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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BC

FILE:

EAC 03 245 52923

Office: VERMONT SERVICE CENTER

Date:

JUL 31 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a manager. 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 that it had not established that the beneficiary has the requisite experience as stated on the labor certification application. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date and whether it has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, *See* 8 C.F.R. § 204.5(d), 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 Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$902.40 per week, which equals \$46,924.80 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, the petitioner stated that its gross annual income is \$317,517 and that it employs three workers. It left blank the spaces for it to report the date it was established and its net annual income. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Asbury Park, New Jersey.

On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner. The beneficiary stated that he had worked as a manager at the Raja Gas Station in Mirpurkhas, Pakistan from April 1996 to May 1998, and as a manager at the Gul Sima Corporation Maplewood Amoco in Maplewood, New Jersey from March 1999 to March 2001.

In the instant case the record contains (1) the 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation of the petitioner, [REDACTED] of [REDACTED] in Asbury Park, New Jersey, (2) a 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation bearing the petitioner's name, Hasan Oil Corporation, but showing [REDACTED] in Towaco, New Jersey as its address, (3) a 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, bearing the petitioner's name and showing its correct address, [REDACTED] Asbury Park, New Jersey, (4) Form W-2 Wage and Tax Statements, (5) monthly statements pertinent to the petitioner's bank account, (6) compiled financial statements, and (7) an undated letter from the petitioner's owner. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains (1) a January 18, 1996 employment verification letter, (2) a May 1998 employment verification letter, (3) an undated employment verification letter, (4) the beneficiary's 2001, 2002, 2003, and 2004 Form 1040 U.S. Individual Income Tax Returns, and (5) a G-325 Biographic Information form. The record does not contain any other evidence relevant to the beneficiary's claim of qualifying employment experience.

The petitioner gave its address on the Form I-140 visa petition as [REDACTED] in Asbury Park, New Jersey. The tax returns of Hasan Oil Corporation at [REDACTED] in Asbury Park, New Jersey show that it is a corporation with the Employer Identification Number (EIN) [REDACTED], that it incorporated on August 18, 1998, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

One 2001 tax return shows that the petitioner, [REDACTED] declared ordinary income of \$2,165, and that at the end of that year it had current assets of \$40,728 and current liabilities of \$3,184, which yields net current assets of \$37,544. The EIN on that tax return is [REDACTED]. The address listed for the petitioner on that return is 2 [REDACTED] in Towaco, New Jersey

The other 2001 tax return indicates that it is an amended return and that during 2001 the petitioner, [REDACTED] of [REDACTED] in Asbury Park, New Jersey, declared ordinary income of \$48,989. That return further indicates that at the end of that year the petitioner had current assets of \$40,728 and current liabilities of \$3,184, which yields net current assets of \$37,544. The EIN on that tax return is also [REDACTED]

The Schedule L entries are the same on that tax return as those on the 2001 return of [REDACTED] at [REDACTED] in Towaco, New Jersey. The difference between the figures shown for ordinary income on the two returns results from a change in a deduction.

Specifically, on the original 2001 return the petitioner deducted \$107,250 for part-time help. This resulted in Line 19, Other Deductions of \$153,190 and Line 21 Ordinary Income of \$2,165. On the revised 2001 return the petitioner deducted only \$60,426 for part-time help, resulting in Line 19, Other Deductions of \$106,366 and Line 21 Ordinary Income of \$48,989, an amount greater than the annual amount of the proffered wage.

During 2002 the petitioner declared ordinary income of \$50,838. At the end of that year the petitioner had current assets of \$47,877 and current liabilities of \$3,359, which yields net current assets of \$44,518. The EIN on that tax return is [REDACTED]

During 2003 the petitioner declared ordinary income of \$46,718. At the end of that year the petitioner had current assets of \$51,713 and current liabilities of \$3,973, which yields net current assets of \$47,740. The EIN on that tax return is [REDACTED]

During 2004 the petitioner declared ordinary income of \$30,660. At the end of that year the petitioner had current assets of \$28,991 and current liabilities of \$8,038, which yields net current assets of \$20,953. The EIN on that tax return is [REDACTED]

A 2000 W-2 form shows that the petitioner paid the beneficiary wages of \$8,190 during that year.¹ A 2001 W-2 form shows that the petitioner paid the beneficiary wages of \$10,920 during that year. A 2002 W-2 form shows that the petitioner paid the beneficiary \$11,310 during that year.

Another 2002 W-2 form shows that [REDACTED] of [REDACTED] in Towaco, New Jersey, EIN [REDACTED] paid the beneficiary \$11,310 during that year. A 2003 W-2 form shows that [REDACTED] of [REDACTED] in Manasquan, New Jersey, EIN [REDACTED] 5, paid the beneficiary \$2,730 during that year.

¹ Because the priority date of the instant petition is April 23, 2001 evidence pertinent to wages the petitioner paid to the beneficiary prior to that date is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

A 2004 W-2 form shows that the petitioner paid the beneficiary wages of \$52,000 during that year.

The petitioner's owner's undated letter states that the petitioner has paid the beneficiary \$1,000 per week since August 11, 2003.

The January 18, 1996 employment verification letter is from Prince Petroleum Service on [REDACTED] in Mirpurkhas, Pakistan. It states that the beneficiary worked for that company as an assistant manager from January 13, 1994 to January 18, 1996. The Form ETA 750 states that the proffered position requires two years of experience as a manager, rather than an assistant manager. That letter purports to have been signed by the managing director of that company and states,

He has good command on Supervisory of Administration, Computer Knowledge, Accounts and maintenance of petrol filling units carefully and Banking dealing with good conducts and satisfactory. (Errors in the original.)

This office notes that, although the instructions to the Form ETA 750B required the beneficiary to list all employment related to the proffered position, the beneficiary did not list that employment.

The May 1998 employment verification letter is from Raja Gasoline Service, the location of which is unidentified, and signed by managing director [REDACTED]. It states that the beneficiary worked at that gas station for three years from 1996 to 1998, without otherwise specifying the beginning and ending dates of that employment. That letter does not give the beneficiary's job title, and thus does not confirm that he worked as a manager, a requirement stated on the Form ETA 750. That employment verification letter states,

He knows Supervisory of Administration, Computer Knowledge, and accounts carefully and banking dealing with good conducts and satisfactory. (Errors in the original.)

The undated employment verification letter is from [REDACTED] in Maplewood, New Jersey. It states that the beneficiary worked for that company as a shift manager from March 1999 to March 2001.

The beneficiary signed the G-325 Biographic Information form on November 1, 1999. On that form the beneficiary stated that he had not been employed during the previous five years.

The director denied the petition on April 5, 2005. On appeal, counsel asserted that the 2001 return showing the [REDACTED] address in Towaco was the petitioner's return but an incorrect address was placed on the form by mistake. Although counsel did not directly address the amendment to the petitioner's deductions and ordinary income shown on the 2001 return showing the petitioner's correct address, its submission appears to imply that it is a *bona fide* copy of an amended return submitted to IRS. Counsel also asserted that the evidence submitted shows the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Form ETA 750B required the beneficiary to list all previous employment related to the proffered position. The beneficiary did not then list employment for Prince Petroleum Service on Hyderabad Road in

Mirpurkhas, Pakistan from January 13, 1994 to January 18, 1996. Nor did the petitioner raise that employment claim in response to an October 29, 2003 request for evidence asking for evidence that the beneficiary has the requisite employment experience. Instead, the petitioner submitted evidence in support of that claim on appeal, after the evidence in support of the beneficiary's claim of employment for Gul Sima in New Jersey was found insufficient to show eligibility.

A petitioner raises serious questions of credibility when asserting a new claim to eligibility on appeal. Counsel provides no explanation for the failure to advance this additional claim on the Form ETA 750 Application for Alien Employment Certification, with the initial petition, or in response to the request for evidence.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) does not encourage petitioners to hold evidence in abeyance and submit it on appeal or on post-appeal motion. Rather, it clearly states that evidence of the beneficiary's experience **must accompany** the petition.

In this case, the service center found that the experience initially claimed does not qualify the beneficiary for the proffered position. In response to that finding, counsel has submitted evidence of other, previous employment, never before mentioned in conjunction with this application. Under these circumstances the evidence of the claim of employment for Prince Petroleum Service is unreliable, does not demonstrate qualifying experience, and will not be further considered.

On the Form ETA 750B the beneficiary claimed to have worked for Raja Gasoline Service on Hyderabad Road in Mirpurkhas, Pakistan as a manager from April 1996 to May 1998. That employment claim, if sufficiently supported and uncontradicted, should have been sufficient to show that the beneficiary has the requisite employment experience.

The petitioner submitted no evidence in support of that claimed experience with the petition, but submitted a letter dated May 1998 in response to the request for evidence. That letter states that the beneficiary worked for that company as a manager "for three years from 1996 to 1998."

The director found that evidence insufficient and denied the petition. On appeal, counsel submitted evidence in support, not of that claimed experience, but of similar experience on the same highway at a different time.

On the Form ETA 750B the beneficiary claimed to have worked as a gas station manager on Hyderabad Road in Mirpurkhas beginning in April 1996. The January 18, 1996 employment verification letter, however, purports to have been issued to the beneficiary before that employment began. Counsel offered no reconciliation of the chronological discrepancies between the employment claimed on the ETA 750B and the May 1998 letter, and that for which the January 18, 1996 employment verification letter was submitted. Under these circumstances, this office does not find the documentation in support of the beneficiary's claim of employment in Mirpurkhas, Pakistan to be reliable and finds that it does not support the beneficiary's claim of qualifying experience.

On the Form ETA 750B the beneficiary claimed to have worked for [REDACTED] in Maplewood, New Jersey as a manager from March 1999 to March 2001. The beneficiary submitted no evidence in support of that employment claim either with the petition or in response to the October 29, 2003 request for evidence. Instead, counsel submitted an employment verification letter on appeal.

The undated letter from [REDACTED] echoes the beneficiary's claim of employment for that company as stated on the Form ETA 750B. It states that the beneficiary worked for [REDACTED] from March 1999 to March 2001.

The beneficiary's 2001 tax return and a 2001 W-2 from the petitioner are in the record. The W-2 form shows that during that year the petitioner paid the beneficiary gross wages of \$10,920. On the 2001 tax return the beneficiary claimed to have received total gross wages during that year of \$10,920. The beneficiary's tax return, if the version submitted is authentic, demonstrates that he worked only for the petitioner during that year, and did not, contrary to the information on the Form ETA 750B and the employment verification letter, work for [REDACTED] at any time during 2001. The evidence is in conflict pertinent to that employment claim and, absent reconciliation of those conflicts, it cannot be used to show that the beneficiary has the requisite experience. Further, this office reminds the petitioner that if it intends to pursue this matter further it must successfully reconcile all of the material conflicts with independent, objective evidence.

Finally, even if the beneficiary's employment claims were consistent and otherwise reliable, this office notes that, on the November 1, 1999 G-325 Biographic Information form, the beneficiary stated that he had been unemployed for the previous five years. That admission contradicts the beneficiary's claim of employment for Prince Petroleum Service from January 13, 1994 to January 18, 1996, for Raja Gasoline Service 1996 to 1998, and for [REDACTED] from March 1999 to March 2001.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner has not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification. The petition was correctly denied on this basis, which has not been overcome on appeal.

The remaining issue is the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Initially, this office notes that the Forest Place address in Towaco, New Jersey appears to be the address of the petitioner's accountant. This office accepts that it was mistakenly placed on the original version of the petitioner's 2001 tax return, as well as apparently being mistakenly placed on the 2002 W-2 forms issued by the petitioner and [REDACTED]

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.² 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 reported on its tax returns. The amounts shown on the petitioner's bank statements will not be included in determining the petitioner's ability to pay the proffered wage.

Counsel's reliance on the unaudited financial statements in the record is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 W-2 forms in the record indicate that the petitioner paid the beneficiary \$8,190 during 2000, \$10,920 during 2001, \$11,310 during 2002, and \$52,000 during 2004. The record contains additional W-2 forms issued to the beneficiary by H&A Oil Corporation of either ██████████ in Towaco, New Jersey, or ██████████ in Manasquan, New Jersey, EIN ██████████. Those W-2 forms, however, have no apparent relevance to the petitioner's ability to pay the proffered wage and will not, therefore, be considered.

The petitioner's owner's undated letter states that the petitioner has paid the beneficiary \$1,000 per week since August 11, 2003. The W-2 forms submitted do not support that assertion, as they do not show that the petitioner paid the beneficiary any wages during 2003.³

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

³ The record contains no 2003 W-2 form from the petitioner. The 2003 W-2 form from H&A Oil Corporation shows a payment of only \$2,730 during that year. Even if that amount were somehow imputed to the petitioner, it does not support the assertion that the petitioner paid the beneficiary \$1,000 per week from August 11th to December 31st of that year.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$46,924.80 per year. The priority date is April 23, 2001.

The 2001 W-2 form states that the petitioner paid the beneficiary \$10,921 during that year and the petitioner would ordinarily be obliged to demonstrate the ability to pay the remaining \$36,003.80 during that year.

⁴ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The remaining evidence pertinent to the petitioner's ability to pay the proffered wage during 2001 consists of two competing versions of the petitioner's 2001 tax return. The petitioner and counsel imply, but do not directly state, that the petitioner filed an amended return that shows greater profits during that year.

The record contains no evidence that the amended return was submitted to IRS. In view of the apparently falsified documentation in the record, this office declines to assume that amended return is the petitioner's actual tax return submitted to IRS upon which its tax liability was assessed. This office will consider the original version of the petitioner's 2001 tax return, the one submitted with the petition that shows the Towaco, New Jersey address, although the *bona fides* of that return, too, are open to question.

The petitioner's 2001 tax return states that it declared ordinary income of \$2,165. That amount is insufficient to pay the remaining balance of the proffered wage during that year. The return states that at the end of that year the petitioner had net current assets of \$37,544. That amount is sufficient to pay the proffered wage. If the 2001 W-2 form and the original version of the petitioner's 2001 tax return are assumed to be genuine, then the petitioner has demonstrated the ability to pay the proffered wage during 2001.

The 2002 W-2 form in the record states that the petitioner paid the beneficiary \$11,310 during that year. The petitioner would ordinarily be obliged to demonstrate its ability to pay the remaining \$35,614.80 balance of the proffered wage during that year. The 2002 return states that the petitioner declared ordinary income of \$50,838 during that year. That amount is sufficient to pay the remaining balance of the proffered wage. If the 2002 W-2 form and the petitioner's 2002 tax return are assumed to be genuine, then the petitioner has demonstrated the ability to pay the proffered wage during 2002.

The record contains no evidence that the petitioner paid any wages to the beneficiary during 2003. The petitioner would ordinarily be obliged to demonstrate the ability to pay the entire proffered wage during that year. The 2003 tax return submitted states that the petitioner declared ordinary income of \$46,718 during that year. That amount is insufficient to pay the proffered wage. The return states that at the end of that year the petitioner had net current assets of \$47,740. That amount exceeds the annual amount of the proffered wage. If the petitioner's 2003 tax return is assumed to be genuine, then the petitioner has demonstrated the ability to pay the proffered wage during 2003.

A 2004 W-2 form in the record states that the petitioner paid the beneficiary \$52,000. That amount exceeds the annual amount of the proffered wage. If the W-2 form is presumed to be genuine then the petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on August 11, 2003. On that date the petitioner's 2005 tax return was unavailable. On October 29, 2003 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The evidence submitted, if assumed genuine, would demonstrate that the petitioner was able to pay the proffered wage during each of the salient years. If today's decision hinged on that issue, this office would

require additional evidence of the authenticity of the evidence of the petitioner's ability to pay the proffered wage. Because the appeal is otherwise dismissible, this office will not rely on the issue of the petitioner's ability to pay the proffered wage and need not request additional evidence.

The petitioner has not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification and the petition may not be approved. 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.