

identifying data deleted to
prevent clear and warranted
invasion of personal privacy

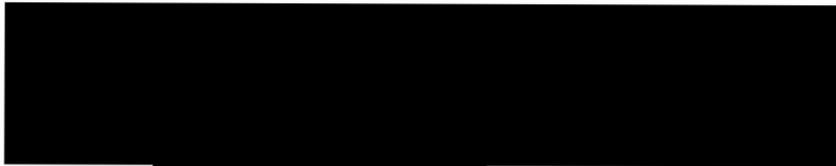
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
LIN 04 202 51848

Office: NEBRASKA SERVICE CENTER

Date: JUL 02 2007

IN RE: Petitioner: [REDACTED]
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:



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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and a gas station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's December 5, 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 2001 priority date of the visa petition, and continuing through tax year 2003. Accordingly, the director denied the petition.

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)(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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10 per hour (\$20,800 per year). The Form ETA 750 states that the position requires two years of work experience as an assistant manager in a retail store with similar product mix.

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 appeal¹. On appeal, counsel submits a statement, with no new evidence.² The record contains the petitioner's Forms 1120 for tax years 2001, 2002, and 2003, as well as the beneficiary's Forms 1040 for these three years along with W-2 forms issued to the beneficiary by the petitioner and by [REDACTED] another business entity, for these three years.

The record also contains a pay stub from [REDACTED], Milwaukee, Wisconsin that indicates that as of July 15, 2005, the beneficiary had earned \$6,566.56 in wages. The petitioner, in a cover letter submitted with the initial petition, stated that the beneficiary had worked for the last six and a half years as an assistant manager at one of the petitioner's retail food products and petroleum products combination stores.³ The record also contains the petitioner's unaudited balance sheets for tax years 2002, 2003, and from January to September 2004.⁴ 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 1996, to have a gross annual income of two million dollars, and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel states that the petitioner's operating losses, incurred in calendar years 1997 and 1999, were utilized as loss carry-overs, in accordance with IRS rules. For calendar years 2001, 2002, and 2003, counsel asserts that the petitioner's net operating taxable income was effectively cancelled out by the allowance of carrying a loss forward to nullify the taxable income for the respective years. Counsel also states that Citizenship and Immigration Services (CIS) ignores the effect of other non-cash losses, such as depreciation and

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).

² On the Form I-290B submitted on appeal and received by the Nebraska Service Center on January 6, 2006, counsel indicated that he was submitting additional evidence or a brief to the AAO within 30 days; however, the AAO has received no further evidence or materials. On May 2, 2007, the AAO sent counsel a FAX informing him that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and, as a courtesy, giving him five days to respond. On May 2, 2007, counsel responded that the statement on the Form I-290B correctly stated the petitioner's ability to pay the proffered wage and that a brief was not necessary.

³ The record contains no further evidentiary documentation on the relationship between the petitioner and [REDACTED]. The record does contain W-2 forms for the beneficiary's wages received from [REDACTED] for tax years 1998, 1999, 2000, 2001, 2002, 2003, and 2004.

⁴ The AAO notes that the director requested the petitioner's balance sheets from tax year 2001 to April 2005 in his request for further evidence dated May 5, 2005. It is not clear why the director did not specify audited balance sheets. The regulation at 8 C.F.R. § 204.5(g)(2) clearly identifies audited balance sheets as one of the three criteria utilized to establish the petitioner's ability to pay the proffered wage.

amortization, on the petitioner's financial assets. Counsel then asserts that when these numbers are factored in with the taxable profit, the petitioner has excess funds available to pay the proffered wage in all three tax years. Counsel states that the director's statement that CIS does not recognize the petitioner's depreciation deductions because depreciation is used to replace equipment completely ignores the realities of real business life.

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).

As previously stated, the director requested the petitioner's balance statements for the 2001 priority year and through April 2005, without specifying that such documents should be audited. The petitioner submitted unaudited statements for tax years 2002, 2003, and part of 2004. 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. The AAO notes that in the director's decision he did state that the unaudited balance statements were given no evidentiary weight.

On appeal, counsel brings up such issues as carryover losses impacting the petitioner's net income in subsequent tax years, and the use of depreciation and amortization expenses to establish the petitioner's ability to pay the proffered wage. The AAO regards the carryover of losses by the petitioner as a legitimate tax accounting practice; however, the AAO does not use this approach when analyzing whether the petitioner had the ability to pay the proffered wage.

The net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120 or line 25(a) of Form 1120-A. However,

the carryover cannot be more than the corporation's taxable income after special deductions. *See* 26 C.F.R. § 1.172-4 and 26 C.F.R. § 1.172-5. *See also* Corporations, I.R.S. Pub. No. 542, at 15-16 (2006), <http://www.irs.gov/pub/irs-pdf/p542.pdf> (accessed April 2, 2007). Because a petitioner's NOL is related to another year's outcome, it should be omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. CIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the IRS Form 1120 in our computation of net income.

With regard to depreciation or amortization expenses, the depreciation deduction may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While those expenses do not require or represent the current use of cash, neither are they available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's selection of an accounting method and a depreciation schedule accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

The same is true of amortization expense. Amortization is the attribution to given years of the cost or other basis of intangible assets. The allocation of amortization expense, though of intangible assets such as goodwill, is similarly a real expense, however spread or concentrated. No reasonable basis exists for permitting the petitioner to add the amount it claimed as an amortization expense back into its profits or to permit its redistribution to other years as convenient.

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. In the instant case, the petitioner has indicated that it and another business entity employed and paid the beneficiary during the 2001 priority year and in subsequent years. Although the petitioner stated that Fatima, Inc. is a part of the petitioner's greater business operations, the record contains no evidentiary documentation to further substantiate this assertion. 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 wages paid by Fatima, Inc. to the beneficiary are not viewed as wages that the petitioner paid to the beneficiary. With regard to the beneficiary's W-2 forms for wages received from the petitioner for tax years 2002 to 2004, the record indicates the petitioner paid the beneficiary \$660 in 2002, \$4,290 in 2003, and \$3,960 in 2004. The record does not contain a W-2 Form for tax year 2001 from the petitioner to the beneficiary. The petitioner therefore did not establish that it paid the beneficiary the proffered wage of \$20,800 as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to

pay the entire proffered wage of \$20,800 in priority year 2001, and the difference between the beneficiary's actual wages and the proffered wage in 2002 and 2003.⁵

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, contrary to counsel's assertion, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,800 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁶ of \$7,120.
- In 2002, the Form 1120 stated a net income of \$7,789.
- In 2003, the Form 1120 stated a net income of \$11,137.

⁵ Since the petitioner did not submit its tax return for 2004, the AAO will not examine the petitioner's ability to pay the proffered wage based on its net income, net current assets or based on the beneficiary's wages.

⁶The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

Therefore, for the years 2001 to 2003, the petitioner did not have sufficient net income to either pay the entire proffered wage in 2001, or the difference between the beneficiary's actual wages and the proffered wage in tax years 2002 or 2003.

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.⁷ 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 2001 were \$31,526.⁸
- The petitioner's net current assets during 2002 were \$14,535.
- The petitioner's net current assets during 2003 were -\$71,233.

Therefore, for the year 2001, the petitioner had sufficient net current assets to pay the entire proffered wage of \$20,080. During tax years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$20,140 in 2002, and \$16,510 in 2003.

While the evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, it does not establish that the petitioner continued to have the ability to pay the proffered wage in either tax year 2002 or 2003. 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 except for the priority year 2001.

⁷According 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.

⁸In the director's determination of the petitioner's net current assets for tax year 2001, the petitioner's inventory of \$81,371 was erroneously not included as part of the petitioner's current assets. The addition of this sum to the other current assets minus the petitioner's current liabilities equals net current assets of \$31,526. Thus, the part of the director's decision with regard to the petitioner's ability to pay the proffered wage based on its net current assets in tax year 2001 is withdrawn.

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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, based on discrepancies in the documentation submitted to the record with regard to the beneficiary's previous work experience. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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 and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The ETA 750, as previously stated, required two years of work experience as an assistant manager of a retail store with a similar product mix.

The regulation at 8 C.F.R. § 204.5(1)(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.
- (B) *Skilled worker*. If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification The minimum requirements for this classification are at least the two years of training or experience.

With the initial petition, the petitioner submitted a letter of work verification from [REDACTED], Gandhinagar, India dated January 20, 1996. The writer of the letter stated that the beneficiary had worked as a manager from March 1, 1993 to January 19, 1996. The letter contained no original signature, although the signature block on the letter identified the signer of the letter as the "proprietor." In his first request for further evidence dated May 5, 2005, the director requested an experience letter with an original signature, current address and point of contact with the previous employer to validate the beneficiary's work experience. In response, counsel stated that the original employer in India was no longer in business and that the petitioner had noted on his cover letter that the beneficiary had worked for another of the petitioner's businesses as an assistant manager for six and a half years.⁹ Counsel then states that the beneficiary's previous employment from 1998 to the April 2001 priority date would satisfy the work experience stipulated on the Form ETA 750.

However, as stated previously, no evidentiary documentation was ever placed in the record to establish the business relationship with [REDACTED], and the petitioner. The petitioner needed to submit a letter from Fatima, Inc., as a previous employer, to establish the beneficiary's previous work experience as an assistant manager. The record does not contain a letter from Fatima, Inc. confirming the beneficiary's employment as an assistant manager as required by 8 C.F.R. § 204.5(1)(3). It is also noted that on his Form 1040 for tax year 1999, the beneficiary identified his work as "cashier," which suggests that the beneficiary may have performed duties other than those of an assistant manager. *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 petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with two years of experience as an assistant manager of a retail store with a similar product mix.

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.

⁹The AAO notes that the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner did not provide a more complete letter of work verification from [REDACTED] which would have provided more probative evidence as to the beneficiary's previous work experience as a manager. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

