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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 03 2007

EAC-04-250-52003

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. In connection with results of the beneficiary's application to adjust status to lawful permanent resident, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain revoked.

The petitioner is a salon and day spa. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. The director revoked the approval of the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 2, 2006 NOR, the single issue in this case is whether or not the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary is qualified to perform the duties of the proffered position. The director noted the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience and the ability to obtain the license prior at the time of employment.

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 DOL 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 26, 2001.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1].

[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

On appeal, counsel submits a brief. Other relevant evidence in the record includes an experience letter from [redacted] a hair stylist at Hair Celine in Arlington, Virginia dated February 23, 2004 February 23, 2004 letter), a letter from [redacted], a client of Hair Celine, dated May 5, 2006 ([redacted] May 5, 2006 letter), a copy of a paycheck issued by [redacted] beneficiary in 1995, the beneficiary's W-2 form for 1998 from Hair Celine, a work certificate from Nilda [redacted] the manager-owner of the Nilda Institute of Beauty company (Instituto De Belleza Nilda or IBN), a letter from [redacted] the owner of the petitioner dated May 8, 2006 (the petitioner's May 8, 2006 letter), the beneficiary's W-2 forms for 2000 through 2004 from the petitioner and the beneficiary's individual tax returns for 2001 through 2004. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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 cosmetologist. Item 14 describes the requirements of the proffered position as follows:

14.	EXPERIENCE	
	Job Offered	2 years
	Related Occupation	2 years
	Related Occupation (specify)	Various positions in beauty salon.

The duties of the proffered position 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 reflects other special requirements as follows: "Must have or be able to obtain license at time of employment."

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 15, eliciting information of the beneficiary's work experience, she represented that she had been working 40 hours per week as a "Shampoo Attendant" for the petitioner since July 1999. Prior to that, the beneficiary represented that she worked 40 hours per week as a "Shampoo Attendant" for a beauty salon named Hair Celine in Arlington, Virginia from February 1995 to December 1998, and worked 40 hours per week as a "Cosmetologist" for a beauty salon

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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).

named Instituto [redacted] from January 1985 to December 1985. She did not provide any additional information concerning her employment background on that form.

With the initial filing, the petitioner submitted the [redacted] February 23, 2004 letter as evidence to establish the beneficiary's requisite work experience. Based on the interview, evidence in the file and the sworn statement, the CIS district officer determined that the beneficiary did not have the necessary experience to qualify as a skilled worker. The director subsequently issued a NOIR on April 17, 2006 giving the petitioner 30 days to submit evidence in opposition to the proposed revocation upon receipt of a recommendation from the district office. A response to the director's NOIR was received on May 15, 2006 from counsel with the [redacted], the beneficiary's paycheck from Hair Celine in 1995, the beneficiary's W-2 form for 1998 from [redacted] a work certificate from IBN, the petitioner's May 8, 2006 letter, the beneficiary's W-2 forms for 2000 through 2004 from the petitioner and the beneficiary's individual tax returns for 2001 through 2004.

The director revoked the petition on August 2, 2006 stating that the response to his NOIR failed to adequately confirm the beneficiary's qualifications and there was no evidence to show that the beneficiary had met the requirements of two years of experience as a cosmetologist or two years of experience in various positions in a beauty salon and of having or to be able to obtain a license at the time of employment.

On appeal, counsel asserts that the beneficiary has at least two years of experience in various positions in a beauty salon and qualifies for the position offered with submitted evidence of her 11 months of experience in Bolivia as a cosmetologist, over 3 years of full-time experience at Hair Celine and as a helper since July 1999 for the petitioner. Counsel also asserts that the regulations do not require the beneficiary to obtain a cosmetologist license before the adjustment of status application is approved.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

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. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 204.5(l)(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.

The record of proceeding contains letters and other documents to verify the beneficiary's three employment periods: 11 months from January 1985 to December 1985 as a cosmetologist at IBN, 3 years and 10 months from February 1995 to December 1998 as a shampoo attendant at Hair Celine, and 1 year and 9 months from July 1999 to April 2001 as a shampoo attendant at the petitioning entity. To verify the employment with IBN as a cosmetologist, the petitioner submitted the work certificate from IBN. As previously noted, the IBN work certificate was on the business letterhead, signed by [redacted] as the manager-owner of the company. The original certificate is in Spanish and submitted with English translation and the translator's certificate. It certified the beneficiary's 11 months of experience as a cosmetologist with IBN in Cochabamba, Bolivia. However, this verification is not supported by the beneficiary's sworn statement at her adjustment of status application interview[2]. Further, the IBN certificate did not verify the beneficiary's full-time employment and did not include a specific description of the duties performed by the alien as required by the above quoted regulation. Therefore, the IBN work certificate cannot be accepted as primary evidence prescribed by the regulation at 8 C.F.R. § 204.5(g)(1).

For the alleged 3 years and 10 months of experience as a shampoo attendant at Hair Celine in Arlington, VA, the record contains the Nhounisoung's February 23, 2004 letter, the [redacted] May 5, 2006 letter, a paycheck issued by Hair Celine to the beneficiary in 1995, and the beneficiary's W-2 form for 1998 from Hair Celine. The [redacted] February 23, 2004 letter was on a computer-created Hair Celine letterhead and signed by [redacted] as a hair stylist for Hair Celine. This letter did not come with any explanation whether [redacted] was the owner or ran Hair Celine as a hair stylist. In response to the director's NOIR, both counsel and the petitioner claimed that the beneficiary was unable to get the work experience letter from the owner at Hair Celine because of her immigration status. Therefore, it is clear that the letter from [redacted] a hair stylist at Hair Celine, is not a letter from the beneficiary's former employer as required by the regulation, nor was the Johnson's May 5, 2006 letter. [redacted] provided her letter as a client of Hair Celine. A client letter cannot be used

[2] In her sworn statement at the adjustment interview, the beneficiary stated that she worked as a cosmetologist/facial specialist for six months outside of the United States.

in lieu of a letter from the actual company for which the beneficiary worked without solid objective evidence. As a client of Hair Celine for more than one year, [redacted] was not in the position to verify the beneficiary's full-time employment for 3 years and 10 months from February 1995 to December 1998.

The regulation at 8 C.F.R. § 204.5(g)(1) permits the consideration of other documentation of the beneficiary's qualifying experience if the required evidence is not available. However, the petitioner did not establish that the experience letter from the beneficiary's former employer was unavailable. Counsel's claim that the beneficiary was unable to obtain an experience letter from the owner of Hair Celine is not sufficient. 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)).

The beneficiary's paycheck from Hair Celine indicates that the beneficiary was paid a gross payment of $600 some time at the end of year 1995, however, the paycheck did not show the beneficiary's position and the pay period of the pay check. The beneficiary's W-2 form for 1998 from Hair Celine shows that [redacted] t/a Hair Celine paid the beneficiary in the amount of $8,010 as wages, tips, other compensation in 1998. It is unlikely that the beneficiary worked for the whole year of 1998 on a full-time basis with such an amount of compensation. Again the W-2 form did not verify the beneficiary's position with Hair Celine. Thus, the paycheck and W-2 form for the beneficiary may support that the beneficiary worked for Hair Celine some time in 1995 and 1998, however, these documents failed to demonstrate that the beneficiary worked as a full-time shampoo attendant from February 1995 to December 1998.

Therefore, the evidence submitted in the record is not sufficient to verify the beneficiary's work experience with Hair Celine, and further the petitioner failed to establish that the beneficiary worked for Hair Celine as a full-time shampoo attendant during the period from February 1995 to December 1998 with regulatory-prescribed evidence.

In response to the director's NOIR, the petitioner submitted a letter dated May 8, 2006. The petitioner's May 8, 2006 letter was signed by [redacted], the owner of the petitioner, and states in pertinent part that:

> [The beneficiary] has been employed with us since July 1999. During the period of employment up until the date of filing the labor certification application, [the beneficiary] worked as a helper in our salon. Below is a description of her duties and responsibilities:
>
> > Shampoo customer's hair, recommend hair products, massage customer's scalp, assist in performing various skin care, such as chemical peeling, microdermabrasion, power peel treatments, facial treatments perform nail care, massages and other related tasks, under supervision of senior cosmetologist.

The petitioner's May 8, 2006 letter is from the beneficiary's current employer and includes a specific description of the duties the beneficiary performs. The letter verifies that the beneficiary has been working for the petitioner since July 1999. However, since the priority date in the instant case is April 26, 2001, only the beneficiary's work experience for the one year and nine months from July 1999 to April 2001 can be considered to qualify for the proffered position. It is noted that the Form ETA 750 requires two years of experience in the job offered, i.e. cosmetologist, or two years of experience in the related occupation of various positions in beauty salon. The AAO concurs with counsel's argument that the position of helper/shampoo attendant is one of the various positions in a beauty salon and should be considered as qualifying experience. The petitioner did not verify the beneficiary's full-time employment in the petitioner's May 8, 2006 letter. The record contains the beneficiary's W-2 forms from the petitioner for 2000 through 2004. The beneficiary's W-2 forms for 2000 and 2001 show that the beneficiary was paid $18,797.18 in 2000 and $20,176.73 in 2001 respectively. This office notes that these amounts were greater than the prevailing wage for the position of shampooer in the greater Washington, DC area for 2001[3]. However, the petitioner only verifies the beneficiary's one year and nine months of experience in a position in a beauty salon while the Form ETA 750 requires two years of experience in the job offered or in various positions in beauty salon.

In conclusion, the petitioner failed to establish the beneficiary's experience through the employment with IBN or Hair Celine with regulatory-prescribed evidence, and further, failed to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date although it verifies the beneficiary's one year and nine months of experience with the petitioner. Therefore, the petitioner failed to establish the beneficiary's qualifying experience. Counsel's assertions on appeal cannot overcome the ground of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the insufficient evidence in factual assertions presented by the beneficiary concerning her qualifications for the proffered position.

On appeal counsel asserts that director erred in revoking the approval of the petition on the ground that the petitioner failed to submit evidence to show that the beneficiary has or is able to obtain a cosmetology license because the director did not raise the issue of the licensure requirement in his NOIR.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

The record shows that on April 17, 2006, the director issued the NOIR. The director's NOIR states in pertinent part that:

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[3] *See* http://www.flcdacenter.com/OesArchiveResults.aspx?code=39-5093&area=8840&year=1&year=1&source=1 (accessed on November 11, 2007).

> It has now come to the attention of this office that the beneficiary is not qualified for the position because two years of work experience as a cosmetologist is required for the job offered. Through an interview with the beneficiary it was found that she only worked as a cosmetologist for six months. Her current position is a facial assistant.

In the investigative report or memorandum attached to the NOIR, the interviewing officer stated that:

> While the applicant did not need her cosmetology license to qualify for the position stated in the labor certification, according to the sworn statement, she did obtain her cosmetology license in Bolivia.

Neither the NOIR nor the district office's recommendation notified the petitioner of the derogatory information or offered the petitioner an opportunity to rebut the information and present information in its own behalf before the decision was rendered. If the petitioner was notified of the ground of licensure issue in the NOIR, it could have submitted its assertions and additional evidence to rebut that ground of revocation.

In view of the foregoing, the ground of revocation regarding failure to submit any evidence to show that the beneficiary has or is able to obtain a cosmetologist license will be withdrawn because the director failed to offer the petitioner an opportunity to rebut this ground before the revocation was rendered pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i).

Beyond the director's revocation and counsel's assertions on appeal, the AAO will discuss the issue of whether or not the petitioner has demonstrated that it had the continuing ability to pay the proffered wage from 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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As previously noted, the Form ETA 750 in the instant case was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $17.94 per hour ($37,315.20 per year). On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since July 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 forms showing the petitioner paid the beneficiary during the relevant years from 2001 through 2004 and four paystubs in 2005. These W-2 forms show that the petitioner paid the beneficiary $20,176.73 in 2001, the year of the priority date, $25,006.81 in 2002, $28,993.32 in 2003 and $26,102.28 in 2004. The paystubs show that the petitioner paid the beneficiary a bonus of $500 for the June 26-July 2, 2005 week, a commission of $429 for the July 10-16, 2005 week, a commission of $393 for the July 24-30, 2005 week, and a commission of $422 for the August 7-13, 2005 week. The proffered weekly wage is $717.60 in the instant case, therefore, the petitioner failed to demonstrate that it paid the beneficiary the full proffered wage in 2005. In addition, the regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The record contains no evidence that the petitioner guaranteed any commission or bonus to the beneficiary. The petitioner may not, therefore, count any portion of the bonus or commission the beneficiary received during the salient years as evidence of its own ability to pay the proffered wage. The petitioner failed to demonstrate that it paid the beneficiary the full proffered wage during the relevant years and failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the differences of $17,138.47 in 2001, $12,308.39 in 2002, $8,321.88 in 2003 and $11,212.92 in 2004 between wages actually paid to the beneficiary and the proffered wage and the full proffered wage of $37,315.20 in 2005 respectively with its net income or its net current assets.

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 contrary to counsel's assertions. Counsel's assertion in his letter submitted with the petition that depreciation should be considered as an additional resource that the employer can use to pay the beneficiary because depreciation is a non-cash item and is not an actual expense incurred by the company is misplaced. 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). Counsel's reliance on the petitioner's gross income of $561,384 for 2001 is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 and 2002. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year runs from April 1 to March 31. The tax returns for the fiscal years 2001 and 2002 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the year of the priority date:

- In the fiscal year 2001 (4/1/01-3/31/02), the Form 1120 stated a net income[4] of $(7).

[4] Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

- In the fiscal year 2002 (4/1/02-3/31/03), the Form 1120 stated a net income of $623.

Therefore, for the fiscal years 2001 and 2002, the petitioner did not have sufficient net income to pay the differences of $17,138.47 in 2001 and $12,308.39 in 2002 between wages actually paid to the beneficiary and the proffered wage respectively.

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. Counsel's reliance on the petitioner's cash holdings of $37,166 by the end of the year 2001 without being balanced by the petitioner's current liabilities is also misplaced.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during its fiscal year 2001 were $12,446.
- The petitioner's net current assets during its fiscal year 2002 were $16,557.

Therefore, for the fiscal year 2001, the petitioner did not have sufficient net current assets to pay the difference of $17,138.47 between wages actually paid to the beneficiary and the proffered wage, while the petitioner's net current assets during its fiscal year 2002 were sufficient to pay the difference of $12,308.39 between wages actually paid to the beneficiary and the proffered wage that year.

The record does not contain any evidence to show that the petitioner had additional net income or net current assets in 2001. The record before the director closed on August 31, 2004 with the receipt by the director of the petitioner's submission of the petition. As of that date the petitioner's federal tax return for its fiscal year 2003 (4/1/03-3/31/04) should have been available. However, the petitioner did not submit its tax return, annual report or audited financial statements for its fiscal year 2003, nor did counsel provide any evidence explaining why these regulatory-prescribed documents were not available. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of*

[5]According 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.

Brantigan, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax return, annual report or audited financial statement would have demonstrated the amount of net income and net current assets the petitioner reported and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage for its fiscal year 2003 because of its failure to submit these documents.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, 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, its net income or its net current assets except for 2002.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for revocation of the approval of the petition. 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. The director's decision on August 2, 2006 is affirmed. The approval of the petition remains revoked.