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U.S. Citizenship
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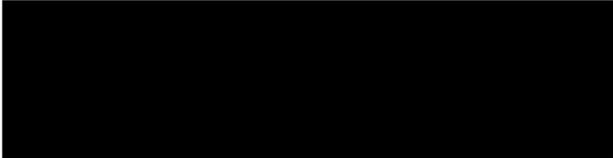
Petitioner:

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.

Robert P. Wiemann, 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 marble care, repair, and restoration business. It seeks to employ the beneficiary permanently in the United States as a marble specialist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because the petitioner failed to provide sufficient evidence that the beneficiary possessed two years of the requisite work experience and was qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel states that Citizenship and Immigration Services (CIS) erred in its evaluation of the beneficiary's qualifications and 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.

The regulation at 8 C.F.R. § 204.5(l)(3) also 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 worker.* If the petitioner 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 The minimum requirements for this classification are at least the two years of training or experience.

To be eligible for approval, a beneficiary must also 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 October 20, 1999.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 marble specialist. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	-
	College	-
	College Degree Required	-
	Major Field of Study	-

The petitioner also specified that any applicants have two years of experience in the job offered.¹ Under Item 15, the petitioner set forth no additional special requirements. The job offered lists the following duties on Item 13:

Applicant will work with already manufactured marble pieces of furniture or other articles which are manufactured of marble or contain marble. Applicant must be able to restore the face of the marble; add portions of marble that match were [sic] the marble has been broken or chipped. Applicant must use certain chemicals where necessary [sic] to treat severely [sic] damaged marble. Applicant may need to read specifications to manufacture marble pieces to match existing pieces, and/or make new pieces according to plans and specifications. Must also train new employees.

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 Cockbourne Elementary School in St. Andrew, Jamaica from 1958 to 1963, and then attended Boyston Middle School, St. Andrew, Jamaica, from 1963 to 1966 and received a diploma. 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 that he worked for [REDACTED] Covina, California, from January 1995 to March 1997 in marble restoration. The job description contained in the Form ETA 750, Part B, states: "The applicant was trained as a marble specialist. This included learning how to maintain marble that has already been manufactured as well as restoring the surface of, matching pieces that had been chipped and chemical treatment of marble." In an attachment to the Form ETA 750, counsel submitted corrections to the Form ETA 750. In this letter, as previously mentioned, the petitioner eliminated two years of training requirement. The petitioner amended the ETA 750 Part B to add work experience from April 1997 to October 1999 to include the beneficiary's self-employment as a marble specialist. The petitioner stated:

The [beneficiary] worked various hours depending upon the work available. He worked as a marble restorer and finisher doing side jobs for various people. The applicant maintained and restored marble that was already manufactured as well as matching pieces that had been chipped and chemical treatment of marble.

¹ The petitioner had initially indicated two years of training in marble restoration on the Form ETA 750, but subsequently amended this requirement to two years of work experience in the proffered position.

With the initial petition, the petitioner provided a letter of support dated July 23, 2003, that stated it still had a full time position as marble specialist available for the beneficiary.

On February 7, 2005, the director issued a Notice of Intent to Deny the Petition (NOID). With regard to the beneficiary's qualifications, the director stated that the beneficiary had to have two years of work experience as a marble specialist prior to the October 20, 1999 priority date. The director then noted the petitioner amended the ETA 750 to add work experience from April 1997 to October 1999, but stated that no documentation, such as signed federal tax returns or W-2 forms were submitted to further corroborate this employment. The director further noted that one of the beneficiary's duties listed on the ETA 750 was to train new employees. The director noted that based on the I-140 petition, the petitioner presently had a total of one employee. The director finally stated that a review of the petitioner's tax returns for the years 1999, 2000, 2001, and 2002 did not list any payment of salaries, although the beneficiary claimed employment with the petitioner from 1998 to the present time.²

In response to the NOID, counsel submitted a letter of work verification from [REDACTED] Covina, California. [REDACTED] stated that the beneficiary had been employed by [REDACTED] as a marble specialist from October 1995 to March 1997.³ [REDACTED] stated that the beneficiary maintained and restored marble furniture, surfaces, and other marble products, and that he also understood the correct procedures for using chemicals to treat and restore marble to its original finish. [REDACTED] concluded his letter by stating "at the end of [the beneficiary's] employment we can truly say he has the ability to a perfect job on his own and also the ability to train others in his field." Counsel also submits a letter dated March 1, 2005 signed by [REDACTED] Global Network Providers, Westlake Village, California. [REDACTED] stated that as a manager of Global Network Providers in the years 1998 to 2000, he engaged the beneficiary to do the restoration and maintenance of the company's marble twice a month.

On May 27, 2005, the director denied the petition. In his decision, the director reiterated the contents of the NOID with regard to the requirement for two years of work experience as a marble specialist prior to October 20, 1999, and also to the submission by the petitioner of an addition to the Form ETA 750 with regard to the beneficiary's self-employment from April 1997 to October 1999. The director then stated the following: "It is unrealistic to assume that [the petitioner] would contract someone who is self-employed in this type of enterprise rather than going to an established well-known dealer for repair /restoration of marble."

The director continued:

In response to the notice of Intent to Deny the I-140 petition, documentation in the form of a letter attesting to the beneficiary's prior experience as a Marble Specialist was submitted. This letter from [REDACTED] stated that the beneficiary began his employment in October 1995 to March 1997. The only evidence to establish the beneficiary's residence in the United States is the aforementioned letter attesting to his employment with that company as a Marble Specialist. But, on

² The record is not clear as to how the director determined any such employment of the beneficiary by the petitioner. The record, including the Form ETA 750 reflects no such employment.

³ Although the letter identifies [REDACTED] as a contractor, the letter does not provide a title for [REDACTED] or explain his relationship to [REDACTED]

the 7-50A,[sic], the beneficiary's job title for the aforementioned employer was that of an Apprentice Marble Specialist from 10-95 to 03-97.

No documentation was submitted in rebuttal to the Intent to Deny corroborating the beneficiary's prior experience as a marble specialist while self-employed. In a letter to the Employment Development Department-Alien Labor Division, Work Experience advising an amendment to work experience from April 1997 to October 1999 to include self-employment during this time [sic].

The director concluded that the petitioner had not established that the position is a full-time, forty hour per week occupation since according to the petitioner's letter to the state of California Employment Development Department (EDD), the applicant worked various hours depending upon the work available. The director noted that the beneficiary worked as a marble restorer and finisher doing side jobs for various people. The director then stated that the certified Form ETA 750 indicated that the minimum qualification for the beneficiary was two years of work experience as a marble specialist prior to October 20, 1999.

On appeal, counsel takes issue with the director's assertion that it is unrealistic to assume that a business would hire someone who is self-employed to repair and restore marble. Counsel states that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* indicates that forty-three per cent of all carpet, floor, tile, installers, and finishers, including marble setters, are self-employed. Counsel also states that when the director stated that the petitioner had not established that the proffered job was a full time forty hours a week occupation, the director did not give proper consideration to the fact that the job duties of a marble specialist are labor and time intensive and that a single work order or job may take days or even weeks to finish. Counsel submits a copy of the *Handbook's* excerpt on these occupations. Counsel also states that the director incorrectly stated that the certified ETA750 Part A, identified the proffered position as apprentice marble specialist.⁴ Counsel submits a copy of the certified ETA 750, with its amendments that reflect the job title of the proffered position as marble specialist not apprentice marble specialist.

Counsel then states that the various jobs that the beneficiary performed while working self-employed could equate to more than 40 hours a week. Counsel resubmits the letter from Global Networks Provider dated March 1, 2005, as well as the letter of work verification from [REDACTED]. In addition, counsel submits, for the first time, two letters from [REDACTED] and [REDACTED] private individuals. In his letter, [REDACTED] states that the beneficiary was engaged in marble restoration and maintenance of his property from May 1999 to August 1999. [REDACTED] in his letter states that he employed the beneficiary as a marble specialist to do restoration and maintenance of marble at his property in North Hills, California from January 1999 to March 1999. [REDACTED] recommended the beneficiary as a high quality, very honest and reliable craftsman.

Counsel states that the months the beneficiary was self-employed with [REDACTED] equate to one year and five months of employment, while the number of months the beneficiary worked for [REDACTED] and [REDACTED] is an additional six months. Counsel then states the beneficiary worked for Global Network Providers for 25 hours,

⁴ Upon review of the director's decision, the director did not state that the title of the proffered position on the Form ETA 750, Part A was apprentice marble specialist, but rather appears to point out the difference between the title of the position noted on the Form ETA 750, Part A, with the title of the beneficiary's employment with [REDACTED] namely, apprentice marble specialist, on Form ETA 750, Part B.

twice a month for two years.⁵ Counsel concludes that beneficiary's employment with Global Network Providers would exceed the requisite two years of work experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, two years of work experience as a marble specialist. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has two years of work experience as a marble specialist prior to the 1999 priority date year.

The director's reasoning for the denial of the instant petition appears confused in part. The AAO does not view the director's comment as to the reality of hiring of a self-employed marble specialist as either appropriate or relevant. With regard to the materials submitted to the record on appeal, as stated by counsel, the *Handbook* excerpt states that 43 per cent of all carpet, floor and tile installers and finishers are self-employed. This job category examines some job duties of marble setters within its description of tile installers, and tile setters. Therefore the director's remark with regard to the hiring of self-employed marble setters shall be withdrawn.

In addition the director's comment in the denial of the petition with regard to the letter from Armani Marble & Stone Restoration being the only evidence to establish the beneficiary's residence in the United States is also viewed as irrelevant and inappropriate. The purpose of these I-140 petition proceedings is to evaluate whether the petitioner has the ability to pay the proffered wage and whether the beneficiary is qualified to perform the duties of the proffered position. Questions with regard to the beneficiary's presence in the United States would be examined in other

⁵ Although counsel identifies the number of hours worked by the beneficiary on a weekly basis for Global Network Providers, the record does not contain any further substantiation of counsel's assertion. 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)).

immigration proceedings. Finally, the director's statement in his denial that the petitioner provided no documentation in response to the director's NOID with regard to the beneficiary's self-employment is erroneous. The record reflects the petitioner submitted the letter from Global Network Providers dated March 1, 2005, in response to the director's NOID.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes two years of work experience as a marble specialist. The director in his denial infers that the beneficiary's work experience of one year and with the [REDACTED] cannot be considered relevant work experience, as the job title for this work experience on Form ETA 750, Part B, is identified as "Apprentice Marble Specialist." Counsel, on the other hand, counts this work experience as part of the requisite two years of experience prior to the 1999 priority date. As noted by the director, the letter submitted by [REDACTED] refers to the beneficiary's position while employed there as "marble specialist", while the ETA 750, Part B indicates the title of the beneficiary's position with Armani was "apprentice marble specialist".

While the AAO acknowledges that the director's reasoning in his decision is confused, nevertheless the AAO views the evidence submitted to the record to support the nature of the beneficiary's duties during his employment with [REDACTED] as problematic. For example, the dates of employment stated on the letter of verification from [REDACTED] are not consistent with the dates of employment stated on the Form ETA 750. On the Form ETA 750, the beneficiary stated he worked for [REDACTED] from January 1995 to March 1997, a period of two years and two months, while the letter from [REDACTED] signed by [REDACTED] states that the beneficiary worked there from October 1995 to March 1997, a period of one year and five months. Furthermore, in his letter, [REDACTED] identifies the beneficiary's work as "marble setter" which denotes work experience, while the ETA 750, Part A description of the position identifies the position as "apprentice marble setter", which denotes a training phase or apprentice status. Finally, [REDACTED] does not provide his title or position with the Armani company which gives the letter limited evidentiary weight, even without considering the contents of the letter. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

It is nowhere identified in the record how long an individual would be considered an apprentice marble specialist, with the duties outlined in the Form ETA 750, and when an individual could perform these duties as a marble specialist. The letters from [REDACTED] and [REDACTED] and from Global Network Providers also do not specify hours of employment to further clarify the beneficiary's employment as a marble setter beyond his [REDACTED] work experience. Counsel states that the beneficiary worked for Global Network Providers twice a month for two years, working 25 hours each time. However, this statement is completely unsubstantiated in the record. Counsel's assertions do not constitute evidence. *See Matter of Obaighena*, 19 I &N Dec. at 534. The actual number of hours worked by the beneficiary as a self-employed marble setter for Global Network Providers or for [REDACTED] and [REDACTED] is not established in the record.

Therefore the AAO cannot evaluate whether the beneficiary's combined work experiences are sufficient to establish the beneficiary has the requisite two years of work experience prior to the October 1999 priority date. It is possible that part of the [REDACTED] employment outlined in the Form ETA 750 even if initially performed as an

apprentice, in combination with the periods of the beneficiary's part time self-employment from 1997 to 1999 could be viewed as the requisite two years of work experience as a marble specialist. However, as stated previously, the Armani period of employment as identified in the record varies and the beneficiary's periods of self-employment are not clarified sufficiently in the record.

Without further clarification of the record, the AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position since it has not proven that the beneficiary had two years of work experience as a marble specialist prior to the 1999 priority date year. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the position

Beyond the decision of the director, the record reflects an additional reason for which the petition may not be approved. 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). In the instant decision, the petitioner has not established its ability to pay the proffered wage as of the priority date and onward.

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 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 October 29, 1999. The proffered wage as stated on the Form ETA 750 is \$25.75 per hour, which amounts to \$53,560 annually.

On the initial petition, the petitioner indicated it was established on January 1, 1990, has one employee, and an gross annual income of \$134,244. With the petition, the petitioner submitted its Forms 1065, Return of Partnership Income, for tax year 1999, 2000, 2001, and 2002. These documents indicated the petitioner's net income⁶ of -\$34,112 in 1999, -\$24,206 in 2000, -\$22,394 in 2001, and -\$26 in tax year 2002. For tax year 2000, the petitioner submitted Forms 1099-MISC for either the petitioner or the petitioner's partner for tax years 1999 and 2000. The Forms 1099-MISC in tax year 1999 total \$13,805, while the Forms 1099-MISC in tax year 2000 total \$44,675. The tax returns for all four tax years indicate the petitioner's use of subcontractors.

⁶ On Form 1065, the petitioner's net income is identified as ordinary income, on line 22.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 7, 2005, the director requested additional evidence pertinent to that ability. The director noted that the petitioner had operated at a loss. The director further noted that the petitioner had submitted W-2 forms either for an individual or for the petitioner.⁷

In response, counsel stated that the weekly proffered wage is \$1,030. Counsel submits, as secondary evidence, the first pages of the petitioner's Bank of America bank account statements from January 30, 1998 to September 30, 2003. Counsel states that the petitioner's average daily balance of at least \$3,000 or more and credits and deposits that exceed the proffered monthly wage are sufficient evidence that the petitioner has the ability to pay the proffered wage.

In his decision to deny the petition, the director did not address the petitioner's ability to pay the proffered wage. The AAO shall do so in these proceedings.

Counsel in response to the director's NOID, submitted the petitioner's bank account statements for 1998 through August 2003. Counsel states that the beneficiary's weekly wage is \$1,030 and that the average daily balance in the petitioner's bank accounts is at least \$3,000. While the I-140 petition does state a weekly salary of \$1,030, the first pages of the petitioner's bank statements only indicate a limited number of average daily balances, that do not support counsel's assertion of average daily balances of over \$3,000. Therefore counsel's statement with regard to the petitioner's average daily balances is without merit. It is also noted that petitioner's monthly ending balances are often below even the pro-rated weekly salary. For example the ending balance for the petitioner's October 1999 business and savings combined account is \$23.74, while the monthly balance for September 30, 2003, the final statement submitted to the record, is \$190.42. Counsel's statement that the monthly credits and deposits shown on checking account statement are sufficient evidence of the petitioner's ability to pay the proffered wage is also without merit, given the resulting monthly balances illustrated above.

Counsel's reliance on the petitioner's bank account statements is misplaced. First, bank 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 in the time period in question. Second, bank 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 bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The beneficiary did not indicate on ETA Form 750 that he had worked for the petitioner prior to the date he signed the Form ETA 750, Part B. The petitioner also did not state that it had employed the beneficiary. Therefore, the

⁷ As previously noted, these Forms 1099-MISC were submitted for tax years 1999 and 2000.

petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1999 or onward. Thus the petitioner has the obligation to establish its ability to pay the entire proffered wage of \$53,560.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner, based on the Forms 1065 contained in the record is structured as a domestic general partnership. The petitioner's tax return reflects the net income of the partnership on line 22, page one of Form 1065. According to the forms, as previously stated, the petitioner's ordinary income for tax years 1999, 2000, 2001, and 2002 are -\$34,112 in 1999, -\$24,206 in 2000, -\$22,394 in 2001, and -\$26 in tax year 2002. These sums are not sufficient to pay the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. The petitioner's current assets include cash and inventory, as counsel correctly noted. Its year-end current liabilities are shown on lines 5 through 7. 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 following years:

	1999	2000	2001	2002
Ordinary Income (Form 1065)	\$ -34,112	\$ -24,206	\$ -22,394	\$ -26
Current Assets	\$ 48,990	\$ 22,784	\$ 92,390	\$ 92,364
Current Liabilities	\$ 0	\$ 0	\$ 0	\$ 0
Net current assets	\$ 48,990	\$ 22,784	\$ 92,390	\$ 92,364

The petitioner has not demonstrated that it paid any wages to the beneficiary during the years 1999 to 2002. In 1999, as previously illustrated, the petitioner shows a net income of -\$34,112, and net current assets of \$48,990, and has not, therefore, demonstrated the ability to pay the proffered wage of \$53,560. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a net income of -\$24,206 and net current assets of \$22,784, and has not, therefore, demonstrated the ability to pay the proffered wage. In 2001, the petitioner shows a taxable income of -\$22,394 and net current assets of \$92,390, and has demonstrated its ability to pay the proffered wage in 2001. Similarly, in tax year 2002, the petitioner shows a net income of -\$26, and net current assets of \$92,364, and has demonstrated its ability to pay the proffered wage of \$53,560 based on its net current assets. Thus, the petitioner had the ability to pay the proffered wage during tax years 2001 and 2002. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that it had the ability to pay the proffered wage from the 1999 priority date and through tax year 2000.

As previously stated, the monthly banking statements submitted by counsel in response to the director's NOID do not establish additional sources of funding to pay the proffered wage. It is noted that each of the partners in a general partnership, in this case both partners, is jointly and severally responsible for the partnership's debts and obligations.⁹ Because each partner is obliged to satisfy those debts and obligations, as necessary, out of his or her own income and assets, the income and assets of each partner is correctly included in the determination of a general partnership petitioner's ability to pay the proffered wage. The petitioner's owner is obliged, however, to

⁸ 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.

⁹ The record reflects that the petitioner has two general partners, one partner with a 99 per cent profit-sharing interest and the other with a one per cent profit-sharing interest.

demonstrate that he or she could have paid the proffered wage out of his adjusted gross income and supported himself or herself, and his or her family, on the remaining funds.

The record contains no further documentation of the partners' assets. Based on the negative ordinary income reflected on the Schedules K-1, neither partner had sufficient assets to pay the proffered wage. In addition, the record contains no further documentation on any other type of assets from which either individual partner could pay the proffered wage, and also support himself and any dependents. Thus, the financial information contained on the Form 1065 submitted in the instant petition would not establish a petitioner's ability to pay the proffered wage, based on the partners' assets and income in either tax year 1999 or 2000.

Therefore the petitioner has not established its ability to pay the proffered wage based on either of the partner's assets in tax years 1999 to 2000, or based on additional sources of funding. The petitioner thus has not established its ability to pay the proffered wage as of the 1999 priority year and through tax year 2000. For this additional reason, the petition will be denied.

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.