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U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

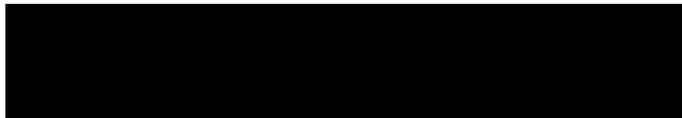
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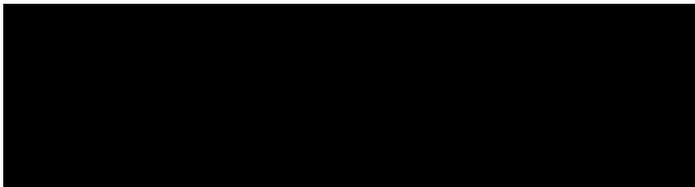
Petitioner:

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.

Michael P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company.¹ It seeks to employ the beneficiary permanently in the United States as a construction superintendent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement 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 granting 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)(3)(ii) states, in pertinent part:

(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.

¹ This statement mirrors the assertion on the Form I-140 petition and the Form ETA 750 that the petitioner's business is construction. The petitioner's name and evidence in the file, however, appear to indicate that it may actually be a property management firm. The distinction, however, does not influence the determination of any material 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 CFR § 204.5(d). 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 for processing on March 5, 2002. The proffered wage as stated on the Form ETA 750 is \$33,000 per year. The Form ETA 750 states that the position requires two years of experience either as a construction superintendent or in another supervisory position in construction.

On the petition, the petitioner stated that it was established on March 25, 1987.² The petitioner did not state, in the space provided on the petition, the number of workers it employs. The petitioner also failed to state its gross annual income and its net annual income in the spaces provided. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Chicago, Illinois.

On the Form ETA 750, Part B, the beneficiary stated that he had worked (1) as a construction foreman from April 1996 to March 1997 for SC Castrum Corporation in Romania, (2) as a construction services manager from January 1999 to January 2000 for SC Moispres³ Com, also in Romania, and (3) as a construction superintendent from May 2000 to March 2001 for David's Painting and Remodeling in Chicago, Illinois.

In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner is a Subchapter C corporation and that it reports taxes pursuant to the calendar year. The return also shows that, during 2001, the petitioner declared taxable income before net operating loss deduction and special deductions of \$14,023. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$184 and current liabilities of \$0, which yields net current assets of \$184. Because the priority date of the petition is March 5, 2002, however, evidence pertinent to the petitioner's financial condition during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In support of the beneficiary's claims of qualifying employment in Romania, counsel provided a copy of a Romanian workbook and an English translation, notarized by the petitioner's owner or part owner. That translation states that the beneficiary worked as a foreman for SC Castrum Corporation from April 1, 1996 to March 1, 1997 and again from January 9, 1998 to June 30, 1999. The translation further states that the beneficiary worked as a superintendent for SC Moispres from March 1, 1997 to January 9, 1998 and again from January 7, 1999 to January 12, 2000.

² The petitioner's tax returns indicate that the petitioner incorporated on December 7, 1987.

³ In various places in the record, the company's name is spelled [REDACTED] and [REDACTED]. This office assumes that all three spellings refer to the same Romanian company. The correct spelling of that company's name is unknown to this office.

The beneficiary's workbook was not issued by either of his former employers and, although it gives the title of the positions the beneficiary held; it does not describe his work experience. Further, 8 C.F.R. 103.2(b)(3) requires that

Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The translation of the workbook is subscribed with the following statement,

I, [REDACTED], [presumably the document's translator] certify hereby that the foregoing is to the best of my knowledge and belief a true and correct translation of the original document to the ROMANIAN [sic] language.⁴ [Emphasis in the original.]

That certification does not state that the translator is competent to translate from the foreign language into English and does not, therefore, conform to the requirements of 8 C.F.R. 103.2(b)(3).

As further evidence in support of the beneficiary's claim of qualifying employment with [REDACTED] counsel submitted a letter, dated January 28, 2003, from the director general of that company. That letter states that the beneficiary "worked on a full time basis as a SUPERVISOR from 1996," but does not indicate the duration of that employment.

Counsel also provided a letter, dated February 4, 2003; from [REDACTED] That letter does not purport to be a translation, but to have been issued by the vice president of that company in Romania in English.⁵ Further, that letter was notarized, also on February 4, 2003, by the petitioner's owner or part owner, a notary in Illinois. The letter states that the beneficiary worked for [REDACTED] as a construction coordinator and supervisor "from 1/07/1999," but does not state the duration of his employment. Further still, as that letter appears to state that the beneficiary began his employment for that firm on January 7, 1999, it does not support the beneficiary's claim of qualifying employment with that company from March 1, 1997 to January 9, 1998.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on September 11, 2003, requested additional evidence pertinent to that ability.⁶ The Service Center also specifically requested that the petitioner provide the information that was missing from its petition.

⁴ The certification was intended to certify a translation from Romanian to English, and this misstatement is accorded no importance.

⁵ If the letter is, in fact, a translation, the original was not submitted and the translation is not accompanied by the certification of the translator as required by 8 C.F.R. 103.2(b)(3).

⁶ That Request for Evidence specifically requested the petitioner's "tax form 1120 for the year of 1120," [sic] an apparent typographical error, "and any other document you wish [CIS] to consider." This office believes that the Service Center intended to ask for the petitioner's 2002 tax return, which the petitioner subsequently provided, and deems that

In response, counsel submitted a completed copy of page 2 of the Form I-140 petition. That page states that the petitioner employs one worker. It also states that the petitioner's gross annual income is \$57,855 and that its net annual income is \$0.

Further, counsel provided a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return. That return confirms that the petitioner is a Subchapter C corporation and shows that the petitioner had gross receipts of \$57,855 and declared taxable income before net operating loss deduction and special deductions of \$351 during 2002. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of \$460 and no current liabilities, which yields net current assets of \$460.

In a letter dated December 2, 2003, counsel states that the petitioner paid the petitioner's owner \$51,250 of its \$57,855 gross receipts during 2002. This fact, taken with the statement on the amended Page 2 of the Form I-140 petition, indicates that the petitioner's owner is the petitioner's sole employee.

Further still, counsel provided a letter, dated November 6, 2003, from the petitioner's owner's accountant. That letter states that the petitioner's owner has owned and operated rental real estate for the past 15 years and owns three properties ranging from 15 units to 247 units. That letter also states that the petitioner does not directly employ any of its workers, but that they are employed by the limited liability companies that own the petitioner's rental properties, which companies the petitioner manages. The letter does not state who owns the limited liability companies.

With that letter, the accountant provided a copy of a personal financial statement that the accountant stated shows that the petitioner's owner has a net worth of \$21,050,000. In fact, that financial statement shows that the petitioner's owner has a net worth of \$11,349,000.

Finally, counsel provided copies of statements pertinent to the petitioner's bank account.

On December 23, 2003 the Nebraska Service Center issued another Request for Evidence in this matter. The Service Center requested additional evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that, if the petitioner had employed the beneficiary, it provide copies of Form W-2 Wage and Tax Statements showing the wages it paid to the beneficiary.

In addition, the Service Center asked for additional evidence pertinent to the beneficiary's claimed qualifying work experience. Consistent with 8 C.F.R. § 204.5(l)(3)(ii) the Service Center noted that

[The evidence must] be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

[Emphasis in the original.]

intended request to have been satisfied.

Consistent with 8 C.F.R. 103.2(b)(3) the Request for Evidence also stated,

If you submit a document in any language other than English, it must be completely translated. The translator must certify that he/she is competent to perform the translation and that the translation is accurate. The foreign language documents(s) must be submitted with the English translations.

[Emphasis in the original.]

Counsel's response is dated March 11, 2004. With that response, counsel provided a copy of the petitioner's owner's 2002 Form 1040 U.S. Individual Income Tax Return and another letter, dated March 4, 2004, from the petitioner's accountant. That letter notes that the petitioner's owner's personal income tax return states that he suffered a loss during that year, but also notes that, if depreciation and amortization are added to that loss, the sum is positive in the amount of \$115,978.

In his cover letter, counsel states

The petitioner's personal financial position undoubtedly established that outcome of current financial situation is strong and continues to be strong. [sic] Therefore, petitioner has financially ability [sic] to pay the proffered wage of \$33,000 to the beneficiary.

The petitioner's owner's 2002 income tax return also indicates that, during that year, the petitioner's owner owned some portion of the five limited liability companies. Counsel provided some documents pertinent to the activities of some of those other companies.

Counsel did not provide any W-2 forms, apparently indicating that the petitioner has not employed the beneficiary.

As to the request for evidence, consistent with 8 C.F.R. § 204.5(1)(3)(ii), in support of the beneficiary's claim of qualifying employment, counsel, in his letter of March 11, 2004, asserted "Please note that in Romania the workbook is the standard legal documents [sic] used to establish Romanian citizen's [sic] previous work experience." The assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel provided no evidence in support of that assertion. Absent evidence, this office cannot take notice of that asserted fact as counsel urges.

As evidence of the beneficiary's claimed qualifying employment, counsel provided copies of documentation previously provided and an additional letter, dated February 15, 2003, from the president of [REDACTED]. That letter states that the beneficiary worked for that company as a construction superintendent from May 2000 through March 2001 and describes the duties of that former position. The duties described include directing construction and supervising construction workers and are consistent with the position of superintendent.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 7, 2004, denied the petition.

On appeal, counsel states,

- (a) The petitioner clearly has the ability to pay the offered salary
- (b) A Sub-S corporation may include shareholder's financial to establish ability to pay offered salary.
- (c) Unfortunately, the IE fails to understand US tax law and has a limited ability to understand documents in support of ability to pay offered salary.
- (e) The documents submitted in support of the I-140 support the ability to pay the salary.⁷

In a brief filed to supplement the appeal, counsel argues that the petitioner's depreciation and amortization deductions should be considered funds available to pay wages. Counsel also argued that, as the petitioner has been in business for 17 years and wishes to hire a construction superintendent, that it has a reasonable expectation of growth, and that the petition should, therefore, consistent with the opinion in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), be approved

Initially, this office notes that, in referring to the "petitioner's personal financial position," counsel is confusing the finances of the petitioner with those of the petitioner's owner. The petitioner in this case, as shown in Part 1 of the Form I-140 petition, is Residential Management Incorporated, a corporation. It is not Leon Petcov, whom the evidence shows is the petitioner's owner or part owner.

Further, the tax returns submitted show that the petitioner is not a subchapter S corporation, as counsel asserts, but a Subchapter C corporation. That distinction is not important, however, to any consideration in this case. Both types of corporations are obliged to demonstrate their ability to pay the wages of alien employees for whom they petition.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, including other companies he owns, shall not be further considered.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

⁷ On appeal, counsel did not point to any portions of the petitioner's tax return, or any calculation to be performed with figures from it, that he urges show the petitioner's ability to pay the proffered wage. Only by asserting that the petitioner is able to rely on the assets of its owner did counsel escape summary dismissal of the appeal as frivolous.

cases,” the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁸ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds available for disposition that were not reported on its tax returns.

The argument of the accountant, in the letter of March 4, 2004, and of counsel on appeal, that depreciation and amortization deductions should be considered in calculating the funds available to the petitioner to pay additional wages, is unconvincing. The accountant is correct that those deductions do not represent specific cash expenditures during the years claimed. They are systematic allocations of the cost of long-term assets, tangible and intangible, respectively.

The depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's selection of an accounting method and a depreciation schedule accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its reallocation to other years as convenient.

Counsel's argument pertinent to *Matter of Sonogawa, supra*, is unconvincing. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. During the year in which the petition was filed in that case the petitioning entity in *Sonogawa* changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been

⁸ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if the losses during some years and very low profits during others are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. Here, the evidence does not establish that petitioner has ever posted a profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$33,000 per year. The priority date is March 5, 2002. .

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$351. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$460. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The more recent Request for Evidence in this case was issued on December 23, 2003. On that date, the petitioner's 2003 tax return was unavailable. Counsel's response to that Request for Evidence is dated March 11, 2004. On that date the petitioner's 2003 tax return was not yet due and may still have been unavailable. Under these circumstances, the petitioner is excused from providing evidence pertinent to 2003 or later years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

Additional issues exist in this case that were not discussed in the decision of denial.

The petition in this case, as amended, indicates that the petitioner has only one employee. Evidence submitted⁹ indicates that the sole employee is the petitioner's owner or part owner, who is paid almost all of the petitioner's gross receipts. That the petitioner does not directly employ any of its construction workers raises the possibility that it may not intend to directly employ the beneficiary, but rather have one or more of the limited liability companies employ him and pay his salary.

A petition for an alien worker may only be filed by the U.S. employer that proposes to directly employ and remunerate the alien worker. *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). This issue should have been raised by the Service Center. Because it was not, however, and the petitioner has had no opportunity to respond to that issue, the instant decision is not based, in whole or in part, on that issue.

Further, this office notes that the evidence submitted to support the beneficiary's claim of two years of qualifying employment experience, as detailed below, is insufficient.

The beneficiary claimed to have worked (1) as a construction foreman from April 1996 to March 1997 for SC Castrum Corporation in Romania, (2) as a construction services manager from January 1999 to January 2000

⁹ The petitioner's 2002 tax return indicates that the petitioner had Line 1c Gross receipts of \$57,855, that it paid no wages or salaries, and that it paid consulting fees of \$51,250. The petitioner's owner's 2002 personal income tax return includes a Schedule C Profit or Loss from Business indicating that he received that \$51,250. The statement on the petition that the petitioner has one employee and counsel's statement that the petitioner paid wages to its owner are not, strictly speaking, correct. That evidence does show, however, that the petitioner pays almost all of its gross receipts to its owner.

for SC Moisprest Com, also in Romania, and (3) as a construction superintendent from May 2000 to March 2001 for David's Painting and Remodeling in Chicago, Illinois.

In support of the claim of employment for Castrum Corporation, counsel submitted the Romanian workbook and translation. That translation states that the beneficiary worked as a foreman for SC Castrum Corporation from April 1, 1996 to March 1, 1997 and again from January 9, 1998 to June 30, 1999.¹⁰ The translation is not certified in conformity with the requirements of 8 C.F.R. 103.2(b)(3) however, and should not have been considered. Further, even if considered, that translation is not a letter from the beneficiary's former employer, does not detail the duties of his former position, and does not, therefore, conform to the requirements of 8 C.F.R. § 204.5(l)(3)(ii).

As further evidence of the employment with Castrum Corporation counsel submitted a January 28, 2003 letter from that company's director general. That letter does not indicate the duration of that employment, and is not evidence of employment of any duration. Further, that letter purports to be a translation from Romanian to English, but was not accompanied by the original letter or by the translator's certification as required by 8 C.F.R. 103.2(b)(3). That letter should not have been considered.

In support of the claim of employment for [REDACTED] counsel again relies, in part, on the Romanian workbook and English translation. The translation states that the petitioner worked for SC Moinprest from March 1, 1997 to January 9, 1998 and again from January 7, 1999 to January 12, 2000.¹¹ Again, the document does not conform to the requirements of 8 C.F.R. § 204.5(l)(3)(ii) and the translation does not conform to the requirements of 8 C.F.R. 103.2(b)(3). Therefore, neither the workbook nor the translation should have been considered.

The February 4, 2003 letter verifying the claim of employment for [REDACTED] Com does not purport to be a translation, but to have been issued in English by a Romanian official of that company. That letter states that the beneficiary worked for the company as a construction coordinator and supervisor "from 1/07/99," but does not state the duration of his employment. That letter cannot be used to show employment of any duration.

That letter purports, further, to have been attested to by an Illinois notary, the petitioner's owner or part owner, on the same day it was signed by a Romanian businessman.¹² How this is possible was not explained, and this circumstance should have been investigated by the Service Center.

¹⁰ Although the instructions pertinent to the Form ETA 750, Part B, require the beneficiary to list all employment related to the occupation for which the alien is seeking certification, the alien did not list the employment from January 7, 1999 to January 12, 2000, although that employment appears to be related to the proffered position.

¹¹ The instructions to the Form ETA 750, Part B require the beneficiary to list all employment within the last three years and all employment related to the occupation for which the alien is seeking certification. Again, notwithstanding the instructions, the beneficiary did not list the employment from January 7, 1999 to January 12, 2000 on the Form ETA 750 Part B, although that employment appears to have been related to the proffered position and was within three years of April 23, 2001, the date the beneficiary signed the Form ETA 750, Part B.

¹² The attestation reads, "Subscribed and sworn to before me."

Finally, even if believed, that letter appears to state that the petitioner began his employment with [REDACTED] on January 7, 1999, and does not, therefore, support the beneficiary's claim of qualifying employment with that company from March 1, 1997 to January 9, 1998.

As to the claim of employment for [REDACTED] in Chicago, Illinois, counsel submitted the letter of February 15, 2003 from the president of [REDACTED]. That letter attests to qualifying employment as a construction superintendent from May 2000 through March 2001 and conforms to the requirements of the regulations. Further, the identity of the writer is attested to by a disinterested notary, rather than by an interested party. The evidence sufficiently supports the claim of employment for David's Painting and Remodeling Company. That employment, however, was of less than two years duration.

Counsel states that the workbook submitted is the standard Romanian employment documentation. Even if counsel had provided evidence in support of that assertion, that fact would not invalidate the requirements of 8 C.F.R. § 204.5(l)(3)(ii) or otherwise excuse the petitioner's failure to provide evidence that conforms to that regulation. The petitioner was apprized, in the December 23, 2003 Request for Evidence that the evidence submitted in support of the beneficiary's employment claim was insufficient. The requirements of 8 C.F.R. § 204.5(l)(3)(ii) were explained in detail with emphasis. Counsel and the petitioner were unable or unwilling to provide evidence that conformed to that regulation and have not, consistent with that regulation, supported the claim of qualifying employment.

The petitioner has not demonstrated that the beneficiary has the two years of qualifying employment stated as a requirement of the proffered position on the approved Form ETA 750 labor certification. Because the beneficiary has not been shown to be qualified for the position based on the requirements of the labor certification, the petition should have been denied on that additional basis.

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).

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.