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U.S. Citizenship
and Immigration
Services

B6

FILE:

[REDACTED]
EAC-05-204-53693

Office: VERMONT SERVICE CENTER

Date: AUG 06 2007

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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

ON BEHALF OF PETITIONER:

[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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology service firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its 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.

As set forth in the director's February 28, 2006 denial, the single 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The instant petition is for a substituted beneficiary.¹ The original Form ETA 750 was accepted on April 16, 2002. The proffered wage as stated on the Form ETA 750 is \$88,702.64 per year. The Form ETA 750 states that the position requires four years of college, a bachelor's degree in engineering, computer science or mathematics, and 18 months of experience in the job offered. The I-140 petition was submitted on July 15, 2005. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$1.1 million, and to currently employ 13 workers. 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 June 8, 2005, the beneficiary claimed to have worked for the petitioner for a period from June 2003 to February 2004 and from May 2005 to the present.

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. On appeal counsel submits the petitioner's amended tax return for 2002 with letters from the petitioner and its accountant and documents regarding lines of credit. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 2002 and 2003, unaudited financial statements for 2004 and projected income statement for 2005, bank statements for the petitioner's money market fund account and line of credit, W-2 forms for the petitioner's officer and the beneficiary, and cancelled checks to SVC corporation. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the amounts paid to one of the co-owners as compensation of officers and to the other co-owner's corporation as sub-contract expenses must be taken into consideration when determining the petitioner's ability to pay the proffered wage, and thus the petitioner would establish its 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, Citizenship and Immigration Services (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,

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm_96/fm_28-96a.pdf (March 7, 1996).

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).

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 form for 2003, which shows that the petitioner paid the beneficiary in the amount of \$23,901.21 in 2003. The record does not contain the beneficiary's W-2 forms, 1099 forms or any other documentary evidence showing that the petitioner paid the beneficiary in 2002, 2004 or onwards. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage from the priority date in 2002 onwards. The petitioner is obligated to demonstrate that it could pay the difference of \$64,801.43 between wages actually paid to the beneficiary and the proffered wage in 2003 and the full proffered wage of \$88,702.64 in 2002, 2004 through to the present.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The priority date in the instant case is April 16, 2002, therefore, the petitioner's 2002 tax return is the one for the year of the priority date. The petitioner's tax returns for 2002 and 2003 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage from the priority date:

- In 2002, the Form 1120 stated a net income³ of \$149.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the

- In 2003, the Form 1120 stated a net income of \$1,801.

Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$88,702.64; and for the year 2003, the petitioner did not have sufficient net income to pay the difference of \$64,801.43 between 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. 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. 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 net current assets during 2002 were \$29,341.
- The petitioner's net current assets during 2003 were \$8,486.

Therefore, for the year 2002, the petitioner's net current assets were not sufficient to pay the full proffered wage of \$88,702.64; for the year 2003, the petitioner's net current assets were not sufficient to pay the difference of \$64,801.43 between wages actually paid to the beneficiary and the proffered wage.

The record before the director closed on December 29, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for 2004 should have been available. However, the petitioner did not submit its 2004 tax return, nor did counsel explain why the tax return was not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 2004 because it failed to submit the tax return.

Form 1120.

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The record contains the petitioner's unaudited financial statements for 2004 and projected income statement for 2005. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal, counsel asserts that the amounts paid to one of the co-owners as compensation of officers and to the other co-owner's corporation as sub-contract expenses must be taken into consideration when determining the petitioner's ability to pay the proffered wage. Counsel submits the petitioner's amended tax return for 2002 and copies of cancelled checks paid to SVC Corporation to support his assertions.

First of all, because the petitioner amended its returns in the middle of proceedings, CIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns submitted by the petitioner does not indicate that they were received by the IRS, and they are not certified copies. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the AAO cannot accept the amended tax return as evidence of the petitioner's ability to pay in any respects.

Counsel submits a letter dated March 23, 2006 from [REDACTED] for the petitioner claiming that the compensation for [REDACTED] was paid to his company-SVC International and included in sub-contract expenses. However, sub-contract expenses paid to another company are not the compensation of officers. In general, wages including costs of labor already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel did not advise that the beneficiary would replace [REDACTED]. Moreover, there is no evidence that the position of [REDACTED] involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. The petitioner failed to submit evidence to establish that the beneficiary would replace [REDACTED] and use the sub-contract expenses paid to [REDACTED] company to pay the beneficiary the proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income

Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 50 percent of the company's stock. According to the petitioner's 2003 IRS Form 1120 Schedule E (Compensation of Officers) and Form W-2 for 2002, the petitioner elected to pay [REDACTED] \$86,500 in 2002 and \$55,000 in 2003, respectively. We note here that the compensation received by the company's owners during these two years was not a fixed salary.

However, the record does not contain any evidence showing that [REDACTED] is willing and able to forego a significant percentage of his 2002 and 2003 compensation of officers to pay the beneficiary the proffered wage. In addition, the petitioner did not submit any evidence of [REDACTED]'s compensation of officers for 2004 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through officers' compensation from 2002, the year of the priority date, to the present.

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

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 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).

Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement 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, CIS records show that the petitioner has filed Immigrant Petitions for Alien Worker (Form I-140) for three more workers and all of the three were approved.⁵ The petitioner must show that it had sufficient income to

⁵ The I-140 immigrant petition EAC-04-256-50135 with the priority date of March 10, 2004 was filed on

pay all the wages at the priority dates. It is doubtful that the petitioner had sufficient net income or net current assets to pay all the four proffered wage in 2004 since the analysis in the instant case indicates that the petitioner even cannot establish its ability to pay the instant beneficiary only the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. Accordingly, the director's February 28, 2006 denial decision is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the qualifying experience prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of programmer analyst requires 18 months of experience in the job offered in addition to the 4 year college studies and a bachelor's degree in engineering, computer science or mathematics.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner submitted the beneficiary's bachelor degree of engineering and demonstrated that the beneficiary met the educational requirements prior to the priority date.

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) of 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 record contains five items pertinent to the beneficiary's experience: (1) an experience letter dated October 28, 2005 from [REDACTED], HR Manager of Rjurekh Solutions Inc. dba Cevian Solutions; (2) an

September 15, 2004 and approved on March 22, 2005; the immigrant petition EAC-05-019-53214 for the original alien beneficiary of the instant labor certification was filed on October 27, 2004 and approved on November 12, 2004; and the petition SRC-06-219-53411 with the priority date of August 2, 2004 was filed on July 11, 2006 and approved on September 13, 2006.

experience letter dated February 20, 2004 from [REDACTED] President of the petitioner in the instant case; (3) an affidavit from [REDACTED] (4) an experience letter dated October 5, 2001 from [REDACTED] Manager – Human Resources of Seranova India Private Limited; and (5) an experience letter dated August 16, 2002 from Upasna Nischal, Senior Associate, People Strategy of Sapien Corporation Private Limited. While only the last two experience letters verify the beneficiary's experience prior to the priority date of April 16, 2002 in the instant, the first three letters attest to the beneficiary's experience after the priority date. The petitioner cannot establish the beneficiary's qualifications for the proffered position with the first three letters.

The experience letter dated October 5, 2001 from [REDACTED] states in pertinent part that:

This is to inform that [the beneficiary], Software Engineer worked in the Company from July 03, 2000 and was relieved on October 5, 2001.

This letter verifies the beneficiary's 15 months of experience as a software engineer but does not provide the address for the company or the writer. The letter does not verify the beneficiary's full time employment. If it was a part time, the 15 months of experience can only be counted as 7 1/2 months of full time experience. This letter does not include a detailed description of the duties performed by the beneficiary during the period he worked, and thus it is not clear whether the experience as a software engineer qualifies the beneficiary to perform the duties described on Item 13 of the Form ETA 750A. Therefore, the letter does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1), and the petitioner failed to demonstrate with this letter that the beneficiary possessed the requisite 18 months of experience as a full-time programmer analyst.

The experience letter dated August 16, 2002 from Upasna Nischal states in pertinent part that:

This is to certify that [the beneficiary] was employed at Sapien Corporation Private Limited from October 2001 to August 2002 and his last title was Associate, Technology.

This letter verifies the beneficiary's 10 months of experience as a technology associate, however, since the priority date is April 16, 2002, only 6 months of experience from October 2001 to April 2002 can be considered as qualifying experience in the instant case. The letter does not verify the beneficiary's full time employment. If it was a part time, the 6 months of experience can only be counted as 3 months of full time experience. This letter does not include a detailed description of the duties performed by the beneficiary during the period he worked, and thus it is not clear whether the experience as a technology associate qualifies the beneficiary to perform the duties described on Item 13 of the Form ETA 750A. Therefore, the letter does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1), and the petitioner failed to demonstrate with this letter that the beneficiary possessed the requisite 18 months of experience as a full-time programmer analyst.

If both experience letters had met the requirements as primary evidence set forth by the regulation at 8 C.F.R. § 204.5(g)(1), they could have established the beneficiary's qualifications for the proffered position. However, both of them do not meet the regulatory-prescribed standards as primary evidence of qualifying experience, and therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite experience prior to the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit

sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.