

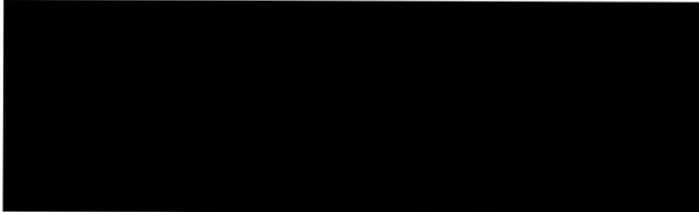
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U.S. Citizenship
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Services *B6*

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FILE: EAC 03 102 51996 Office: VERMONT SERVICE CENTER Date: **SEP 05 2006**

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscaping supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's January 19, 2005 denial, 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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

The regulation 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 4, 1997. The proffered wage as stated on the Form ETA 750 is \$1,084.80 per week (\$56,409.60 per year). The Form ETA 750 states that the position requires one year of experience in the job offered.

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 appeal.¹ On appeal,

¹ 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).

counsel submits a brief and a letter dated February 17, 2005 from the petitioner's accountant. Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 1997, 1998, 1999, 2000, 2001 and 2002, and IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 2002 and 2003.² The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of \$331,408.00, and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 13, 1997, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's depreciation expense should have been considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also cites the petitioner's gross receipts, shareholder loans and its total assets minus total liabilities as evidence of the petitioner's ability to pay the proffered wage. Counsel asserts that the two officers of the petitioner are willing to reduce their compensation to pay the proffered wage. Counsel also asserts that the petitioner has a line of credit that is available to pay the proffered wage. Counsel cites an unpublished AAO decision for the proposition that Citizenship and Immigration Services (CIS) must consider the normal accounting practices of a company even if the ability to pay is not immediately apparent in the tax returns. Counsel further asserts that the director should have considered the totality of the petitioner's financial situation in its determination of the petitioner's ability to pay the proffered wage.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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's IRS Forms W-2 for 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form W-2 stated compensation of \$26,715.92.
- In 2003, the Form W-2 stated compensation of \$33,283.20.

The record also contains IRS Forms W-2 issued by the petitioner to the beneficiary for 1993, 1994 and 1995. Evidence preceding the priority date in 1997 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Therefore, for the years 1997, 1998, 1999, 2000, 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2002 and 2003. Since the proffered wage is \$56,409.60 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$29,693.68 and \$23,126.40 in 2002 and 2003, respectively.³

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 contrary to counsel's assertions. 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 profits is misplaced. Showing that the petitioner's gross receipts and profits exceeded 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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 8, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2002 is the most recent return available. The petitioner's tax returns demonstrate its net income for 1997, 1998, 1999, 2000, 2001 and 2002, as shown in the table below.

- In 1997, the Form 1120 stated net income of \$2,111.00.
- In 1998, the Form 1120 stated net income of \$2,189.00.
- In 1999, the Form 1120 stated net income of \$5,654.00.
- In 2000, the Form 1120 stated net income of \$5,932.00.

³ The record of proceeding closed without submission of the petitioner's 2003 federal income tax return so its net income and net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage.

- In 2001, the Form 1120 stated net income of \$7,616.00.
- In 2002, the Form 1120 stated net income of -\$14,589.00.

Therefore, for the years 1997, 1998, 1999, 2000 and 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$56,409.60. For 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and 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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 1997, 1998, 1999, 2000, 2001 and 2002, as shown in the table below.

- In 1997, the Form 1120 stated net current assets of -\$19,326.00.
- In 1998, the Form 1120 stated net current assets of \$4,073.00.
- In 1999, the Form 1120 stated net current assets of -\$20,192.00.
- In 2000, the Form 1120 stated net current assets of -\$57,443.00.
- In 2001 the Form 1120 stated net current assets of -\$38,210.00.
- In 2002, the Form 1120 stated net current assets of -\$33,543.00.

Therefore, for the years 1997, 1998, 1999, 2000 and 2001, the petitioner did not have sufficient net current assets to pay the proffered wage of \$56,409.60. For 2002, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.⁵

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ CIS electronic records show that the petitioner filed two other I-140 petitions which have been pending during the time period relevant to the instant petition. 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

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in her brief accompanying the appeal that the officers of the petitioner are willing to reduce their compensation to pay the proffered wage. The petitioner's tax returns demonstrate compensation paid to the petitioner's two officers for 1997, 1998, 1999, 2000, 2001 and 2002, as shown in the table below.

- In 1997, the Form 1120 stated total officer compensation of \$114,000.00.
- In 1998, the Form 1120 stated total officer compensation of \$72,000.00
- In 1999, the Form 1120 stated total officer compensation of \$115,600.00
- In 2000, the Form 1120 stated total officer compensation of \$142,000.00
- In 2001, the Form 1120 stated total officer compensation of \$244,000.00
- In 2002, the Form 1120 stated total officer compensation of \$30,000.00

It is not a reasonable contention that the petitioner's two officers, who are also the sole shareholders of the petitioner and who have indicated on the petitioner's tax returns that they spend 100% of their time devoted to the business, would have forgone a large portion of their compensation in order to pay the wages of a subordinate. In 1998, the two officers would have had to forgo approximately 75% of their compensation. In 2002, they would have had to give up approximately 100% of their compensation. Moreover, other than the statement of counsel, the record of proceeding does not contain any evidence, such as affidavits from the petitioner's officers showing other funding sources, that supports the contention that the petitioner's officers were and are willing to accept minimal compensation from their business. Without such evidence, the AAO cannot find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a

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). The other petitions were submitted by the petitioner in April 2003 and January 2004. The petition submitted in April 2003 was approved in August 2003, and the petition submitted in January 2004 was denied in September 2004 but is currently on appeal to this office. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax returns and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In addition, counsel refers to a decision issued by the AAO concerning the petitioner's accounting practices, but does not provide its published citation. 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).

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. In the present case, the petitioner is a landscaping company that had been in business for 13 years at the time the Form ETA 750 was filed. The petitioner had gross receipts of \$784,125.00 in 1997,

\$828,477.00 in 1998, \$1,044,600.00 in 1999, \$1,270,357.00 in 2000, \$1,544,405.00 in 2001, and \$1,254,817.00 in 2002. Further, the petitioner paid salaries, wages and other labor costs of over \$260,000.00 each year. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has established its ability to pay the proffered wage.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

However, beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.⁶ In the instant case, 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 landscaping supervisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-------|
| 14. Education | |
| Grade School | x |
| High School | blank |
| College | blank |
| College Degree Required | blank |
| Major Field of Study | blank |

The applicant must also have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A requires that the applicant have a driver's license and a good driving record.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a landscaper supervisor for [REDACTED] from May 1985 to September 1986, that he worked as a landscape supervisor for Coppy [REDACTED] from March 1989 to December 1991, that he worked as a car washer for [REDACTED] Wash from 1993 to 1994 and that he worked as a pallet repairer for [REDACTED] from June 1987 to December 1988. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted a letter dated March 3, 2004 from the petitioner's President indicating that the beneficiary worked for one of the petitioner's subcontractors as a landscape supervisor for three years. He does not state the name or address of the subcontractor and does not state the dates of the beneficiary's employment. Instead, he indicates that the subcontractor is no longer in business and cannot be located. He also states that the beneficiary has worked for the petitioner, but does not state the dates of his employment, his job title, his job duties or his hours of work. The petitioner also submitted IRS Forms W-2 issued by the petitioner

⁶ 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*, 229 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).

to the beneficiary for 1993, 1994, 1995, 2002 and 2003. The Forms W-2 do not establish that the beneficiary worked full-time for one year as a landscaping supervisor prior to the priority date in 1997.⁷ Further, the petitioner provided no experience letters evidencing the beneficiary's prior employment with [REDACTED]

or [REDACTED]

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

The petitioner failed to provide sufficient documentation of the beneficiary's prior work experience as required by 8 C.F.R. § 204.5(l)(3). Therefore, the preponderance of the evidence does not demonstrate that the beneficiary acquired one year of experience as a landscaping supervisor from the evidence submitted into this record of proceeding and thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.⁸

In visa proceedings, the burden of proof 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.

⁷ The beneficiary's IRS Forms W-2 for 1993, 1994 and 1995 do not list the beneficiary's job title or job duties. Further, the amounts paid to the beneficiary in 1993, 1994 and 1995 are insufficient to establish full-time employment in a supervisory position. Based on a 40 hour work week, the beneficiary would have earned less than \$6.00 per hour in 1994, and approximately \$5.00 per hour in 1993 and 1995. These amounts are only slightly higher than the minimum wage of \$4.25 per hour, indicating that the employment was either non-supervisory or was not full-time.

⁸ This office notes that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140 based on the same approved ETA 750 labor certification. *Cf.* 8 C.F.R. §§ 103.2 (a)(7)(ii) (new fees will be required with any new petition), 103.2(b)(15) (withdrawal of a petition or denial of a petition due to abandonment does not preclude the filing of a new petition with a new fee). However, any new petition submitted by the petitioner would have to be supported by evidence sufficient to establish that the beneficiary is qualified to perform the duties of the proffered position.