



U.S. Citizenship
and Immigration
Services

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File:

[REDACTED]
LIN-05-211-50604

Office: NEBRASKA SERVICE CENTER

Date: NOV 09 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, Nebraska Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a software development and consulting company, and seeks to employ the beneficiary permanently in the United States as a computer programmer (“Programmer Analyst”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s March 2, 2006 decision, the petitioner had filed immigrant visa petitions for multiple beneficiaries. The instant petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage for all the sponsored beneficiaries from their respective priority dates until each beneficiary obtains permanent residence.

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).¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 19, 1999.² The proffered wage as stated on Form ETA 750 is \$56,683 per year, based on 40 hour work week. The labor certification was approved on July 8, 2001, and the petitioner filed the I-140 Petition on the beneficiary's behalf on June 29, 2005. On the I-140 petition, the petitioner listed the following information: date established: 1997; gross annual income: \$1 million; net annual income: not listed; current number of employees: 23.

On August 25, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: evidence that the beneficiary met the educational qualifications of the certified labor certification by the time of the priority date,³ as well as evidence related to the petitioner's ability to pay the proffered wage, including the petitioner's 2000, 2001, 2002, 2003 and 2004 federal tax returns, annual reports, or audited financial statements, as well as Forms W-2 or Forms 1099 if the petitioner employed the beneficiary. Further, if the petitioner sponsored multiple alien workers, the petitioner should submit a list of receipt numbers, proffered wages, and the priority dates for each respective petition. The RFE requested that the list distinguish between petitions approved, withdrawn, and/or revoked. The petitioner responded. Following consideration of the petitioner's response, on March 2, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The certified Form ETA 750 required that the beneficiary have a Bachelor's degree in Computer Science, Computer Engineering, Electric or Electronics Engineering, Mathematics, Statistics, or its foreign equivalent. The petitioner provided that the beneficiary had the required educational background to meet the requirements of the certified Form ETA 750.

wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, the beneficiary listed on Form ETA 750B that the petitioner has employed him since April 2004. The petitioner provided the following evidence of wage payment to the beneficiary:

<u>Year</u>	<u>Wages Paid</u>	<u>Difference between wages paid and the proffered wage</u>
2004	\$40,532.80	\$16,150.20

In 2004, the wages that the petitioner paid to the beneficiary were less than the proffered wage, so that the petitioner must show that it can pay the difference between the wages paid in that year and the proffered wage.

The petitioner additionally provided a paystub for the time period May 1, 2005 to May 31, 2005, which exhibited total earnings pay to the beneficiary in the amount of \$4,544.40, and year to date earnings to the end of May 2005 in the amount of \$20,287.50.⁴ The petitioner, therefore, must establish that it can pay the beneficiary the full proffered wage in the years from 1999 to 2003, and the difference between the wages paid and the proffered wage in subsequent years thereafter.

The petitioner additionally submitted a W-2 for the initial labor certification beneficiary for the year 1999 showing wages paid in the amount of \$51,000. In general, wages already paid to others are not available to prove the petitioner's ability to pay the proffered wage to the beneficiary from the priority date onward. While the petitioner has substituted the present beneficiary into the labor certification, the petitioner has only provided the original beneficiary's W-2 statement from 1999. First, the exact date that the initial beneficiary departed the petitioner's employ is unclear, and second, as the I-140 petition lists that the position is not new, it is unlikely that the petitioner would hold the position open from 1999 until 2004, and that the instant beneficiary "replaced" the initial beneficiary. Therefore, the wages paid to the initial beneficiary would not be considered, as the petitioner has not adequately demonstrated that the present beneficiary necessarily replaced the initial beneficiary.

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. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of

⁴ The monthly salary annualized would equate to slightly less than the proffered wage.

page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists additional income on Schedule K, so we will take the petitioner's net income that schedule:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$63,740
2003	\$98,394
2002	\$36,253
2001	\$71,839
2000	\$47,455
1999	\$48,001

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2001, 2003, and 2004, but not in 1999, 2000, or 2002. Further, the petitioner would need to establish its ability to pay for multiple beneficiaries in these years.⁵

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$51,030
2003	\$102,418
2002	\$51,019
2001	\$116,888
2000	\$62,077
1999	\$46,142

⁵ CIS records reflect that the petitioner has filed for 160 workers, either nonimmigrant H-1B petitions, or I-140 petitions (approximately 20), since the year 1997. Also, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

Following this analysis, the petitioner's federal tax returns show that the petitioner would be able to pay the individual beneficiary's wage in 2000, 2001, and 2003, but not in any of the other years. Further, the petitioner would need to establish its ability to pay for multiple beneficiaries in these years.

Based on the petitioner's net income and net current assets, through one or the other source, the petitioner can show that it can pay the instant beneficiary in the years 2000, 2001, 2003, and 2004, but not in 1999, or 2002. Further, the petitioner's net income or net current assets would not establish the petitioner's ability to pay the proffered wage for multiple beneficiaries.

In response to the RFE, the petitioner had indicated that it filed two other applications, which had priority dates of November 1999, and listed that it paid those two workers \$50,000. The petitioner provided that CIS approved those two applications, and CIS would have determined that the petitioner could pay the proffered wage.⁶ The petitioner did not provide any further information related to other petitions that were withdrawn, or revoked, other petitions filed where the workers left the petitioner's employ, or proffered wages for any of the petitions.

The director's decision outlined eleven separate petitions that the petitioner filed, and listed priority dates, dates of approval and wages if known (the director listed the wages as unknown for nine petitions), and arrived at an estimate that the petitioner would be required to pay \$606,683.00 in proffered wages.⁷ Additionally, the director noted that she could not consider wages that might have been paid to other beneficiaries since the petitioner did not submit such evidence as requested in the RFE.

On appeal, counsel provides that the petitioner provided the names and information related to the petitioner's two I-140 filings in 1999, and CIS then requested "a more comprehensive accounting of filing for the years 1999 onward."

The director's RFE requested information related to all I-140 petitions filed and proffered wages, not just petitions filed in 1999. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner

⁶ The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

⁷ The director's calculation was based on eleven I-140 petitions filed at the time of the decision. We note that the director's calculation did not include H-1B wages that the petitioner would be obligated to pay to all H-1B workers based on DOL regulations, and the certified labor condition applications filed with each I-129 H-1B petition.

had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. However, even if we were to consider the evidence submitted on appeal, the evidence is still deficient in showing that the petitioner can pay for all the sponsored beneficiaries.

Counsel further provides that CIS's conclusion related to the eleven petitions that the petitioner filed was based on "incomplete information." In support on appeal, the petitioner has provided a chart of the eleven filings listed in the director's decision, and provides that only four remain employed with the petitioner. Counsel provides that some that were hired did not join the petitioner, others left or resigned after they began their employment, and that more than half of the individuals that the petitioner filed for since 1999 have left the petitioner's employ. Therefore, counsel contends that the petitioner is not obligated to show the petitioner's ability to pay the proffered wage for individuals that have left the company.

Counsel has misinterpreted the petitioner's burden. The petitioner would need to show that it could pay the proffered wage for all sponsored beneficiaries while the petitions were filed and pending. The fact that the individual later left the company does not negate the original filing. Following the date of sponsored beneficiary's departure, the petitioner would no longer need to demonstrate its ability to pay for that individual. However, if a petition was filed in, for example, 2001, and the petitioner intended to hire that employee, or continue to employ the beneficiary, but the beneficiary left in 2004 prior to obtaining their permanent residence, the petition would have been a legitimately filed petition with the expectation of employing the beneficiary until 2004. Therefore, the petitioner would need to demonstrate its ability to pay from the priority date until 2004. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner provides that based on the individuals that have left the company, the petitioner would need to demonstrate its ability to pay for one additional individual with a priority date in 2001, and three individuals with priority dates in 2003 to the present.

The petitioner provided the following chart:

Petition Receipt	Priority Date	Date approved	Date employee joined Petitioner	Date employee left the petitioner	Status
LIN-01-268-50867	11/01/1999	01/09/2002	12/01/1998	09/30/2004	Resigned
LIN-01-227-57837	11/19/1999	08/01/2001	05/01/1998	12/31/2005	Resigned
LIN-01-228-52461	11/19/1999	08/03/2001	Did not join	Did not join	Resigned
LIN-01-074-54266	02/28/2000	02/05/2001	01/01/2003	02/28/2003	Resigned
LIN-04-233-50205	01/20/2001	12/14/2004	05/01/2004	Currently employed	Currently employed
LIN-01-221-50489	02/15/2001	08/24/2001	02/01/2000	08/15/2002	Resigned
LIN-03-254-51393	03/07/2003	03/23/2004	12/01/2002	08/31/2004	Resigned
LIN-04-032-53056	05/09/2003	12/20/2004	07/01/2002	Currently employed	Currently employed
LIN-04-240-50715	07/21/2003	04/26/2005	01/01/2004	Currently employed	Currently employed
LIN-05-004-51407	10/08/2003	04/20/2005	09/01/2003	Currently	Currently

				employed	employed
LIN-04-255-51347	10/08/2003	04/25/2005	05/01/2003	08/31/2005	Resigned

For the individual with the priority date in 2001, the petitioner would need to demonstrate its ability to pay for that individual in 2001, 2002, 2003, 2004, and 2005. The petitioner provided that this beneficiary was employed with the petitioner since May 1, 2004, and had been substituted into a prior labor certification filed on January 20, 2001. The petitioner provided a 2005 W-2 statement for the individual showing 2005 earnings in the amount of \$42,646.63. The petitioner then asserts that based on the table in the director's decision, the petitioner would have the ability to pay the proffered wage for each of the years in question, and further, that the beneficiary's 2005 W-2 demonstrates the petitioner's ability to pay the beneficiary in that year. The petitioner failed to provide, however, the exact proffered wage listed to be paid to the beneficiary, so that we cannot determine that the 2005 W-2 earnings would exhibit the petitioner's ability to pay. 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)).

Regarding the other three beneficiaries, the petitioner provides the following:

Petition	Priority Date	Date approved	Date of Joining Petitioner	2004 W-2 Wages Paid	2005 W-2 Wages Paid
LIN-04-032-53056	05/09/2003	12/20/2004	07/01/2002	\$53,560.74	\$81,373.42
LIN-04-240-50715	07/21/2003	04/26/2005	01/01/2004	\$37,626.28	\$45,589.30
LIN-05-004-51407	10/08/2003	04/20/2005	09/01/2003	\$47,487.15	\$57,027.13

Counsel provides that for the above three listed individuals, the petitioner is obligated to show that it could pay the proffered wages for the three in 2003, 2004, and 2005. The petitioner provides that the first individual's priority date was May 9, 2003, and that the petitioner is only "obligated to show ability to pay from that date to the end of 2003." The petitioner concludes that it would therefore only need to show the ability to pay \$29,166 for that individual in 2003. Regarding the second individual with a priority date of July 21, 2003, counsel asserts that the petitioner would only need to show that it could pay \$20,833 for 2003, again, based on the assumption of \$50,000 a year; and that the petitioner would only need to show that it could pay \$8,333 based on the priority date of October 8, 2003.⁸ Therefore, counsel asserts that the petitioner would only need to show total wages in the amount of \$58,322 in 2003.

⁸ While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the year's portion that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. See *Matter of Obaigbena*, 19 I&N Dec. at 534. Therefore, the petitioner must show the ability to pay the full proffered wage in that year. We note again, however, that the petitioner did not provide that amount, but instead uses the "\$50,000/year figure." As the wages paid to the first beneficiary varied by almost \$30,000 in the two years that the petitioner submitted W-2 statements for, we are not convinced that the first beneficiary's proffered wage would be \$50,000. The petitioner also did not provide evidence of the exact proffered wage for the second and third beneficiaries. We cannot conclude what the proffered wage would be based on the W-2 statements provided. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165.

We note that the petitioner would additionally need to show that it could pay the individual with the 2001 priority date, as well as the beneficiary, so that the petitioner would need to demonstrate its ability to pay for five individuals in 2003, which would result in a higher wage estimate than counsel's estimate of \$58,322. Further, we note that the petitioner did not list the proffered wage for each of these individuals, or provide a copy of Form ETA 750 to verify the priority dates or the proffered wages to be paid. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). See also *Matter of Soffici*, 22 I&N Dec. at 165.

Counsel further cites to the May 4, 2004 [REDACTED] Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo), and provides that the May 4 Yates Memo instructs that CIS should give reasons for a petition's denial. Further, the May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary in its determination of whether the petitioner can pay the proffered wage. Counsel asserts that the petitioner has shown its ability to pay the sponsored individuals presently working for the petitioner, and that the petitioner has provided full and complete information regarding the sponsored beneficiaries. Further, counsel contends that it previously established the ability to pay for the instant beneficiary with the information previously submitted.

As noted above, the petitioner could establish its ability to pay for the instant beneficiary in the years 2000, 2001, 2003, and 2004, but not in 1999, or 2002. The petitioner did not provide any further evidence related to its ability to pay the instant beneficiary in 1999, or 2002. In addition, the petitioner failed to establish that it could pay for five beneficiaries in 2003. Further, whether the petitioner could pay for all filed for and sponsored beneficiaries is unclear.

Additionally, the petitioner failed to adequately respond to the director's RFE. The petitioner failed to provide an adequate accounting of all sponsored beneficiaries, or their proffered wages. On appeal, the petitioner failed to provide evidence related to the sponsored beneficiaries' proffered wages, and provided only an estimate of \$50,000 as the wage for each rather than any documentary evidence such as a copy of Form ETA 750A, which would contain the proffered wage. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the instant beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and failed to show that it could pay the proffered wage of all sponsored beneficiaries. 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.