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WAC-03-066-50185

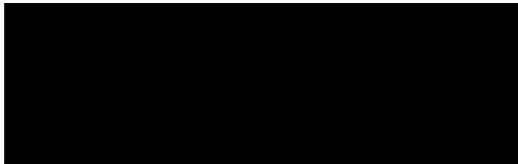
Office: CALIFORNIA SERVICE CENTER

Date: APR 22 2005

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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides health care services and is involved in trading. It seeks to employ the beneficiary permanently in the United States as a financial analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 24, 1997. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which amounts to \$29,120 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$1,200,000, and to currently employ 34 workers. In support of the petition, the petitioner submitted its Forms 1120, U.S. Corporation Income Tax Returns, for the years 1999, 2000, and 2001.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 18, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's 1997-2002 corporate tax returns; evidence of the beneficiary's employment and financial status; the petitioner's quarterly wage reports for the last four quarters; and payroll records.

In response, the petitioner submitted its corporate tax returns on Form 1120 for the years 1997, 1998, 1999, 2000, and 2001, and an unaudited profit and loss statement for 2002. The tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Net income	\$20,010	\$18,527	\$49,799	\$54,333	\$35,509
Current Assets	\$4,784	\$10,338	\$37,762	\$591,900	\$648,191
Current Liabilities	\$0	\$54,600	\$89,097	\$78,978	\$175,582
Net current assets	\$4,784	-\$44,270	-\$51,335	\$512,922	\$472,609

In addition, counsel submitted copies of [REDACTED] Inc.'s quarterly wage reports for the first quarter in 2003 and last three quarters in 2002 and its W-3 forms evidencing its total wages paid to employees from 1997 to 2002. The quarterly wage reports and individual income tax returns do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 28, 2003, denied the petition. The director determined that the petitioner had established its ability to pay the proffered wage in 2000 and 2001, but not in 1997, 1998 or 1999. In 1999, the director noted that the petitioner filed multiple petitions for other sponsored immigrants but could support one proffered wage out of its net income. The director also noted that the petitioner's related entities had multiple petitions pending.

On appeal, counsel asserts that when non-cash deductions, such as depreciation, officer's compensation, and cash assets, are added back to the petitioner's net income, the petitioner can demonstrate its ability to pay the proffered wage in 1998 and 1999. The petitioner submits an accountant's report on appeal to support that assertion. Additionally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the premise that Citizenship and Immigration Services (CIS) should not only consider tax returns but all financial factors and circumstances of the petitioner's case. Counsel also asserts that the petitioner did not have the obligation to pay any wages until each sponsored immigrant obtains lawful permanent resident status; therefore, counsel asserts that the director erred in considering multiple pending petitions against the petitioner's net income. Finally, counsel asserts that the director erred by failing to consider the beneficiary's ability to generate income and cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

At the outset, the unaudited financial statements that counsel submitted for 2002 in response to the director's request for additional evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the petitioner's profit and loss statement for 2002 will not be considered.

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<sup>1</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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 establish that it employed and paid the beneficiary the full proffered wage in 1997, 1998, 1999, 2000, or 2001.

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). 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. Thus, contrary to counsel's assertions on appeal, CIS will not add the petitioner's non-cash deductions back to its net income.

The petitioner's net incomes in 1997, 1998, 1999, 2000, and 2001 of \$20,010, \$18,527, \$49,799, \$54,333, and \$35,509, respectively, are all greater than the proffered wage, with the exception of 1997's and 1998's net incomes. Thus, the petitioner can demonstrate its continuing ability to pay the proffered wage out of its net income in 1999, 2000, and 2001, but only if it does not have too many other petitions pending. It cannot demonstrate its ability to pay the proffered wage out of its net income in 1997 or 1998 because its net incomes are less than the proffered wage in each year.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities

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<sup>2</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

are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 1998 and 1999, however, were negative, and only \$4,784 in 1997. Thus, the petitioner cannot demonstrate its ability to pay the proffered wage out of its net current assets in 1997, 1998 or 1999. Depending on how many other immigrants it sponsored in 2000 and 2001, the petitioner's net current assets of \$512,922 and \$472,609 in each year respectively, may illustrate its continuing ability to pay the proffered wage.

The AAO has accessed an internal database and determined that the petitioner or its affiliated companies filed three other immigrant petitions in 1997 that are still pending; one additional immigrant petition in 1998 that was approved; filed no additional petitions in 1999, 2000 and 2001; filed two petitions in 2002 that are still pending; and filed two petitions in 2003 that were denied. Contrary to counsel's assertion, a petitioner must show its ability to pay the proffered wage beginning on a priority date and continuing until the immigrant obtains lawful permanent residence. While it may not have to actually pay those wages, it must show that it can. Thus, the petitioner must have enough funds to support the wages of all sponsored immigrants in each year, whether those petitions are pending or finally adjudicated. The AAO will assume, since it does not have files or evidence from the petitioner concerning the other cases, that the proffered wages in each of the other petitions pending are similar to the wage in the instant case. Thus, the petitioner must establish that it can pay four wages in 1997, three wages in 1998; two wages in 1999, 2000, and 2001; and four wages in 2002<sup>3</sup>.

The petitioner has not demonstrated that it paid any wages to the beneficiary in 1997, 1998, 1999, 2000, or 2001. In 1997, the petitioner shows a net income of only \$20,010 and net current assets of only \$4,784 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets, especially since it would be obligated to pay four salaries in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1997.

In 1998, the petitioner shows a net income of only \$18,527 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets, especially since it would be obligated to pay two salaries in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1998.

In 1999, the petitioner shows a net income of \$49,799 and negative net current assets. Neither its net income nor net current assets could cover two proffered wages and thus the petitioner cannot demonstrate its ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has, therefore, not shown the ability to pay the proffered wage during 1999.

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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.

<sup>3</sup> The AAO notes that the petitioner may use other name variations for itself and its affiliated companies that were not part of the CIS database search results. Thus, there could be additional pending petitions for which the petitioner would be obligated to pay additional proffered wages.

In 2000, the petitioner shows a net income of \$54,333 and net current assets of \$512,922. Because its net current assets are greater than two proffered wages, it has therefore demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2000.

In 2001, the petitioner shows a net income of \$35,509 and net current assets of \$472,609. Because its net current assets are greater than two proffered wages, it has therefore demonstrated the ability to pay the proffered wage out of its current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001.

There is insufficient information pertaining to 2002, but the petitioner would need to demonstrate that it could cover four proffered wages in any additional proceedings in this matter.

Counsel references *Matter of Sonogawa*, 12 I&N Dec. at 612, which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1997, 1998 or 1999 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d at 898, in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a financial analyst will significantly increase its profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Additionally, counsel asserts that the director erred in failing to consider the beneficiary's contributions to future increased revenues, but that issue was never raised before the director prior to these appellate proceedings by the petitioner. In any event, even if future revenues could be

considered, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998 or 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is February 24, 1997.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 financial analyst.

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

- |     |                         |                           |
|-----|-------------------------|---------------------------|
| 14. | Education               |                           |
|     | Grade School            | 6                         |
|     | High School             | 6                         |
|     | College                 | 4                         |
|     | College Degree Required | Bachelor's                |
|     | Major Field of Study    | Mathematics/Business Adm. |

The petitioner also requires two years of experience in the proffered position or in the related occupation of a finance or budget officer. The proffered position's duties are the following: "Analyze financial markets. Direct and coordinate all account activities of the business. Prepares management operation reports, budgets and cash flow projections. Prepare reports which outline financial position in areas of income, expenses and earnings based on past, present and future operations." Under Item 15, the petitioner also set forth additional special requirements as follows: "References and Verification of Work History Required."

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended De La Salle University in Manila, Philippines, from May 1983 until August 1986 where she studied B.S. Mathematics and received a B.S. Applied Mathematics. Also, the beneficiary indicated that she attended the National Computer Institute in Manila, Philippines, where she studied "Computer" from May 1986 to November 1986 and received a degree in Computer Logic Formulation. She provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that she has been employed with Barry's Jewelers in Monrovia, CA as an accounting assistant from July 1991 to the present time and prior to that as a financial analyst for Far East Bank and Trust Co. in Manila, Philippines, from June 1987 to June 1990.

In support of the petition, the petitioner submitted a copy of a Bachelor of Science in Applied Mathematics diploma issued from De La Salle University in Manila, Philippines to the beneficiary, with accompanying transcripts.

Because the evidence was insufficient, the director requested additional evidence on March 18, 2003, specifically requesting proof of the beneficiary's qualifying two years of experience as a financial or budget officer through a letter as required by 8 C.F.R. § 204.5(1)(3)<sup>4</sup> and with corroborating evidence such as paystubs, contracts or other evidence that substantiates any prior employment history claim.

In response to the director's request for evidence, the beneficiary submitted an unnotarized letter stating the following, in pertinent part:

Please be advised that Far East Bank is no longer in existence, it was bought by another bank and because it has been quite sometime since I worked there, there is no chance of getting a reference letter form [sic] my previous supervisors since they have either retired or moved to another establishment. Copies of W-2's are enclosed for your reference.

Barry's Jewelers, Inc. filed for bankruptcy in 1997 and had closed the shop in 1998.

The petitioner submitted copies of paystubs and W-2 forms issued from Barry's Jewelers to the beneficiary and copies of "Certificate of Income Tax Withheld on Compensation," a Filipino tax form indicating wages received by the beneficiary from Far East Bank & Trust Co.

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<sup>4</sup> 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.

The director denied the petition on July 28, 2003, finding that the beneficiary did not provide evidence of the position held with her prior employers to establish she is qualified for the proffered position.

On appeal, counsel fails to address this issue. For that reason, the appeal could be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v)<sup>5</sup>. However, the AAO will discuss the issue substantively and concurs with the director's decision.

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

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

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

For the "professional category," the beneficiary must show evidence of a "United States baccalaureate degree or a foreign equivalent degree" in addition to showing that the beneficiary meets any additional requirements set forth on the ETA 750A. For petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. Thus, for the "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision.

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 petitioner must show that the beneficiary has the requisite education, training, and

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<sup>5</sup> As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree of applied mathematics and two years of experience in the proffered position or as a finance or budget officer.

The AAO has reviewed the beneficiary's academic accolades and has determined that her bachelor degree in applied mathematics meets the regulatory requirements at 8 C.F.R. § 204.5(1)(3)(ii)(C). However, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary has the two years of qualifying employment experience as delineated on the ETA 750A. No evidence, as required by 8 C.F.R. § 204.5(1)(3), is submitted into the record of proceeding. The evidence submitted as an alternative to the letter requirement of 8 C.F.R. § 204.5(1)(3) is insufficient evidence of the beneficiary's qualifying employment experience since it fails to establish the position held by the beneficiary at the prior places of employment. Thus, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position, and the appeal will be dismissed for this additional reason.

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

**ORDER:** The appeal is dismissed.