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U.S. Citizenship and Immigration Services

B6

[redacted]

JAN 24 2006

FILE: EAC-04-113-51193 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. 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 cleaning service company. It seeks to employ the beneficiary permanently in the United States as a janitorial supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that 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.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 4, 2003. The proffered wage as stated on the Form ETA 750 is $10.86 per hour, which amounts to $22,588.80 annually.

The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [redacted], Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The I-140 petition was submitted on March 8, 2004. On the petition, the petitioner claimed to have been established on April 30, 1990, to currently have approximately 100 employees, to have a gross annual income of $1,288,635.00, and to have a net annual income of $115,031.00. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the beneficiary on January 30, 2004, the beneficiary did not claim to have worked for the petitioner. With the petition, the petitioner also submitted supporting evidence.

In a decision dated August 31, 2004, the director determined that the petitioner had filed I-140 petitions for twenty-five beneficiaries. The director found that five of the petitions had been approved and that the evidence did not establish that the petitioner had the ability to pay the proffered wage to the beneficiary of the instant petition and to the beneficiaries of other petitions filed by the petitioner. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the director did not issue a request for additional evidence to allow the petitioner to establish its ability to pay the proffered wages to the beneficiaries of all petitions filed by the petitioner. Counsel also states that the positions to be filled pursuant to the petitions are not new positions, but that the beneficiaries will replace previous employees. Counsel states that evidence submitted on appeal shows that the petitioner's workforce has a very high turnover rate, requiring continual replacement employees.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records indicate that the petitioner has filed twenty-four other I-140 petitions. Twenty-three of those were filed in 2004, the same year as the instant petition. The other I-140 petition was filed on December 27, 2003.

Even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new ETA 750B for the new beneficiary. The ETA 750's underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from [redacted] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of*

Labor Certification Beneficiaries, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004) (available at "LexisNexis" Mathew Bender Online). Therefore the approved ETA 750's underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA 750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for same beneficiary, or for a substituted beneficiary.

For the foregoing reasons, the petitioner must establish its ability to pay the proffered wages to each of the beneficiaries of the I-140 petitions submitted by the petitioner as well as the proffered wage to the beneficiary of the instant petition.

The priority date in the instant petition is September 4, 2003, and the filing date of the I-140 petition is March 8, 2004. CIS electronic records show the filing dates of I-140 petitions, but they do not generally show the priority dates on which the ETA 750's were filed. Therefore the other relevant petitions will be considered to be those in which the I-140 petition was submitted in the same year as the instant petition, that is, in 2004.

The record in the instant case contains no specific information about the proffered wages for the beneficiaries of the other petitions submitted by the petitioner. However, the instant appeal is one of seventeen appeals by the same petitioner currently pending before the AAO. Each of the other petitions on appeal is for the same position of janitorial supervisor as in the instant petition, and for the same proffered wage. For purposes of analysis, it will be assumed that the proffered wages for the beneficiaries of each of the petitioner's twenty-four petitions filed in 2004 are the same as the proffered wage in the instant petition, which is $22,588.80. The total proffered wage commitment of the petitioner is therefore twenty-four times that amount, or $542,131.20

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 30, 2004, the beneficiary did not claim to have worked for the petitioner, and no other evidence indicates that the beneficiary has worked for the petitioner.

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

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2002 and 2003. The record before the director closed on March 8, 2004 with submission of the I-140 petition and supporting documents. No request for evidence was issued by the director. As of March 8, 2004 the petitioner's federal tax return for 2003 was not yet due and it was not submitted for the record prior to the director's decision. However a copy of that return has been submitted on appeal.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

Moreover, some expense deductions appear only on the Schedule K. For example, the cost of business property elected to be treated an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. *See* Internal Revenue Service, Instructions for Form 4562 (2003), at 1, *available at* http://www.irs.gov/pub/irs-prior/i4562--2003.pdf; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf.

In the instant petition, the petitioner's tax returns indicate insignificant income from activities other than from a trade or business, but they show substantial deductions for the costs of business property elected to be treated as expense deductions under Section 179 of the Internal Revenue Code, which are shown on Schedule K. For this reason, the petitioner's net income must be considered to be the figure shown on Line 23 of the Schedule K, for income.

In the instant case, the petitioner's tax returns show the following amounts for income on line 23, Schedule K as shown in the table below.

Tax year	Net income	Wage increases needed to pay the proffered wage	Surplus or deficit
2002	$89,460.00	not applicable	not applicable
2003	$74,230.00	$542,131.20*	-$467,901.20

* The proffered wage of $22,588.80 multiplied by 24, which is the number of petitions submitted by the petitioner in the year 2004.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003, which is the only year at issue in the instant petition.

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

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets Beginning of year	End of year	Wage increases needed to pay the proffered wage
2002	-$59,948.00	-$91,207.00	not applicable
2003	-$91,207.00	-$64,850.00	$542,131.20*

* The proffered wage of $22,588.80 multiplied by 24, which is the number of petitions submitted by the petitioner in the year 2004.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the year 2003, which is the only year at issue in the instant petition.

Counsel asserts in his brief that the beneficiaries for which it has submitted I-140 petitions will not be filling new positions but will be replacing employees who have left the petitioner. Counsel submits two lists of names, which counsel states are the names of the petitioner's employees in 2002 and in the current year, referring to 2004. Counsel states that only twenty-six of the persons employed by the petitioner in 2002 remain employees of the petitioner. Counsel states that the names of those who remain employees from 2002 are underlined on the list for that year.

The record contains copies of the two lists described by counsel. The list of the petitioner's employees for 2002 consists of five pages of names with 55 names per page and one page containing 49 names, for a total of 324 names. Twenty-six of the names are underlined. The second list is a petitioner's employee contact list dated November 17, 2004, which consists of two pages of names containing 79 names per page and one page containing 41 names, for a total of 199 names. A comparison of various names on the two lists supports counsel's assertion that only the twenty-six underlined names on the 2002 list also appear on the employee contact list for November 17, 2004.

The list for 2002 is titled Payee Journal, and it contains references for the petitioner's corporate name and tax identification number, and the reference "Payer Tax Year 2002." The list is dated January 1, 2003. The list appears to be a list of all employees who received payments from the petitioner at any time during the tax year 2002, which in the case of the petitioner, is the same as the calendar year 2002. Therefore, although a total of 324 names appear on the list, that fact does not indicate that the number of the petitioner's employees on any given date was 324. On the I-140 petition, submitted on March 5, 2004, the petitioner stated its current number of employees as "@ 100," indicating about 100 employees. The list of employee contacts dated November 17, 2004

appears to be a list of employees currently employed by the petitioner as of that date, showing 199 employees as of November 17, 2004.

Counsel states that the petitioner's federal tax return for 2003 shows substantial growth in the petitioner's business. Counsel states, "The gross profit is $1,621,199 and the salaries paid are $983,586, showing an increase of $306,639." (Counsel's Brief, November 22, 2004, at 2). Counsel also cites a non-precedent decision of the AAO in an unrelated case as an example of a decision based on an analysis similar to that proposed by counsel. A copy of that decision has been submitted for the record by counsel. Nonetheless, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage.

The record contains a copy of a brochure describing the petitioner's services. The brochure indicates that the petitioner specializes in building cleaning, in the areas of commercial cleaning, carpet and upholstery cleaning, new construction clean-up, and industrial cleaning.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002 shows gross receipts or sales of $1,288,635.00, no deductions for cost of goods sold, total income of $1,288,635.00 and expenses for compensation of officers of $45,883.000 and for salaries and wages of $676,947.00.

Given the number of employees listed for 2002, the petitioner's total payments for salaries and wages indicate that a large portion of the petitioner's employees must have been employed for only short periods or only part-time that year, since dividing the total payments for salaries and wages by the number of employees for 2002, that is, dividing $676,947.00 by 324 employees, produces an average wage of only $2,089.34 per employee.

The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2003 shows gross receipts or sales of $1,621,199.00, no deductions for cost of goods sold, total income of $1,621,199.00 and expenses for compensation of officers of $62,500.00 and for salaries and wages of $983,586.00.

The increase in the petitioner's expenses for salaries and wages from 2002 to 2003 was $306,639.00, a 45.3% increase over the petitioner's expenses for salaries and wages in 2002.

In his brief, counsel asserts that the high turnover of the petitioner's work force shows that the beneficiaries will be filling positions made vacant by the departure of other employees, and that the petitioner has demonstrated its ability to pay significantly increased costs for salaries and wages in 2003, which is the year of the priority date. The employee lists submitted on appeal support counsel's assertion that the petitioner had a high turnover of employees from 2002 to 2004. However, the record contains no information on the number of the petitioner's employees during 2003, which is the year of the priority date.

The other petitions currently on appeal before the AAO are each for the position of janitorial supervisor. The petitioner's Form 1120S tax return for 2003 shows payments of salaries and wages in the amount of $983,586.00. On the I-140 petition the petitioner claimed to have "@100" employees, or about 100 employees. If the petitioner had paid twenty-four supervisors the proffered wage in 2003 there would have been $441,454.80 left for the petitioner's other seventy-six employees, or $5,808.62 per employee. In 2002 the petitioner's Form 1120S tax return shows payments of salaries and wages in the amount of $676,947.00.

At a payroll level of 100 employees, if the petitioner had been paying twenty-four supervisors the proffered wage in 2002 (the year before the priority date), the amount remaining for other employees would have been $134,815.80, or $1,773.89 per employee.

Moreover, although the petitioner claimed on the I-140 petition to have approximately 100 employees, the evidence indicates that the petitioner had more than 100 employees during the years at issue. To the extent that the petitioner's payroll was larger than 100 employees, payments of the proffered wage to twenty-four supervisors would mean that the remaining amounts of total wages and salary payments would be divided over a larger number of other employees, resulting in even lower average payments for the petitioner's other employees. Therefore the petitioner's tax returns do not support the contention that the petitioner is replacing twenty-four janitorial supervisors whom it has lost through employee turnover and to whom it had been paying the proffered wage. The level of compensation that the petitioner's other employees would have had to accept under such a contention is not realistic.

The petitioner has submitted no evidence in the instant petition specifying each of the positions for which it has submitted an I-140 petition, nor identifying the former employees who are to be replaced with the beneficiaries of the I-140 petitions. The record therefore lacks details sufficient to establish that each of the beneficiaries of the twenty-four I-140 petitions submitted by the petitioner in 2004 would be a replacement for a previous employee. As shown above, the information in the petitioner's tax returns is insufficient to establish the petitioner's ability to pay the proffered wages to twenty-four beneficiaries for new positions. Although the evidence establishes that the petitioner had a high employee turnover from 2002 to 2004, the evidence fails to establish that the position covered by the instant I-140 petition and the positions covered by the petitioner's twenty-three other I-140 petitions filed in 2004 are existing positions made vacant by the departures of former employees.

For the foregoing reasons, the evidence on the totality of the circumstances affecting the petitioner fails to establish the petitioner's ability to pay the proffered wage during the relevant period to the beneficiary of the instant petition and to pay the proffered wages to the beneficiaries of the other petitions submitted by the petitioner.

In his decision, the director correctly stated the petitioner's net income in 2002. The director found that that amount was insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary and to the beneficiaries of the petitioner's other petitions. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. The record before the director did not contain a copy of the petitioner's tax return for 2003, which was not yet due when the record closed. Nor did the record before the director contain the copies of the petitioner's employee lists which are discussed above. Those documents were submitted for the first time on appeal.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director concerning the issue of the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the record on appeal raises an additional issue concerning the signatures of the beneficiaries on the ETA 750's. In a letter dated May 5, 2005, counsel states that the ETA 750's initially submitted with the I-140 petition had been signed by counsel's legal assistant acting under a power of attorney. The language of counsel's letter is unclear, since counsel refers to "Form ETA 750 B's," in the plural as having been signed by his legal assistant, but states that the legal assistant acted pursuant to "a separate power of attorney executed by the Beneficiary and the original alien worker." (Counsel's letter, May

5, 2005, at 1). The reference to "a separate power of attorney" is in the singular, and the reference therefore appears to refer to a single document executed by both the original beneficiary and by the substituted beneficiary. No copy of any power of attorney document has been submitted in evidence.

In the letter dated May 5, 2005 counsel states that he will be submitting new ETA 750B's, one signed by the original beneficiary and the other signed by the substituted beneficiary. Counsel states that the new ETA 750B's are intended "to correct any procedural defects in the filing of the Labor Certification Application." (Letter from counsel, May 5, 2005, at 1).

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect in March 2005, but the instant petition is governed by the prior regulations. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The citations below are to the Department of Labor regulations as in effect prior to the 2005 amendments.

The regulation at 20 C.F.R. § 656.21 states in pertinent part:

> (a) Except as otherwise provided by Sec. Sec. 656.21a and 656.22, an employer who desires to apply for a labor certification on behalf of an alien shall file, signed by hand and in duplicate, a Department of Labor Application for Alien Employment Certification form and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed. The employer shall set forth on the Application for Alien Employment Certification form, as appropriate, or in attachments:
>
> (1) A statement of the qualifications of the alien, signed by the alien; . . . .

The regulation at 20 C.F.R. § 656.31, Labor certification applications involving fraud or willful misrepresentation, states in pertinent part:

> (d) If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

Counsel's letter dated May 5, 2005 refers to two new ETA 750B's, but those documents are not found attached to that letter in the record. The record contains copies of one ETA 750B for the original beneficiary and two ETA 750B's for the substituted beneficiary, but those documents are found in the record immediately below the original ETA 750A, certified by the Department of Labor. No copies of any ETA 750B's are found in the record with signatures indicating that they were signed pursuant to a power of attorney.

In any event, counsel's letter dated May 5, 2005 states that the ETA 750B's were originally signed by counsel's legal assistant. Such a signature would not appear to satisfy the requirement of the regulation at 20 C.F.R. § 656.21(a)(1) for a statement of the alien's qualifications "signed by the alien." That issue potentially affects the validity of the ETA 750 labor certification, since a signature by a legal assistant with no indication that the signature is that of the legal assistant rather than that of the alien might constitute a material misrepresentation within the meaning of the regulation at 20 C.F.R. § 656.31.

On the other hand, counsel's reference in his letter dated May 5, 2005 to ETA 750B's (in the plural) may refer only to the two copies of the ETA 750B pertaining to the current beneficiary as having been signed by counsel's legal assistant. That ETA 750B was submitted for the first time with the I-140 petition. If that ETA 750B is the only one signed by counsel's legal assistant the validity of the labor certification would not be in question.

The information about the signatures by the legal assistant was submitted by counsel for the first time on appeal. Therefore the director did not have an opportunity to consider that information. In any event, however, the above finding that the evidence fails to establish the petitioner's ability to pay the proffered wage is a sufficient ground to deny the petition, without the need to resolve all issues concerning the signatures on the ETA 750B's.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Beyond the decision of the director, a letter submitted on appeal by counsel raises issues concerning the validity of the signatures of the prior beneficiary and of the present beneficiary on the Forms ETA 750B, but a resolution of those issues is not necessary for the decision in the instant appeal, since the failure of the evidence to establish the petitioner's ability to pay the proffered wage during the relevant period is a sufficient ground to deny the petition.

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.