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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC-04-073-51801

Office: TEXAS SERVICE CENTER

Date: MAY 1 8 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pool tile installation company. It seeks to employ the beneficiary permanently in the United States as a 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 (DOL). As set forth in the director's March 17, 2005 denial, the director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification application. 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.

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 April 14, 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 the beneficiary's identification card dated August 31, 1992 and 1099 forms for 1995 and 1996 issued by [REDACTED], the beneficiary's Florida worker's compensation exemption certificate, **the beneficiary's certificate of insurance for commercial general liability issued on August 16, 1995, the beneficiary's 1099 forms for 1995 and 1996 issued by [REDACTED], the beneficiary's certificate of competency issued by Broward County, Florida for marble and tile setting valid until August 31, 2001, three letters from the beneficiary's customers, the beneficiary's individual income tax returns for 1997 through 1999, and an affidavit of the beneficiary dated September 23, 2005.** Other relevant evidence in the record includes an experience letter from [REDACTED], the beneficiary's certificate of competency issued by Broward County for tile and marble with experience date of August 31, 2005, the beneficiary's individual income tax returns with 1099 forms for 2000 through 2003, and an affidavit of the beneficiary dated March 9, 2005. The record does not contain any other evidence relevant to the beneficiary's requisite four years of experience.

On appeal, counsel asserts that the newly submitted evidence ranging from the year of 1992 up through 1999, in addition to the previously submitted documentation from 2000 up through 2003 establishes that the beneficiary possesses the requisite four years of experience in the job offered.

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).

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

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 4 years |
| | Related Occupation | Blank |

The duties of the proffered job 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 does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 9, 2001 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 has been working 40 hours per week as a tile setter for [REDACTED] from January 1997 to April 2001, the date he signed the ETA 750B. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The instant I-140 petition was submitted on January 13, 2004 with an experience letter from [REDACTED] as evidence pertinent to the beneficiary's qualifications as required by the above regulation. This letter stated concerning the beneficiary's work experience in pertinent part that:

This letter will confirm that [the beneficiary] is employed as Tile Setter for our Company, He started working in our company in January 1997 until the present.

First of all, this experience letter was not dated, but faxed on October 23, 2003. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 14, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Therefore, the beneficiary's experience after the priority date of April 14, 2001 cannot be considered as part of the beneficiary's qualifications for the proffered position. Although the period from January 1997 to April 2001 is more than four years, the experience letter did not verify the beneficiary's full time

employment. If the four years of employment was part time, the beneficiary did not meet the four years requisite experience requirement.

On appeal counsel asserts that the beneficiary's individual tax returns and 1099 forms establish the beneficiary's full time employment. The beneficiary's tax returns for 1997 through 1999 do not include any W-2 or 1099 forms from [REDACTED], therefore, the petitioner failed to submit evidence to support the assertion in the experience letter, and further failed to establish the beneficiary's employment with [REDACTED] from 1997 through 1999. The beneficiary's 1099 forms for 2000 and 2001 issued by [REDACTED] show that the beneficiary worked for and was paid by that company. However, it is unlikely that the beneficiary worked full time for the company in 2000 and 2001 with the annual compensation of \$9,725.91 and \$9,083.67 respectively.

Secondly, the experience letter from [REDACTED] was signed, but did not identify the name and title of the writer. The regulation expressly provides that an experience letter must be from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer. Without the name and title of the writer in the company, the AAO cannot determine whether this letter is from the employer.

Finally, the letter did not include a specific description of the duties the beneficiary performed as required by the regulation. Without a specific description of the duties, the AAO cannot determine whether the beneficiary's more than four years of experience with [REDACTED] qualifies him to perform the duties of the proffered position set forth in Item 13 of the Form ETA 750A.

The director found an inconsistency in the beneficiary's claim to employment because for the period the experience letter claimed the beneficiary was working, he was not authorized to obtain employment. The AAO concurs with counsel's assertion that the director's emphasis on unlawful employment is unnecessary. There is no provision to prohibit for the beneficiary of a labor certification to use unlawful employment experience to qualify himself for the proffered position set forth on the Form ETA 750. Nonetheless, for the reasons discussed above, the experience letter from [REDACTED] does not meet the requirements under the regulation at 8 C.F.R. § 204.5(g)(1), and cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The petitioner failed to demonstrate that the beneficiary possessed the requisite four years of experience in the job offered for the proffered position as required by the ETA 750 with the letter from [REDACTED].

On appeal counsel asserts that the beneficiary had more experience in addition to that with [REDACTED]. Counsel claims that the beneficiary worked for [REDACTED] from 1992 to 1996 and submits the beneficiary's identification card dated August 31, 1992 and 1099 forms issued by that company in 1995 and 1996. The identification card of The Pool People Inc. was issued by the company for the beneficiary in 1992, however, the identification card itself does not automatically establish that the beneficiary worked for that company as a full time tile setter in 1992. The 1099 forms indicate that the beneficiary was paid \$2,754 in 1995 and \$16,262.50 in 1996. However, the 1099 forms do not establish that the beneficiary worked for that company as a tile setter, and do not establish that the beneficiary worked on a full time basis. On appeal counsel submits the beneficiary's 1099 forms for 1995 and 1996 from E.F.G. Contracting, Inc. and claims that the beneficiary worked as an independent contractor for that company. However, the 1099 forms submitted do not establish that the beneficiary worked for this company as a tile setter and the compensation of \$17,454.75 in 1995 and \$6,573.50 in 1996 does not establish the beneficiary's full time employment. The record does not contain experience letter either from [REDACTED] or [REDACTED] to verify the beneficiary's employment with the companies for any period of time. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988);

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). 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)). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, the petitioner failed to demonstrate that the beneficiary worked as a full time tile setter with T [REDACTED] and/or F [REDACTED] from 1992 to 1996 with primary regulatory-prescribed evidence.

On appeal counsel claims that the beneficiary has been self-employed in the tile setting business for many years. The record contains copies of the beneficiary's certificates of competency for tile and marble issued by Broward County, Florida with expiration dates of August 31, 2001 and August 31, 2005 respectively, and a construction industry certificate of election to be exempt from the Florida worker's compensation law issued to the beneficiary as an owner or proprietor for tile work in 1995 and a certificate of commercial general liability insurance purchased by the beneficiary for a period from August 16, 1995 to August 1996. The beneficiary's individual tax returns for 1997 through 2003 show that the beneficiary filed his tax returns under the status of a sole proprietor; that the schedule Cs indicate that the beneficiary runs his own business; and that all income the beneficiary reported in his tax returns was from his business. These documents establish that the beneficiary has been self-employed at least since 1995. Therefore, it appears that a letter from a former employer as generally required by the above regulation is unavailable. Per the regulation, other documentation relating to the alien's experience or training must be considered. See 8 C.F.R. § 103.2(b)(2)(i). Counsel argues that the submitted documentation has established that the beneficiary possessed the requisite four years of qualifying employment experience as a tile setter prior to the priority date.

The AAO finds that having a certificate of competency, purchasing commercial general liability insurance and being exempted from the Florida worker's compensation law may establish that the beneficiary is self-employed as a sole proprietor, but does not automatically translate into having the required four years of experience as a tile setter prior to the priority date. The relevant evidence of the beneficiary's qualifying four years of full time self-employment experience in the record includes the beneficiary's individual tax returns with schedule C for the years 1997 through 2001² and three letters from the beneficiary's customers. The beneficiary's tax returns shows that the beneficiary's income from his brick and tile business was \$13,709 in 1997, \$7,172 in 1998, \$7,318 in 1999, \$10,627 in 2000 and \$6,122 in 2001. Compared with the proffered wage the petitioner offered to the beneficiary in the instant case, the beneficiary's compensation from his self-employment was at most one third, and at least one fifth of the proffered wage. Therefore, based on the beneficiary's limited income from 1997 to 2001, it is reasonably concluded that the petitioner failed to establish that the beneficiary possessed the requisite four full time years of experience prior to the priority date with the evidence discussed above.

² The record contains copies of the beneficiary's individual tax returns for 1997 through 2003, however, the AAO will review and consider the tax returns for 1997 through 2001 only since the beneficiary must qualify for the proffered position prior to the priority date which in the instant case is April 14, 2001.

Counsel also submits three letters from Linda Wright, Joseph Vinski, and Pat Dacruz as customers claiming that the beneficiary made service in their house, setting bricks and tiles in their pool. Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidence standards. Letters from people who have interacted with the beneficiary while he worked for or operated another company cannot be used in lieu of a letter from the actual company for which the beneficiary worked without solid objective evidence. These letters did not come with any documentary evidence to support their contents. 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)).

In addition, the letters that have been provided are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Furthermore, all the three letters are formatted exactly same with the same contents except for the names and addresses. This similarity casts doubt on the origin and reliability of the letters. "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 petitioner has not submitted sufficient evidence to demonstrate that the beneficiary possessed the requisite four full time years of experience as a tile setter prior to the priority date.

In the decision the director pointed out another inconsistency between the beneficiary's statements and CIS records, namely that the beneficiary attests to never having signed any petition or taken any medical examination, but that the record reflects that the beneficiary took a medical examination and filed Form I-485 and G-325A. The record shows that the beneficiary did concurrently file the Form I-485 adjustment of status application based on an I-130 immigrant petition for alien relative as a spouse of a U.S. citizen. The beneficiary's I-485 was denied on February 20, 1996 because the beneficiary failed to appear for an interview.

On appeal counsel submits another affidavit of the beneficiary to resolve the inconsistency pertinent to the previously filed adjustment application. The beneficiary explains that he answered "no" to the questions that "Is the person you are filing for in removal proceedings?" and that "Has any immigrant visa petition ever filed by or on behalf of this person?" because he did not recall and he did not receive any documents. In his second affidavit notarized on September 23, 2005 the beneficiary states in pertinent parts that:

[I]n 1995, after just having arrived in the United States, I did not speak English and it is possible that I may have signed some papers under the direction of the individual "Evanio" who represented himself to me as a licensed attorney but was not. However, as stated in my

previous affidavit, "I did not know what papers [redacted] had filed for me" and therefore, if I signed, I did not know what I was signing, as it could have been anything, as [redacted] was not a forthright individual.

[redacted] unlawfully represented himself to me as an attorney, I have reason to believe [redacted] was convicted for the unlicensed practice of law and was sent to prison. I am a victim of his crime and I am left without knowing what he did in my name.

I believe that by paying someone who I thought was a "licensed attorney" \$5,000 to handle my case, that my case would be handled in accordance with the laws of the United 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel's assertions on appeal cannot overcome the director's findings that the beneficiary has not met the experience requirements of the proffered position as designated on the Form ETA 750 prior to the priority date.

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

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. DOL. *See* 8 C.F.R. § 204.5(d). As noted previously, the priority date in this case is April 14, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). On the Form ETA 750B signed by the beneficiary on April 9, 2001, he did not claim to have worked for the petitioner.

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 did not submit the beneficiary's W-2, 1099 forms or any other compensation documents in 2001 or subsequently and the beneficiary did not claim to have worked for the petitioner. The petitioner failed to demonstrate that it paid the beneficiary any amount of compensation in these years. Therefore, the petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$31,200 per year each of the years from 2001 through the present.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 evidence shows that the petitioner was structured as an S corporation and its fiscal year is based on a calendar year. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2002. The petitioner's 2002 tax return demonstrates that the petitioner had a net income³ of

³ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income

\$200,963 in 2002. Therefore, for the year 2002, the petitioner had sufficient net income to pay the proffered wage that year, and the petitioner established its ability to pay the proffered wage in 2002 with its net income.

The regulation at 8 C.F.R. § 204.5(g)(2) expressly requires a petitioner to demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence with its tax returns, annual reports or audited financial statements. The priority date in the instant case is April 14, 2001, and therefore, the petitioner must demonstrate its ability to pay the proffered wage from 2001, the year of the priority date. However, the record does not contain any regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage in 2001. The record before the director in the instant case closed on March 14, 2005 with the receipt by the director of the petitioner's submission of the response to the notice of intent to deny (NOID). As of that date the petitioner's federal tax return for 2003 should have been available. However, the petitioner did not submit its 2003 tax return. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without the petitioner's tax returns or other regulatory-prescribed evidence for 2001 and 2003, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage for these years. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Bank statements for the petitioner's bank account for 2003 are not considerable in determining the petitioner's ability to pay the proffered wage in 2003. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 and 2003 through an examination of wages paid to the beneficiary, its net income or its net current assets.

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.

from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.*