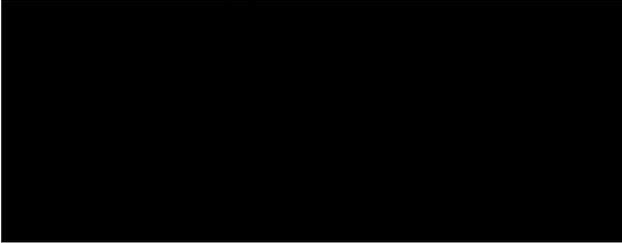




U.S. Citizenship
and Immigration
Services

Administrative Review
of Decision of Immigration Officer
PUBLIC COPY



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FILE: WAC 03 164 53165 Office: CALIFORNIA SERVICE CENTER Date: AUG 17 2005

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

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:
[Redacted]

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. Wiemanns, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a cutlery services company. It seeks to employ the beneficiary permanently in the United States as a cutlery grinder. 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 was qualified to perform the proffered position, and denied the petition accordingly.

On appeal, counsel asserts that the petitioner has previously submitted evidence to establish that the beneficiary possessed the requisite work experience. Counsel submits additional documentation.

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.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

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

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

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

To be eligible for approval, therefore, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service

system. 8 C.F.R. § 204.5(d). In this case, that date is November 6, 1995. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cutlery grinder. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	0
	College Degree Required	Not Required
	Major Field of Study	Not Required
	Training	None

The petitioner also specified that any applicant have two years of experience in the job offered. Under Item 15, the petitioner noted that a resume or letter of qualification was required.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended elementary and junior high at Jalisco, Mexico, from September 1968 to June 1976. The beneficiary indicated that no degree or certificate was received. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated the following in reverse chronology:

1. Diamond Sharp Cutlery Services, cutlery grinder, November 1990 to the present: The beneficiary listed job duties identical to those outlined for Pete's Grinding Services.
2. Pete's Grinding Services, Northridge, California, Cutlery grinder, March 1988 to November 1990, 40 hours a week, sharpened knives, shears, scissors and other fine-edged cutting tools using whetstone, grinding and polishing wheels. Holds the cutting edge of the tool toward the rotating wheel in order to sharpen.

Because the evidence submitted was insufficient to demonstrate the beneficiary's qualifications, on February 14, 2004, the director requested additional evidence pertinent to that ability. The director stated that evidence of prior work experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying the information, and that the verification should state the beneficiary's title, duties, dates of employment/experience, and number of hours worked per week.

Although the petitioner responded to other items listed in the director's request for further evidence, the record contains no correspondence that the petitioner submitted in response to the director's request with regard to the beneficiary's claimed former employer.

On March 18, 2004, the director denied the petition, noting that the petitioner had not responded to the director's request and that, as a consequence, the petitioner had not established that the beneficiary had the requisite two years of work experience prior to the priority date.

On appeal, counsel states that the petitioner submitted evidence to establish the beneficiary possesses the experience listed on Form ETA-750, Part B. Counsel submits a letter dated April 16, 2002, from [REDACTED] (Mr. [REDACTED] Vice President of Operations, Pete's Grinding Services, Northridge, California. In his letter, Mr. [REDACTED] that Pete's Grinding Services employed the beneficiary from June 1988 to November 1990 on a full time 40 hours a week basis. Mr. [REDACTED] described the beneficiary's duties, and states that he was a great asset to the company. Although counsel indicated that he was submitting a brief and/or evidence to the AAO within 30 days, the record contains no further evidence. Therefore the AAO will examine the record as presently constituted.

On appeal, counsel submits a letter of employment verification. Although the letter is dated April 16, 2002, which is prior to the date of filing the I-140, namely, May 6, 2003, counsel provides no explanation for why such a letter was not submitted previously, or any other evidence was not submitted previously to establish this claimed employment. Counsel simply asserts that the petitioner submitted the documentation previously, but submits no further documentation of any earlier submission. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

It should also be noted that based on the information contained in Part B, with regard to the beneficiary's education, the beneficiary does not possess a high school degree, which is listed as required education. The beneficiary entered the primary school system at the age of six and ended his formal education eight years later, when he was fourteen years old. The record contains no evidence that equates these eight years of education to the completion of a high school degree. The record also does not contain any resume or letter of qualification that the labor certification requires. Without more persuasive evidence, the petitioner has not established that the beneficiary has either the required education or work experience. Therefore the director's decision shall stand. Consequently, the appeal will be dismissed.

In his decision, the director made no determination with regard to whether the petitioner established it has the ability to pay the proffered wage from the priority date of 1995 to the present. The director did request further

evidence to examine this issue; however, his decision contains no direct reference to this issue. The AAO will briefly examine this issue.

The petitioner must demonstrate the 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. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 6, 1995. The proffered wage as stated on the Form ETA 750 is \$12.05 a month, which amounts to \$25,064 annually. On the Form ETA-750, the beneficiary stated that he had worked full time for the petitioner since November 1990.

With the petition, the petitioner submitted Forms 1120, U.S. Corporation Income Tax Return, for the years 1996 to 2001. In a request for further evidence dated February 14, 2004, the director requested the petitioner's signed federal income tax returns from 1995 to 2003, along with copies of the beneficiary's pay statements for the November and December 2003, and for January 2004.

The petitioner submitted the federal income tax returns requested, with a notation that the petitioner's tax returns for 2003 had not been submitted yet. The pay statements submitted by the petitioner indicated that the beneficiary earned \$7,168, for the three months in question, and his weekly salary was \$560.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for the petitioner from November 1990 to the present, the director only requested three months of employment records for the years 2003 and 2004. The record reflects no information with regard to the wages paid to the beneficiary from the years 1995 to November 2003. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage of \$25,064 in 1995 and onward.

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). Showing that the petitioner's gross receipts 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 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. The petitioner's federal income tax returns indicate the following net incomes from 1995 to 2002: in 1995, -\$31,020; in 1996, \$22,805; in 1997, \$37,714; in 1998, -\$2,122; in 1999, \$27,089; in 2000, \$63,565; in 2001, \$62,199; and in 2002, \$23,802. Thus, for the years 1997, 1999, 2000, and 2001, the petitioner's net income was sufficient to pay the entire proffered wage of \$25,064, or the difference between the beneficiary's actual wages and the

proffered wage. Without further information on the beneficiary's actual wages, the petitioner can not establish that it had sufficient net income to pay either the entire proffered wage, or the difference between the beneficiary's actual wages and the proffered wages in the years 1995, 1996, 1998, or 2002.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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 tax returns reflect the following information for the years 1995, 1996, 1998, and 2002:

	1995	1996	1998	2002
Taxable income ²	\$ -31,020	\$ 22,805	\$ -,2,122	\$ 23,802
Current Assets	\$ 14,304	\$ 18,674	\$ 63,605	\$ 235,764
Current Liabilities	\$ 0	\$ 4,729	\$ 39,232	\$ 226,636
Net current assets	\$ 14,304	\$ 13,945	\$ 24,373	\$ 9,128

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1995, 1996, 1998, or 2002. Although the petitioner had positive net current assets in these four years, the petitioner's net current assets are not sufficient to pay the entire proffered wage of \$25,064. As noted previously, the petitioner has not established the actual wages paid to the beneficiary in these four years, therefore, the AAO can not determine if the petitioner's net current assets in these years was sufficient to pay the difference between any actual wages and the proffered wage.

It is noted that in response to the director's request for further evidence, the petitioner established it has been in business since 1987, has forty one employees, and has a history of increasing sales. As such, the totality of the

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

petitioner's circumstances may add weight to the petitioner's ability to pay the proffered wage. Furthermore, further documentation of the beneficiary's wages from 1995 to 2002 might have established the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Nevertheless, without more persuasive evidence, the petitioner has not shown the ability to pay the proffered wage from 1995 to the present time.

As stated previously, the petitioner has not established that the beneficiary is qualified to perform the proffered position. In addition, although not stated by the director, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.³

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.

³ 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).