



U.S. Citizenship
and Immigration
Services

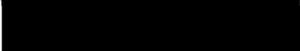
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FILE:



Office: VERMONT SERVICE CENTER

Date:

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EAC-04-127-54446

IN RE:

Petitioner:

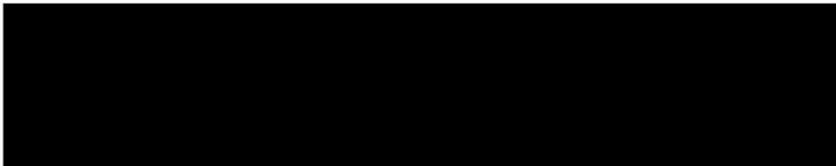


Beneficiary:

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:



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, Chief
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 printing graphics firm. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 the petitioner had not established that the beneficiary possessed the requisite experience, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 19, 2004 denial, two issues exist in this case. The first issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second issue is whether or not the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 April 23, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$28,000.00 annually.

¹ The director, in her decision, erred in stating that the priority date is August 7, 2003. However, this error is immaterial as the director did discuss the petitioner's ability to pay the proffered wage in 2001 and 2002.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². Relevant evidence submitted on appeal includes an affidavit from one of the petitioner's owners dated November 19, 2004, a copy of a CIS memorandum signed by William Yates on May 4, 2004, an appraisal report for real estate property belonging to the petitioner's owners, the owners' home loan information, one of the owners' retirement information, the petitioner's paystub detail, the petitioner's payroll transaction detail, copies of checks addressed to the beneficiary, and copies of the beneficiary's Form 941 Employer's Quarterly Federal Tax Returns. Other relevant evidence in the record includes an experience letter dated December 29, 1994 and copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2000, 2001, and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage or the beneficiary's past experience.

Counsel states on appeal that wages paid to outside contractors can be considered, personal assets of the petitioner's owners can be considered as current assets, the beneficiary is currently being paid the proffered wage, CIS cannot only look at income tax returns, and the director made her decision without the necessary information. Counsel also states that the beneficiary is fully qualified for the proffered position.

The first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

² 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).

business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 April 4, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1999 and continuing through the date of the ETA 750B. The record contains evidence showing that the beneficiary received compensation from the petitioner for part of 2004. Specifically, the record contains the petitioner's paystub detail from January 2, 2004 until June 17, 2004, the petitioner's payroll transaction detail for the same period, and copies of checks addressed to the beneficiary for the same period and for August 20, 2004. According to the evidence, the beneficiary received \$10,912.00 as of June 17, 2004.

Counsel states that "the beneficiary has been paid \$545.60 per week (annualized at \$28,372.00) effectively January 2, 2004." The AAO will not "annualize" the beneficiary's compensation for all of 2004 when the evidence only shows that the beneficiary was paid until June 17, 2004 and was also paid on August 20, 2004; the evidence does not indicate that the beneficiary was paid or how much the beneficiary was paid for the rest of 2004. In addition, the beneficiary was not paid the proffered wage from January 2, 2004 until June 17, 2004 because half of the annual proffered wage is \$14,000.00, and \$10,912.00 is less than \$14,000.00.

A closer look at the evidence, including the petitioner's paystub detail, the petitioner's payroll transaction detail, and copies of checks addressed to the beneficiary, reveals that the beneficiary was paid \$545.60 for every two weeks until the paycheck for April 8, 2004, when the beneficiary's pay was changed to \$1091.20 for every two weeks. This information is inconsistent with counsel's assertion that the beneficiary has been paid \$545.60 every week. *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.

The record contains copies of the petitioner's Form 941 Employer's Quarterly Federal Tax Return. Those forms show the total amount the petitioner paid in wages and the petitioner's federal tax liabilities for each quarter. However, they do not show which workers were paid and how much the petitioner paid each worker. Thus, the petitioner's Form 941s are irrelevant in determining the petitioner's ability to pay the proffered wage to the beneficiary.

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 2000, 2001, and 2002. The record before the director closed on March 23, 2004 with the receipt by the director of the petitioner’s I-140 petition and supporting documents. As of that date the petitioner’s federal tax return for 2003 was not yet due. Therefore the petitioner’s tax return for 2002 is the most recent return available.³

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. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner’s tax returns show the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$3,198.46	\$28,000.00*	-\$24,801.54
2002	\$1,905.00	\$28,000.00*	-\$26,095.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

As an alternative means of determining the petitioner’s ability to pay the proffered wage, 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.

³ Even though a copy of the petitioner’s Form 1120S U.S. Income Tax Return for an S Corporation for 2000 appears in the record, it is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is April 23, 2001.

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 End of year	Wage increase needed to pay the proffered wage
2001	-\$10,262.00	\$28,000.00*
2002	-\$8,517.00	\$28,000.00*

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001 and 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

Counsel states that “[t]he same funds paid out to ‘contract employees’ or ‘sub-out’ to other competitors could easily be used to pay the salary of ‘in-house skilled employee.’” An affidavit from one of the petitioner’s owners dated November 19, 2004 states that he paid \$11,886.00 for contracted work in 2001 and \$9,874.00 in 2002 and “I could have used the same funds to pay for [an in-house employee’s] salary rather than paying an outside contractor(s).”

The record does not name those contractors, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the proffered wage to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no supporting evidence that the position of these contractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of workers who performed the duties of the proffered position. If those workers performed other kinds of work, then the beneficiary could not have replaced them.

Counsel states that according to the Yates memorandum, “in the event the petitioner has paid or is currently paying the proffered wages, the I-140 petition should be approved.” The Yates memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity’s ability to pay if, in the context of the beneficiary’s employment, “[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage.”

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel’s interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 23, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001,

2002, and 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In addition, the evidence only shows that the beneficiary was paid the proffered wage from April 8, 2004 until June 17, 2004 and also on August 20, 2004, and the evidence is inconsistent with the information presented by counsel.

Counsel states that the Yates memorandum also points to net current assets as one of the criteri[a] for making a positive ability to pay determination, and the equity from the house of the petitioner's owners and their retirement information are current assets. The record contains an appraisal report for real property belonging to the petitioner's owners, the owners' home loan information, and one of the owners' retirement information.

As stated above, net current assets are a corporate taxpayer's current assets minus its current liabilities. Thus, the Yates memorandum, when discussing net current assets, is referring to the corporation's net current assets as shown on its federal tax returns, annual reports, or audited financial statements. Nowhere does it imply that the memo is referring to personal assets belonging to the owners of a corporation.

Moreover, contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

Counsel states that a determination of the petitioner's ability to pay "cannot be based solely from the [i]ncome [t]ax [r]eturns of the petitioning corporation," and "[the] [p]etitioner's access to *other* financial means must be taken into considerations."

As stated above, 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). The AAO can look to other documentary evidence, such as annual reports or audited financial statements. The AAO, however, cannot pierce the corporate veil and look to personal assets of the petitioner's owners.

Counsel points to *Matter of Sonogawa*, *Full Gospel Portland Church v. Thornburg*, and *Masonry Masters, Inc. v. Thornburgh* as evidence that "the [i]ncome [t]ax [r]eturns only present a limited aspect of the *financial viability* and [ability to pay]" and states that "there are many other factors to determine the overall viability of [the petitioner]."

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. 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 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 couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. The record also lacks evidence regarding the petitioner's reputation. Thus, *Sonegawa* is distinguishable from the case at hand.

The decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners and the church's financial records in determining a church's ability to pay. Here, counsel asserts that CIS should treat personal assets of the petitioner's owners as evidence of its ability to pay. Considering the pledges of parishioners and the church's financial records is not the equivalent of piercing the corporate veil.

In regards to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2nd 898 (D.C. Cir. 1989), the AAO, as stated above, is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel also cites the part of the decision regarding the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Although part of the decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a graphic designer will significantly increase the profits for a printing graphics firm. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel state that "employers who have the track records of successful operation clearly establish stable business and future viability." Evidence in the record shows that the petitioner did not have the ability to pay the proffered wage in 2001 and 2002, and the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 shows a net income of \$644.00 and net current assets of -\$6,309.00. Nothing else in the record indicates that the petitioner is a successful entity capable of continually paying the proffered wage.

Counsel states that the director's decision "is based upon the lack of detailed [f]inancial information and corroborative evidence as stated in [a Yates memorandum regarding request for evidence]." The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal, and the petitioner did submit additional evidence on appeal.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

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 regarding the petitioner's ability to pay the proffered wage.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The Form ETA 750 states that two years of experience is required for the proffered position of a graphic designer, and according to the Form ETA 750B, the beneficiary was employed by Oriental Watchman Publishing House from April 1989 to November 1994 as a graphic artist. The record includes a letter from Oriental Watchman Publishing House dated December 29, 1994 stating that the beneficiary "[has worked] with us in the Graphic Arts Department since April 1989." The letter includes the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. The letter, on its face, meets the qualifications for evidence relating to qualifying experience as stated at 8 C.F.R. § 204.5(g)(1). According to the director's denial, "the record lacks the required evidence that the beneficiary had the experience required by the job offer as of the date of filing," and there is no explanation as to why the letter from Oriental Watchman Publishing House is deficient. The director erred in her determination that the petitioner failed to establish that the beneficiary possessed the requisite experience.

Despite the fact that the petitioner has established that the beneficiary possessed the requisite experience, the petitioner has failed to overcome the decision of the director regarding its ability to pay the proffered wage.

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.