

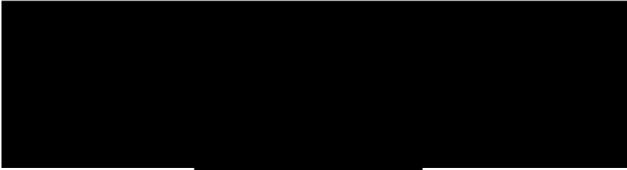
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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
WAC 03 021 53264

Office: CALIFORNIA SERVICE CENTER

Date: MAY 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 preference visa petition<sup>1</sup> was denied by the Director, California Service Center. The petitioner<sup>2</sup> appealed. After review, the Administrative Appeals Office (AAO) remanded the case to the director. The director requested and received additional evidence. The director denied the petition and certified the decision to the AAO for review.<sup>3</sup> The director's decision will be affirmed.

The petitioner is a tile and marble installation firm. It seeks to employ the beneficiary permanently in the United States as an apprentice tile setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three years of qualifying employment experience, and, that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

#### Qualifications of the Beneficiary

As set forth in the director's denial dated October 18, 2005, an issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining the beneficiary's employment experience and found the beneficiary's statements concerning his prior work experience inconsistent and not credible.

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.

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 March 6, 2000.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal,<sup>4</sup> or, in this instance as certified for review.

<sup>1</sup> There is another I-140 petition filed by the petitioner for the same beneficiary on September 18, 2003. The CIS file identification number for that case is WAC 03 261 54934. This case is still pending.

<sup>2</sup> The original attorney of record in this matter is on the list of disciplined practitioners as maintained by the U.S. Department of Justice, Executive Office for Immigration Review and ineligible to represent the petitioner in this matter.

<sup>3</sup> The chronological progression of the case is as follows: the Application for Alien Employment Certification was accepted on March 6, 2000; the I-140 petition was filed October 22, 2002; the director's decision was issued on April 30, 2003; the petitioner appealed on May 27, 2003; the AAO remanded the petition to the director for investigation and entry of a new decision on March 17, 2005; the director issued a request for evidence on May 13, 2005; substitute counsel responded to the request for evidence on August 9, 2005; the director denied the petition and certified the case to the AAO for review on October 18, 2005.

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

Relevant evidence in the record includes copies of the following documents: an explanatory letter from substitute counsel dated August 4, 2005; a Certificate of Employment dated June 30, 2005 from [REDACTED] of Rainbow Tile, (that has since ceased to do business), formerly of North Hollywood, California; a legal brief in support of the appeal dated May 24, 2003; the AAO decision dated March 17, 2005; the director's decision dated April 30, 2003; a request for evidence dated December 2, 2002; an explanatory letter from original counsel dated February 17, 2003; a notarized Certificate of Employment, attested May 19, 2003, from Rainbow Tile; a notarized Certificate of Employment, attested May 23, 2003, from [REDACTED] of City Title & Stone Tile, Inc., of Van Nuys, California; an unpublished AAO decision dated January 29, 2001; various labor certification recruitment and filing materials; an undated CIS Form G-325A prepared by the beneficiary in which he stated that he worked for the petitioner from August 1997 to present time (i.e. based upon the filing dates of related forms submitted with the application, September/October, 2002); an employment offer letter from the petitioner dated September 10, 2002; a summary translation of a marriage certificate issued at Guadalajara, Jalisco, Mexico on October 28, 1994 stating that the beneficiary was married on November 25, 1993; an original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accepted on March 6, 2000; an explanatory letter from the petitioner dated September 9, 2002; the petitioner's U.S. federal Form 1040 tax returns and contractor's license; a "Declaration of [REDACTED]" dated September 12, 2002; a page from the Code of Federal Regulations revised January 1, 1999 concerning documentation necessary to evidence job or training experience; and, a letter from original counsel dated February 17, 2003.

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 workers.* 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.

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).

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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).

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 apprentice tile setter. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.

Education .....	
Grade School	C
High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank
Training .....	Blank
Experience .....	
Job Offered Yrs./Months	3/0

The applicant must have three 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 that relates to other special requirements is blank.

The beneficiary set forth his credentials on Form ETA-750B and signed on February 3, 2000, his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he was unemployed from February 1997 to present (i.e. February 3, 2000). From June 1990 to February 1994, the beneficiary stated that he was employed by the petitioner as a tile setter apprentice 40 hours each week and that the duties of that job were similar to the job offered. The beneficiary does not provide any additional information concerning his employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. He stated that he worked for the petitioner from August 1997 to present time (i.e. based upon the filing dates of related forms submitted with the application, September/October, 2002). No prior employment was indicated.

Concerning his job experience, with the petition, the petitioner submitted a "Declaration of [redacted] dated September 12, 2002; a notarized Certificate of Employment, attested May 19, 2003, from Rainbow Tile; a notarized Certificate of Employment, attested May 23, 2003, from [redacted], of City Title & Stone Tile, Inc., of Van Nuys, California; and, a Certificate of Employment dated June 30, 2005 from [redacted] of Rainbow Tile, (that has since ceased to do business), formerly of North Hollywood, California.

A summary translation of a marriage certificate, in the record, issued at Guadalajara, Jalisco, Mexico on October 28, 1994 stated that the beneficiary was married on November 25, 1993. According to the original certificate the beneficiary identified as [redacted] then 26 years of age and noted in the occupation, workman, resided at Sandoval, [redacted], Guadalajara, Jalisco Mexico.

Submitted on appeal, according to a notarized Certificate of Employment, attested May 23, 2003, from [redacted], of City Title & Stone Tile, Inc., of Van Nuys, California, the beneficiary worked as a tile setter full-time from March 1994 to October 1996. There is no mention in the labor certification of this work

experience between March 1994 to October 1996, and, the petitioner has submitted no independent objective substantiation such as pay stubs, tax returns, bank pay deposits, cancelled checks or verification by co-workers or customers serviced that the beneficiary worked as a title setter full-time from March 1994 to October 1996. We find that this job reference not credible. The job reference has no probative value to determine the beneficiary's qualifications in the proffered position as of the priority date.

According to the petition, the beneficiary's date of entry into the United States was 1993. However, according to the "Declaration of [REDACTED] dated September 12, 2002, he worked for Rainbow Tile formerly of North Hollywood, California from June 1990 to February 1994. According to a Certificate of Employment dated June 30, 2005 from [REDACTED] of Rainbow Tile, formerly of North Hollywood, California, the beneficiary worked for the business during the period he indicated performing duties as a title setter that are similar duties to the job descriptions. While these two submittals are in and of themselves consistent, the term of employment given is contradicted by the marriage record indicated (the statement of the beneficiary's Mexican residence), and, by the statement in the petition of the beneficiary's entry into the United States in 1993. Even if the record of proceeding did not contain multiple inconsistencies, the petitioner failed to submit any tax bills, lease records, utility receipts or pay stubs in the record of proceeding to establish that the beneficiary resided in the United States prior to 1993, and, that the beneficiary was employed for three years in an employment capacity with duties similar to the duties of the proffered position by Rainbow Tile. Since the director's decision was issued on April 30, 2003, there has been ample time to respond to the evidentiary inconsistencies mentioned here, and in part, in the prior decision. 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)).

As noted above, there are multiple evidentiary inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

#### Ability to Pay the Proffered Wage

As set forth in the director's denial dated October 18, 2005, an 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.

The regulation at 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).

Here, the Form ETA 750 was accepted on March 6, 2000.<sup>5</sup> The proffered wage as stated on the Form ETA 750 is \$24.49 per hour (\$50,939.20 per year).

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1040 tax returns<sup>6</sup> for 1998, 1999 and 2000; a partial U.S. Internal Revenue Service Form 1020S tax return for 2001; an undated letter from the petitioner, and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship to September 2001. Thereafter, the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ 3 subcontractors at the time the petition was prepared. The corporation was established on November 29, 2000 with the effective date of the S corporation election, September 1, 2001. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year as a sole proprietorship. The first S corporation tax return was for a partial year. On the Form ETA 750B, signed by the beneficiary on, the beneficiary did claim to have worked for the petitioner.

On appeal, on the issue of the ability to pay the proffered wage, substitute counsel made no statement on this issue. Counsel did request on August 4, 2005, additional time to submit pertinent financial documentation to the director's request for evidence but none was submitted. The regulations do not provide an extension of time to respond to requests for evidence. See C.F.R. §103.2(b)(8). Although certified decisions permit the

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<sup>5</sup> It has been approximately seven years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>6</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

submission of briefs, and the director provided such notice to counsel, no additional contentions, assertions or evidence was presented on certification. *See* C.F.R. §103.4(a)(2).

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 CFR § 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. No wage or compensation payments were submitted although the director requested it in his requests for evidence dated December 2, 2002, and May 13, 2005. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner is obligated to demonstrate that is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date.

#### Sole Proprietorship

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The I-140 petitioner's business was a sole proprietorship in 2000. Therefore, to determine the ability of the petitioner to pay the proffered wage, his living costs, that is a statement of recurring household expenses for the petitioner's family must be considered. This statement must indicate all of the family's household living expenses. Such items generally includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable,

phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

### Corporation

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 gross sales and profits exceeded the proffered wage 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.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. 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 that 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:

- In 2000, the Form 1040 stated adjusted gross income<sup>7</sup> of \$56,963.00. Schedule C stated gross receipts of \$254,801.00, cost of labor of \$115,561.00 and net profits of \$61,991.00.<sup>8</sup>
- In 2001, the Form 1020S stated net income for the period September 1, 2001 to December 31, 2001 of \$7,148.00.<sup>9</sup>

Since the proffered wage is \$50,939.20 per year, the petitioner did not have the ability to pay the proffered wage from an examination of his adjusted gross income for 2000, or, its net income for 2001. It is not

<sup>7</sup> IRS Form 1040, Line 31.

<sup>8</sup> IRS Form 1040, Schedule C, Part II, Line 31.

<sup>9</sup> IRS Form 1120S, Line 21.

credible that the petitioner could support a family of four on the difference between the proffered wage and his adjusted gross income for the year 2000.

If the net income the petitioner demonstrates it had available during the 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.<sup>10</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during the last quarter of 2001 were \$3,070.00.

Therefore, for the period examined, the petitioner did not have sufficient net current assets 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.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

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 director's decision is affirmed. The petition remains denied.

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<sup>10</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.