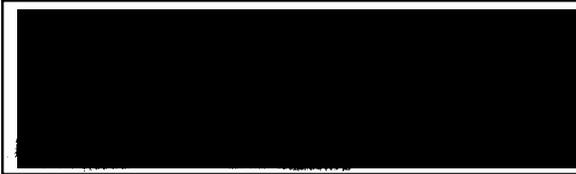


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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services



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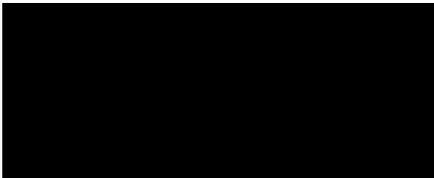
Date: NOV 18 2005

IN RE: Petitioner:
Beneficiary



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a software development and network engineering corporation. It seeks to employ the beneficiary permanently in the United States as a network engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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, and, that it had not established that the beneficiary has the qualifications for the occupation of network engineer as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, the 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.

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.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

“Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

Professionals. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to 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. The petitioner selected in Part 2, box “e” of the I-140 petition. That selection states, “a skilled worker (requiring at least two years of specialized training or experience) or professional”

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 29, 2002. The proffered wage as stated on the Form ETA 750 is \$60,000.00 per year. The Form ETA 750 states that the position requires a bachelor's degree attained after four years of college education in the major field of study of computer science/information technology.

With the petition, counsel submitted the following documents: the original Form ETA 750, approved by the Department of Labor, copies of two IRS Form 1120S tax returns; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested on October 29, 2003, copies of the petitioner's U.S. federal tax return for 2002; alternatively, the director requested annual reports for 2002 with reviewed or audited financial statements. The director advised petitioner to consider withdrawing "one or more" of the pending immigrant petitions in the event that there was difficulty demonstrating the ability to pay the proffered wages¹.

In the request for evidence dated October 29, 2003, the director requested evidence that the beneficiary possessed a bachelor's degree in computer science/information technology as of August 29, 2002 and two years of job experience.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the petitioner's Internal Revenue Service (IRS) Form 1120S tax return for 2002; "projected financial statements for the period November 2003 to October 2004;" and, a financial statement as well as other documents.

The first issue to be discussed is whether or not the beneficiary met the requirements set forth in the certified ETA 750. To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

¹ It would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending.

In the instant case, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of network engineer:

14.	Education (enter number of years)	
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	<u>4</u>
	College Degree Required	<u>Bachelors</u>
	Major Field of Study	<u>Computer Science/Information Technology</u>
	Training	Blank
	Experience	
	Job Offered	
	Number –Years Mos.	<u>2</u>
	Related Occupation	
	Number –Years Mos.	<u>2</u>
	Related Occupation	
	Specify	Blank

The employer who is the petitioner has prepared the above ETA 750 A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements also state that the occupation of network engineer has a four-year college degree specified as Bachelor’s degree in the computer science/information technology major field of study. The employer/petitioner requires two years of occupational experience.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a “Statement of Qualifications of Alien.” Part B identifies the alien, specifies his current and prospective address in the United States, her education including trade and vocation training, and lists her work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

* * *

Gujarat University, Ahmedabad, India

Field of Study	<u>Commerce/Information Technology</u>
From ...[mo./yr]	<u>05/1996</u>
To ...[mo./yr.]	<u>05/1999</u>
Degrees or Certificates Received	<u>Bachelors of Commerce</u>

Azure Institute of Technology, Ahmedabad

Field of Study	<u>MS Fundamentals</u> <u>System Engineering</u>
From ...[mo./yr]	<u>05/2001</u>
To ...[mo./yr.]	<u>07/2002</u>
Degrees or Certificates Received	<u>MSCE²</u>

The director discussed the beneficiary's qualification documents submitted as well as an education evaluation submitted, as will be discussed below. The director requested a supplemental education evaluation without including work experience, and, documentation conforming to the requirements stated in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) first above recited.

In response to the request for evidence concerning the beneficiary's qualifications, petitioner submitted an evaluation report mentioned below, and, counsel provided a description of the beneficiary's "relevant industrial experience" and other related matters as of the priority date.

The director denied the petition on May 17, 2004, finding that petitioner had not established that the beneficiary has the qualifications for the occupation of network engineer as stated on the labor certification.

On appeal, counsel asserts in pertinent part that the beneficiary is qualified for the job position on academics alone as verified by the education evaluations submitted, and, counsel submits a third education evaluation from Multinational Education & Information Services, Inc.

As stated above, the certified Alien Employment Application stated that the occupation of network engineer required a four-year college Bachelor's degree in the major field of study of Computer Science/Information Technology and two years of occupational experience. These are the petitioner's own requirements used to obtain the certification by advertising these same criteria in the job market in the United States. In other words, applicants that had not attained a bachelor's degree or have a bachelor's degree in some other major field of study would not qualify under these criteria. The beneficiary does not have a four-year bachelor's degree, nor, does she have a four-year bachelor's degree in Computer Science/Information Technology. Also, by a review of her post graduate technical school record in which she undertook computer technical training from May 2001 to July 2002, she also asserts she was employed by Span Power System (P) Ltd.³ in Ahmedabad, India from January 1999 to August 16, 2002 the date of her signature of the form ETA 750 B. This work and education experience seems to be mutually exclusive unless both were less than full time. Counsel has not adequately explained this discrepancy raised initially by the director in his decision.

The beneficiary has attained a Bachelor's degree in Commerce from Gujarat University, Ahmedabad, India that is undisputed by the record of proceeding to be a three-year degree. Thereafter, it is unclear whether she attended full or part-time, as the case may be, the Azure Institute of Technology, Ahmedabad, India to obtain several certificates of merit obtained according to the certificates on its online examination system. According to the certificates, the beneficiary was a student and obtained diplomas in e-commerce.

² Microsoft Certified System Engineer (MCSE)

³ There is an employment verification letter in the record of proceeding from Power Systems Pvt. Ltd that appears to be the same employer.

There are also other certificates in the record of proceeding to show the passage of other courses of instruction. The subject Form ETA 750 Part A requires a degree from a college and the completion of four years of baccalaureate studies. CIS regulations do not provide that a combination of education and experience may be accepted in lieu of a four-year degree. While the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) do state that the "relevant post secondary education may be considered as training for the purposes of this paragraph;" there is no regulation that would allow for a converse, that the experience may be considered for education requirements.

There are three education evaluations submitted in support of the beneficiary's qualifications. The first was dated February 18, 2003, from The Trustforte Corporation as is entitled "Educational Equivalent in the United States: BACHELOR OF BUSINESS ADMINISTRATION DEGREE." According to this evaluation, the beneficiary had attained a Bachelor's of Commerce degree as is stated in the ETA 750B portion of the labor certification, and, "Coursework Toward Master of Commerce Degree" from Gujarat University, in years 2000 and 2001. This evaluation is not persuasive. Based upon the evidence submitted the beneficiary was attending Azure Institute of Technology, Ahmedabad, India, or working for Span Power System (P) Ltd, during this period (1999/2001). Also, it is not supportive on its face, of the petitioner's contention that the beneficiary is qualified for the job position of network engineer on academics alone.

A second evaluation dated February 27, 2003, from The Trustforte Corporation was submitted. This evaluation is entitled "BACHELOR OF SCIENCE DEGREE IN MANAGEMENT INFORMATION SCIENCE." In this evaluation only the beneficiary's Bachelor of Commerce degree was mentioned. There is no mention of coursework toward a master of commerce degree from Gujarat University, in years 2000 and 2001. This evaluation combined both her education attainments and her work experience to reach the conclusion that she has the foreign equivalent of a Bachelor of Science Degree in management information systems. This evaluation is also not persuasive. As the director indicated in his request for evidence, the certified Alien Employment Application required a four-year college bachelor's degree in Computer Science/Information Technology. Education and work experience cannot be combined.

A third education evaluation dated July 9, 2004 was submitted as prepared by the Multinational Education & Information Services, Inc. In this evaluation, the beneficiary's Bachelor of Commerce degree was mentioned. There is also mention of coursework toward a master of commerce degree from Gujarat University, in years 2000 and 2001. Again, this "coursework" is not found in the ETA 750B, and, there are no grade transcripts submitted. There is a reference in the beneficiary's resume to "Master of Commerce, Gujarat University, Final Year." Presumably, the beneficiary did not finish this final year since no Master's degree is indicated as an attainment. Even if the beneficiary had completed a final year of college credits toward an advanced commerce degree, the certified Alien Employment application requires a different degree, a four-year college bachelor's degree in Computer Science/Information Technology. This evaluator goes on to combine the beneficiary's college degree with all her other technical coursework to say that the beneficiary has the equivalent of a "Bachelor degree in Information Systems and Business Administration." Technical school certificates do not equate to college or university course work credits.

CIS may in its discretion use as advisory opinions, statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this instance, by petitioner's three credential evaluators, the beneficiary has less than a four-year college degree and all evaluators recognize that the beneficiary has a three-year degree in Commerce. This matter is not in dispute.

The Director in his decision determined that the beneficiary had not met the minimum requirements stated in the certified Alien Employment Application for the occupation of network engineer. Reviewing his decision reveals, and the record shows, that the beneficiary has not satisfied the requirements of regulation 8 C.F.R § 204.5(l)(3)(ii). None of the above mentioned education evaluator's opinions show credibly that the beneficiary has a Bachelor's degree attained after a four-year university obtained education in the major field of Computer Science/Information Technology.

As stated above, the director also 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.

CIS electronic database records show that the petitioner filed I-140 petitions on behalf of another beneficiary at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage for years 2002 and 2003, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. The total amount of proffered wages is \$120,000.00.⁴ When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary as she has not arrived in the United States and had not entered into employment with the petitioner.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered 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, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

⁴ CIS record number EAC 03 116 53141, proffered wage is \$60,000.00 and the priority date is August 29, 2002.

The tax returns⁵ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$60,000.00 from the priority date⁶ August 29, 2002.

- In 2002, the Form 1120S stated taxable income of \$64,362.00.
- In 2003, the Form 1120S stated taxable income of \$60,944.00.

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. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage for both beneficiaries at any time between the years 2000 through 2003 for which the petitioner's tax returns are offered for evidence.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120S return stated current assets of \$18,287.00 and \$550.00.00 in current liabilities. Therefore, the petitioner had \$17,737.00 in net current assets. Since the proffered wage was \$60,000.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of \$1,935.00⁸ and \$0.00 in current liabilities. Therefore, the petitioner had a \$1,935.00 in net current assets for 2001. Since the proffered wage was \$60,000.00, this sum is less than the proffered wage.

Therefore, for the period 2002 through 2003 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary

⁵ Tax returns were submitted reporting income before the priority date. They cannot show the ability to pay the proffered wage from the priority date, but they will be accepted for what evidence they may state. In 2000 the petitioner reported income of \$96,500.00, and, in 1999, \$48,196.00.

⁶ In 2001, the Form 1120S stated taxable income of \$52,484.00. Since it was before the priority date it cannot be used to prove the ability to pay the proffered wage from the priority date.

⁷ 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.

⁸ The petitioner has submitted a "Projected Balance Sheet" for the period November 2003 through October 2004. In December 2003, "Cash" and "Total Current Assets" were stated as \$95,011.00 but the corresponding tax return, Schedule "L" states "Cash" as \$1,935.00. There was no explanation in the record of proceeding for this inconsistency.

the proffered wage at the time of filing through an examination of its current assets reported on petitioner's tax returns.

On the issue of the ability to pay the proffered wage, counsel submits additional evidence that is petitioner's 2003 U.S. federal tax return and an "audited" financial statement for the period January 31, 2004 through May 31, 2004. Also, counsel submits bank statements and projected financial statements for the period June 2004 to May 2005.

Counsel cites no legal precedent for the contention, and, according to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

As stated above neither the petitioner's taxable income or net current assets are insufficient to pay the two proffered wages for employment-based petitions now pending.

Counsel has produced, according to his assertion, "audited" financial statement for the period January 31, 2004 through May 31, 2004. There is no accountant's statement concerning or accompanying these statements. They appear to be internally generated. Counsel's statement that the financial statements are "audited" is not supported with evidence to that fact. 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)). Similarly, the "Projected Balance Sheet" and other financial statement that the petitioner has submitted are not qualified as audited statements, and, they can have little probative weight as evidence in this matter.

Counsel submits petitioner's bank statements as proof of the ability to pay the proffered wages. Counsel advocates the use of the cash balance of the business and brokerage accounts to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank and brokerage statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, the statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel maintains that it is a service business that places consultants with its clients and that because of this, its "... net income for the upcoming tax years will be well above and beyond the minimum of \$120,000 as required by CIS." Counsel assertion is erroneous. Proof of ability to pay begins on the priority date, that is August 29, 2002, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a network engineer will significantly increase petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

⁹ 8 C.F.R. § 204.5(g)(2).

Counsel's contention cannot be concluded to outweigh the evidence presented in the corporate tax returns as submitted by petitioner that demonstrate that petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor for all beneficiaries of pending employment based petitions.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the qualifications for the occupation of network engineer as stated on the labor certification petition, or, that that the beneficiary had the requisite two years of experience on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.