

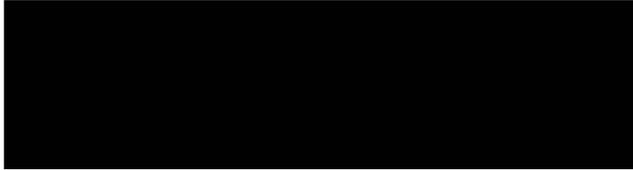
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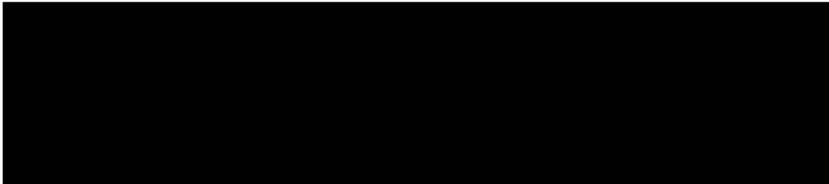
Date: JUN 20 2007

IN RE: Petitioner:
Beneficiary:



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 for

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 wholesale and retail cigarettes distributor. It seeks to employ the beneficiary permanently in the United States as a manager of operations (sales 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 February 16, 2005 denial, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the petitioner had not provided evidence that the beneficiary's studies had resulted in any degree, and the petitioner did not submit an educational equivalency evaluation document with regard to the beneficiary's foreign studies in the Ukraine. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

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 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). Here, the Form ETA 750 was accepted on October 12, 2001.

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 an educational equivalency document prepared by ██████████ Silvergate Evaluations Inc., Baltimore, Maryland. In his evaluation, ██████████ states that Kiev Financial Management University, also known as Kiev Investment Management Institute, is an accredited institution of higher learning in the Ukraine. ██████████ further asserts that Kiev Financial Management University requires graduation from high school and competitive entrance examinations for admission and enrollment, and that the beneficiary in July 1997, completed examinations and was awarded a Specialist Diploma in Management Administration of

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).

Non-Profit Organizations with State Qualification of Manager/Economist. Based on her studies, Dr. Harrow determined that the beneficiary had the equivalent of a U.S. bachelor's degree in business management from an accredited U.S. institution of higher education.

The record also contains a document in the Ukrainian language with an accompanying translation that identifies the document as a diploma from Kiev Financial Management University. Another document lists the coursework undertaken by the beneficiary with an accompanying translation of the courses. The record also contains a letter from ██████████ President, United Motors Ukraine-U.S. Auto Company dated June 28, 2004. In the letter, the letter writer states that the beneficiary worked for the company as an operations manager from January 1996 to August 1998.

On appeal, counsel states that the director never explicitly requested an evaluation of the beneficiary's credentials, despite the fact that the Form ETA 750 indicated that the beneficiary's education was obtained in the Ukraine. Counsel states that a request for further evidence should have been submitted to the petitioner, rather than the denial of the petition.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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).

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 sales manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School 7
 - High School 3
 - College 4
 - College Degree Required bachelor's degree diploma
 - Major Field of Study Management

The applicant must also have two years 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 did not state any further special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated she attended grade and public school in the Ukraine from September 1981 to June 1991, and received a high school diploma. She further stated that she attended Kiev Institute of Management and Economics from September 1992 to June 1997, studying management and economics and received a bachelor's degree in management.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes 4 years of college, with a bachelor's degree in management, and two years of experience in the job offered.

The petitioner clearly delineated four years as the number of years required for the bachelor's degree requirement on the Form ETA 750A. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

Evaluating the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.” With regard to counsel's assertions on appeal, it is not clear why the director did not specifically request an educational evaluation report in his request for further evidence dated July 16, 2004. However, the director did request additional documentation that the beneficiary qualified for the proffered job based on the required experience, training, education and /or special requirements, even though his request focused more on the beneficiary's work and training experience and also on the petitioner's ability to pay the proffered wage. Nevertheless, on appeal, counsel submits an educational equivalency document to further substantiate how the beneficiary's foreign degree would equate to a U.S. bachelor degree in the field of management. With regard to [REDACTED]'s evaluation, submitted on appeal, the AAO notes that the evaluation does not list or contain the diploma and/or transcripts on which the evaluation is based. Further, the evaluator does not conclude that the beneficiary's course of instruction that lead to the diploma to be the equivalent of any specific time spent at a U.S. college or university. Thus, the AAO would give only limited weight to [REDACTED]'s conclusions with regard to the equivalency between the beneficiary's studies in management and a U.S. equivalent degree.

The petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification. Therefore the AAO will comment on the requisites of both classification in these proceedings.

The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(1)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 750 stipulates a four year bachelor's degree in management and two years of experience in the job offered.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the

beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

If the petition 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*, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the beneficiary must have a four year bachelor’s degree or its foreign equivalent in management.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a four year bachelor’s degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent four year foreign degree to a U.S. bachelor’s degree.²

The beneficiary was required to have a four year bachelor’s degree on the Form ETA 750. Based on the beneficiary’s educational documentation, namely, her diploma from Kiev Financial Management University, or Kiev Investment Management Institute, she does possess a four year bachelor degree in management, the

² Under the skilled worker classification, the petitioner would also have to establish that the beneficiary had two years of relevant experience.

only field stipulated on the Form ETA 750. Thus, the petitioner has met its burden with regard to the requisite educational credentials.

Nevertheless, with regard to whether the beneficiary has the requisite two years of relevant work experience as an operations manager, the record is inconsistent. The academic documentation submitted to the record indicates that the beneficiary attended the university from 1992 to 1997, while the letter of work verification dated June 28, 2004 indicates the beneficiary was working for the US Ukraine Motor Company from January 1996 to August 1998. The letter does not indicate if the beneficiary was working full-time or part-time for the company. On Part B, Form ETA 750, the beneficiary indicated that she worked 40 hours a week for this employer and that from June 1991 to January 1996, she worked forty hours a week for Technor Join Venture, Kiev, Ukraine as an operations manager. The record does not contain a work verification letter from Technor Join Venture. The record does not establish if the beneficiary was both attending the university and working fulltime during all of her university studies from 1992 to 1997.

Thus, while the record does establish that the beneficiary attended the university, it does not establish whether the beneficiary had the two years of full time employment as an operations manager stipulated by the Form ETA 750 prior to the 2001 priority date. *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." Thus the petitioner has not established that the beneficiary was qualified to perform the duties of the position as of the 2001 priority date.

Beyond the decision of the director, the petitioner has not established its ability to pay the proffered wage. 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).

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 October 12, 2001. The proffered wage as stated on the Form ETA 750 is \$21.12 per hour (\$38,438.40 per year for a 35 hour week).

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 1988, to have seven employees, a gross annual income of \$250,000 and a net annual income of \$70,000.³ On the Form ETA 750B, signed by the beneficiary on August 24, 2001, the beneficiary claimed to have worked for the petitioner since July 2000.

Evidence submitted with the initial petition or in response to the director's request for further evidence dated July 16, 2004 includes the petitioner's Form 1120 for tax year 2001 that indicates taxable income before net operating loss deduction and special deductions of \$764; checking account balance statements from Sovereign Bank for the months December 2001 and 2002; a checking account statement from Sovereign Bank for March 2004 that indicates an ending balance of \$51,975.23; and checking account statements from Sovereign Bank for the months April to August 2004, that indicated ending balances of \$72,026.05, \$56,232.83, \$55,386.42, \$83,386.20, and \$92,243.52, for the respective months.

The record also contains a statement by counsel submitted in response to the director's request for further evidence. In his statement counsel stated that despite the petitioner's net income of \$764 in tax year 2001, the petitioner's depreciation expenses, cash available, and the petitioner's assets in capital stock were available to pay the proffered wage in 2001. Counsel also states that the December 2001 and 2002 checking account balances also established that at least \$141,696.53 and \$152,991.81 were available to pay the proffered wage in 2001 and 2002. Counsel states that CIS should consider the petitioner's bank statements as evidence of the petitioner's ability to pay the proffered wage. With regard to tax year 2004, counsel states that the petitioner's bank statements for the period starting February 2004 through September 2004 had average monthly balances of over \$50,000. Counsel states that such balances are sufficient evidence to establish the petitioner ability to pay the proffered wage to the beneficiary.

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.⁴ 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).

³ The petitioner's Form 1120 for tax year 2001 indicates that the petitioner was incorporated in 1993.

⁴ It is also noted that the record in the instant petition closed as of the petitioner's response to the director's request for further evidence dated October 12, 2004. Thus, the petitioner would not have had its 2004 tax return available for submission to the record. Thus, the AAO will only examine the petitioner's ability to pay the proffered wage as of the 2001 priority date and through tax years 2002 and 2003.

Counsel's reliance on the balances in the petitioner's Sovereign Bank checking 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.

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, although the beneficiary indicated she had worked for the petitioner since July 2000, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. The record lacks copies of IRS Forms W-2, Forms 1099-MISC or other evidence showing wages paid to the beneficiary. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003.

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 assertions, 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 record before the director closed on October 12, 2004 with receipt by the director of the petitioner's submission in response to the director's request for further evidence. As of that date, the petitioner's 2002 and

2003 tax returns were due. As stated previously, the petitioner submitted its tax return for tax year 2001, the priority year; however, the record does not contain the petitioner's tax returns for any subsequent year. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income for the tax years 2002 and 2003. With regard to tax year 2001, the petitioner's tax return demonstrates that the Form 1120 stated a net income⁵ of \$764. Therefore, for the year 2001, the petitioner did not have sufficient net income to pay 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.⁶ 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. Contrary to counsel's assertion, the AAO does not consider the petitioner's stock holdings as reflected on line 22, Schedule L, when it calculates the petitioner's net current assets. 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.

Once again, the petitioner did not submit its tax returns for any other years other than priority year 2001. Therefore the petitioner cannot establish its ability to pay the proffered wage based on the petitioner's net current assets during the years 2002 or 2003. The AAO also can only examine the petitioner's tax return for 2001 with regard to the petitioner's ability to pay the proffered wage of \$38,438.60 in 2001.

- The petitioner's net current assets during 2001 were \$109,128.

Therefore, for the year 2001, the petitioner did have sufficient net current assets to pay the proffered wage. However, since the petitioner did not submit its tax returns for the years 2002 and 2003, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the proffered wage in these years. While the December 2001 and 2002 bank statements submitted to the record establish the petitioner's ability to pay the entire proffered wage during these two months, these documents would not establish in themselves the petitioner's ability to pay the proffered wage during tax years 2002 and 2003.

On appeal, counsel states that the petitioner's bank statements that covered a period of time from March to September 2004 are sufficient to establish the petitioner's ability to pay the proffered wage in tax year 2004.

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁶According 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.

It is noted that each ending balance in these statements indicated sufficient funds to pay the entire proffered wage during the months in question; however, as stated previously, 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.⁷ Without the petitioner's tax returns for tax years 2002 and 2003, years for which the petitioner could have submitted its tax returns, the record does not reflect sufficient evidence to establish the petitioner's ability to pay the proffered wage in tax years 2002 and 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 2001.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and that the beneficiary is qualified to perform the duties of the proffered position.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁷ Furthermore, the petitioner did not submit bank statements for all twelve months of 2004. Therefore it is not possible to determine whether the petitioner had ending balances throughout the year that exceeded the proffered wage.