidence [REDACTED] offered to try to locate for the field investigator." The somewhat ironic tone of this sentence is apparently one of the reasons for counsel's assertion in his brief that the language of the director's decision evidences a bias by the director against the petition.

While the use of ironic language is never appropriate in these proceedings, the director was correct to note the continued absence of some types of corroborative documents in the petitioner's submissions in response to the ITD. The absence of such documentation, however, does not necessarily imply that the beneficiary's claim of prior employment with Construcciones Miram is untrue. Although documentation such as payroll records or time sheets may not now exist, the petitioner submitted written statements by two persons claiming direct knowledge of the beneficiary's prior employment with that company. The first statement was the letter of [REDACTED] submitted in response to the RFE. The second written statement was the letter from [REDACTED] foreman for Construcciones Miram, submitted in response to the ITD. Moreover, the other written statements submitted by the petitioner provide corroboration of the beneficiary's residence in Mexicali during the period of claimed employment there.

Counsel in his brief asserts that previous counsel, now deceased, was inexperienced in labor certification matters, as evidenced by the many amendments required by the Department of Labor to the Form ETA 750, and as evidenced by previous counsel's failure to submit any documentation of the beneficiary's prior work experience with the initial submission of the I-140 petition. The many technical corrections required on the ETA 750 appear to support the assertions of present counsel that the petitioner's previous counsel lacked experience in labor certifications.

The copy of the obituary submitted for the record by present counsel states that the petitioner's previous counsel died on December 30, 2002. The most recent document in the record signed by previous counsel is a letter dated June 11, 2002, submitted with the I-140 petition, which was received by CIS on June 17, 2002. As noted above, when the previous counsel's office responded to the RFE, the letter dated December 18, 2002 in the name of previous counsel was not signed personally by previous counsel but was signed on his behalf by [REDACTED] the same person who certified the accuracy of the English translation of the letter from [REDACTED] [REDACTED] was presumably an assistant to previous counsel.

The foregoing matters pertaining to the petitioner's counsel suggest that the failure of the petitioner to submit any documentation of the beneficiary's prior work experience with Construcciones Miram until its response to the RFE in December 2002 is not a strong reason to doubt the truth of the information in the letter dated November 11, 2002 from the legal representative of that company.

In his decision, the director cited *Matter of Treasure Craft*, 14 I&N Dec. 190, for the proposition that "[s]imply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." However, as counsel points out in his brief, the facts in that case differ significantly from the record in the instant petition. In *Matter of Treasure Craft* the issues concerned the availability of pottery training programs in Mexico and the effect on U.S. workers in offering an on-the-job training program in pottery in the United States. The petitioner submitted no evidence on those issues other than the petitioner's own statements. In contrast, the petitioner in the instant case provided a total of six written statements in support of the beneficiary's claim of prior employment with Construcciones Miram, two from employees of that company, one from the beneficiary himself, one from the beneficiary's brother, and two from persons who knew the beneficiary in Mexicali, his landlord and his dentist.

Viewed as a whole, the AAO finds the evidence in the record in the instant petition sufficient to establish that the beneficiary had the required two years of experience in general construction as of the January 14, 1998 priority date. The decision of the director to deny the petition for failing to establish that experience was therefore in error.

The evidence in the record also raises the issue of the petitioner's ability to pay the proffered wage during the relevant period. In the RFE and in the first ITD the director requested evidence on that issue. However in the second ITD and in his decision the director made no further mention of that issue, presumably because he considered the evidence to be then sufficient on that issue. An analysis of the evidence in the record shows that the evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. As noted above, the priority date in the instant petition is January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$27.41 per hour, which amounts to \$57,012.80 annually.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubada v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the following amounts for taxable income on line 28: \$47,237.00 for the 1998 tax year, \$238,297.00 for the 1999 tax year, \$7,757.00 for the 2000 tax year, and \$11,295.00 for the 2001 tax year. Only for the 1999 tax year is the petitioner's taxable income on line 28 greater than the proffered wage. Moreover, the earliest of the petitioner's tax returns in the record is for the 1998 tax year, which ran from July 1, 1998 until June 30, 1999. Therefore the period covered by that return does not include the priority date of January 14, 1998. For these reasons the petitioner's net income figures on its tax returns fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: \$338,826.00 for the beginning of the 1998 tax year; \$469,047.00 for the end of the 1998

tax year; \$506,862.00 for the end of the 1999 tax year; \$510,541.00 for the end of the 2000 tax year; and \$419,289.00 for the end of the 2001 tax year. The figure for the beginning of the 1998 tax year is the same in accounting terms as the figure for the end of the previous tax year, ending on June 30, 1998. Therefore that figure represents the petitioner's net current assets for the end of the tax year which includes the January 14, 1998 priority date.

Each of the figures for net current assets of the petitioner is significantly higher than the proffered wage of \$57,012.80. Therefore, those figures are sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner's evidence is therefore sufficient to carry its burden of proof on that issue.

In summary, concerning the beneficiary's qualifications, although the record lacks certain documentary evidence as noted in the director's decision, the evidence submitted by the petitioner relevant to that issue is sufficient to establish that the beneficiary had the required two years of experience in general construction as of the priority date, as required by the Form ETA 750 as amended and approved by the Department of Labor. Concerning the petitioner's ability to pay the proffered wage, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained. The petition is approved.