

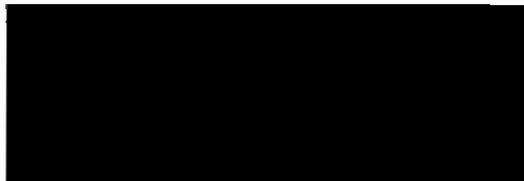
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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

APR 10 2008

WAC-01-218-52390

IN RE:

Petitioner:

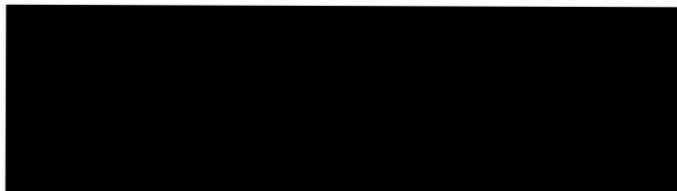
Beneficiary:



PETITION:

Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 employment-based preference visa petition was initially approved by the Director, California Service Center, however, the director invalidated the underlying labor certification and revoked the approval of the petition after issuing a notice of intent to revoke the approval of the petition (NOIR). Subsequently, the director reopened the case and served the petitioner with a notice of intent to deny (NOID). Upon viewing the response to the NOID, the director denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a sewing machine operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. On April 30, 2001, the petitioner filed the instant petition for a substituted beneficiary<sup>1</sup> and the petition was initially approved on February 27, 2002. In connection with the widespread scope of the fraudulent scheme of Robert Sklar<sup>2</sup> who represented the petitioner in the labor certification application process, the director served the petitioner with the NOIR on December 18, 2003. In a Notice of Revocation (NOR) dated February 3, 2004, the director invalidated the underlying labor certification on the basis of fraud and/or willful misrepresentation and revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). On February 22, 2007, the director served the petitioner with notice of intent to deny (NOID) after reopening the instant case. Upon viewing the response to the NOID, the director denied the petition on January 24, 2008 because it lacked a valid labor certification and the beneficiary would not work for the petitioner in the proffered position.

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

As set forth in the director's January 24, 2008 decision, the primary issues in this case are whether or not the labor certification was properly invalidated on the basis of fraud and/or misrepresentation and whether the beneficiary will work for the petitioner in the proffered position and thus the job offer is a realistic and *bona fide* one.

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

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<sup>1</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</sup> In June 1999, John Kim and Robert Sklar pled guilty to counts of immigration fraud, and were sentenced to short prison terms. As part of the fraudulent scheme, Robert Sklar and John Kim, obtained labor certifications for non-existent job offers, and filed Form I-140 petitions, without the knowledge and authorization of the employers listed on those documents, in order to acquire immigrant visas for aliens who had no real intention of working for the claimed employers.

considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup> On appeal, counsel submits a brief asserting that the labor certification was never obtained by fraud or willful misrepresentation of a material fact, and that positions of sewing machine operator and floor manager at the petitioner are very similar, and thus the beneficiary will work for the petitioner in the proffered position. Other relevant evidence in the record includes affidavits of [REDACTED], letters from the petitioner, and samples of [REDACTED]'s signatures on the petitioner's checks. The record does not contain any other evidence pertinent to the validation of the labor certification and *bona fide* job offer.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

- (i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

Section 212(a)(6)(C)(i) of the Act provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured ) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [Citizenship and Immigration Services (CIS)] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application."

In the instant case, the employer, now the petitioner, through attorney Gary M. Sklar of Sklar & Associates, filed an application for alien employment certification, Form ETA-750, on behalf of [REDACTED] in the position of sewing machine operator (semiautomatic) on April 11, 1988 and the Form ETA 750 was certified on December 7, 1995. On April 30, 2001, the petitioner filed the instant I-140 immigrant petition for the beneficiary to substitute the original labor certification beneficiary, [REDACTED] based on the underlying approved labor certification. In the February 3, 2004 NOR, the director invalidated the underlying labor certification on the basis of fraud and/or willful misrepresentation and revoked the

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<sup>3</sup> 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).

approval of the petition. On appeal, counsel argues that the labor certification was never obtained by fraud or willful misrepresentation of a material fact.

Upon a complete review of the record of proceeding, the AAO finds that the relevant labor certification was obtained through fraud committed by Robert Sklar and his office Sklar & Associates, and therefore the director correctly invalidated the labor certification. First of all, although [REDACTED] of the petitioner asserted that she as legal representative of the petitioner retained Robert Sklar and authorized him to file the labor certification application for the petitioner, the attorney of record for the labor certification application was Gary Sklar. The record does not contain any evidence that the petitioner retained Gary Sklar to file the labor certification, nor is there any evidence showing Gary Sklar ever worked for Sklar & Associates or authorized Robert Sklar to use his name in the instant case. Robert Sklar forged the attorney's name and used it without authorization. The labor certification application was fraudulently filed.

Secondly, [REDACTED] of the petitioner indicated that she personally signed all the applications submitted to DOL in response to the director's NOIR and NOID and provided sample signatures to support her assertions. However, while all signatures provided match other signatures on the documents in the instant case, the signatures under her name on the Form ETA 750A appear to be different from the signature samples she provided in response to the NOIR and the signatures in the file. It raises doubt that [REDACTED]'s signatures on the Form ETA 750A for [REDACTED] are legitimate or may have been forged or signed by someone else. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Thirdly, in response to the director's assertion that Robert Sklar filed the underlying labor certification application without the knowledge of the employers listed on the applications, by forging signatures and claiming he was their legal representative, [REDACTED] of the petitioner provided a letter and affidavit dated January 15, 2004. [REDACTED] submitted another affidavit in response to the NOID in June 2007. [REDACTED] stated in her letter and affidavits that in 1988 she personally retained the Law Offices of Robert M. Sklar to submit applications for labor certifications on behalf of some of her previous employees. However, despite the director's express request she did not submit the retainer agreement allegedly entered into between the petitioner and Robert Sklar, nor was any other documentary evidence, such as cancelled checks for the retainer payment or any payment receipts from Robert Sklar submitted. 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)).

Fourthly, [REDACTED]'s affidavit in June 2007 stated in pertinent part that:

There was a 'Notice of decision' which stated that I had submitted a letter to [CIS] requesting a withdrawal of the petition for [REDACTED] when I never requested such. I do not know why this was sent to me or did not authorize any one to withdraw the petition.

In her affidavit of January 15, 2004, stated that

I have reviewed and examined copies of such application/petition. I hereby certify and confirm that the signatures on the labor certification applications and the immigrant petitions filed on behalf of the original beneficiary, and the substituted beneficiary, are my signatures.

In an accompanying letter, she also confirmed that she was the only person who signed the documents submitted to CIS. However, the record of proceeding contains inconsistent documentary evidence. The record in the instant case contains not only a copy of the notice of decision dated March 11, 2002 from Christina Poulos, Acting Director of the California Service Center, but also the original copy of the letter dated April 13, 2001 from as the president of the petitioner with her signature requesting to withdraw/revoke the petition (WAC-96-254-52008) filed by the petitioner for *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. The record contains no such independent objective evidence to resolve these inconsistencies.

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

Therefore, the AAO finds that the director correctly determined that the relevant labor certification in the instant case was obtained by fraud and the statements from cannot overcome the decision to invalidate the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Accordingly the director's decision to invalidate the labor certification is affirmed. The petition is not supported by a valid labor certification.

The second issue is whether the petitioner established that the beneficiary would work for the petitioner in the proffered position as the labor certification approved and thus the job offer the petitioner provided to the beneficiary was and continues to be a realistic and *bona fide* one.

The original certified Form ETA-750 was filed on April 11, 1988 and the job offered was a "sewing machine operator." The petitioner filed the instant petition based on the underlying labor certification for a substituted

beneficiary. The petitioner indicated on the I-140 that it offered the substituted beneficiary the same proffered position of sewing machine operator. However, the record contains a certificate of employment issued by [REDACTED] – Vice president of the petitioner on September 12, 2005 certifying that the beneficiary has been employed by the petitioner since December 4, 2000 to the present as a full-time floor manager at the wage level of \$40,000 annually. On the Form G-325A Biographic Information signed on November 21, 2005, the beneficiary claimed to have worked for the petitioner as a floor manager since December 2004 to the present. The beneficiary's paystubs show that the beneficiary was paid at the level of \$700 weekly (\$36,400 annually) in 2006, and his W-2 form for 2005 indicates that he earned \$36,050 from the petitioner in 2005. Although the petitioner recently confirmed again that it would hire the beneficiary as a sewing machine operator on a permanent full time basis at the level of \$7.50 per hour (\$15,600 per year),<sup>4</sup> it did not provide any evidence to support that the beneficiary would work in the proffered position instead of the current position of floor manager. The petitioner did not explain how the beneficiary would take the job offer for a sewing machine operator at the level of \$4.86 per hour (\$10,108.80 per year or at maximum of \$15,600 per year) as the original labor certification set forth while he has been working as a floor manager earning around \$40,000 a year. It appears unlikely in the instant case that the petitioner would have employed the beneficiary in the proffered position at the proffered wage set forth by the Form ETA 750A even after his status had been adjusted to the permanent resident.

Counsel asserts on appeal that the positions of sewing machine operator and floor manager are very similar in terms of production at the petitioner. Counsel's assertion is misplaced. DOL assigned the occupational code of 786.685-030, sewing machine operators, the same type of occupation as the proffered position. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=786.685-030&g=Go> (accessed April 7, 2008) and its extensive description of the position and requirements for the position, the position falls within Job Zone One requiring "little or no preparation" for the occupation type of sewing machine operator position. According to DOL, no previous work-related skill, knowledge, or experience is needed for these occupations. DOL assigns a standard vocational preparation (SVP) range of below 4.0 to the occupation. See <http://online.onetcenter.org/link/summary/51-6031.00#JobZone> (accessed April 7, 2008). DOL's Dictionary of Occupational Titles (DOT) set forth the duties as follows:

Tends one or more semiautomatic sewing machines that attach, join, reinforce, or decorate garments or garment parts, or perform other preset cycle operations, such as buttonhole making: Threads machine and adjusts thread tensions. Positions fabric layers, garment, or garment part in holding device on machine bed or according to guides, edges, or markings, and starts machine. Notifies SUPERVISOR, GARMENT MANUFACTURING (garment) 786.132-010 if machine malfunctions. May select supplies, such as fasteners and thread, according to specifications or color of fabric. May change needles and oil machine.

However, the closest type of occupation in the DOT to a floor manager in a garment manufacturer is manager, garment manufacturing under DOT code of 786.132-010. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=786.132-010&g=Go> (accessed April 7, 2008)

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<sup>4</sup> See a letter dated June 15, 2007 from [REDACTED] as the president of the petitioner.

and its extensive description of the position and requirements for the position, the position falls within Job Zone Three requiring “medium preparation” for this occupation. According to DOL, previous work-related skill, knowledge, or experience is required for these occupations. DOL assigns a standard vocational preparation (SVP) range of 6.0 < 7.0 to the occupation. See <http://online.onetcenter.org/link/summary/51-1011.00#JobZone> (accessed April 7, 2008). DOT describes duties for garment manufacturing manager as follows:

Supervises and coordinates activities of workers engaged in sewing, pressing, and inspecting garments in one department of manufacturing establishment: Inspects work for adherence to specifications. Notifies mechanic when machines malfunction. Trains workers in assembly of new style garments. Performs other duties as described under SUPERVISOR (any industry) Master Title. May be designated according to department supervised as Supervisor, Finishing Department (garment); Supervisor, Inspection Department (garment); Supervisor, Sewing Room (garment).

Therefore, sewing machine operator and floor manager are different occupations in significant aspects: different titles, different duties, different SVPs, different job zones and different minimum requirements. If the petitioner offers the beneficiary a floor manager position based on the underlying labor certification, the petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). It seems that the petitioner intends to employ the beneficiary as a floor manager, outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I&N Dec. 283.

Therefore, we affirm the director’s decision to invalidate the underlying labor certification application and the director’s decision to deny the petition.

Beyond the director’s decision and counsel’s assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d

1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 11, 1988. The proffered wage as stated on the original Form ETA 750 filed on behalf of the original alien is \$4.86 per hour (\$10,108.80 per year). On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked for the petitioner since December 2000.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted its Form 941 Employer's Quarterly Tax Returns and DE-6 forms for the fourth quarter of 2004 and the second quarter of 2005, the beneficiary's W-2 forms for 2002 through 2005, the beneficiary's two weekly paystubs for August 2005 and two weekly paystubs for January and February 2006. These documents show that the petitioner paid the beneficiary \$28,600 in 2002, \$31,230 in 2003, \$33,920 in 2004 and \$36,050 in 2005. The beneficiary's paystubs for two weeks from January 28, 2006 to February 3, 2006 and from February 4, 2006 to February 10, 2006 show that the petitioner paid \$700 weekly in 2006, greater than the proffered wage rate. Therefore, the petitioner established its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary in 2002 through 2006. However, the petitioner failed to demonstrate that it paid the beneficiary the proffered wage in 1988 through 2001, and thus it is obligated to demonstrate that it could pay the proffered wage in these relevant years. Therefore, the petitioner must establish its ability to pay the full proffered wage with its net income or its net current assets in each of these relevant years from 1988 to 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 1988, 1990, 1992, 1993 and 1994. According to the tax returns, the petitioner was run and reported its tax returns as a C corporation for the years from 1988 to 1994 and its fiscal year ran from March 1 to February 28. The record also contains copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 1995, 1996, 1997 and 1999. These tax returns show that the petitioner was elected as an S corporation on April 3, 1995, and its fiscal year is based on a calendar year.<sup>5</sup> The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the year of the priority date:

- In 1988, the Form 1120 stated a net income<sup>6</sup> of \$15,131.
- In 1990, the Form 1120 stated a net income of \$108,904.
- In 1992, the Form 1120 stated a net income of \$(3,517).
- In 1993, the Form 1120 stated a net income of \$(36,641).
- In 1994, the Form 1120 stated a net income of \$(233,427).
- In 1995, the Form 1120S stated a net income<sup>7</sup> of \$(1,241).

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<sup>5</sup> The petitioner filed its 1995 tax return for a period from March 1, 1995 to December 31, 1995.

<sup>6</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

- In 1996, the Form 1120S stated a net income of \$223,166.
- In 1997, the Form 1120S stated a net income of \$747,965.
- In 1999, the Form 1120S stated a net income of \$113,775.

Therefore, while the petitioner's net income was sufficient to pay the proffered wage for the years 1988, 1990, 1996, 1997 and 1999, the petitioner failed to establish its ability to pay the beneficiary the proffered wage with its net income for 1992 through 1995.

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>8</sup> A corporation's year-end current assets are shown on Schedule L, lines [1 through 6]. Its year-end current liabilities are shown on lines [16 through 18]. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 1992 were \$22,070.
- The petitioner's net current assets during 1993 were \$2,487.
- The petitioner's net current assets during 1994 were \$(4,508).
- The petitioner's net current assets during 1995 were \$(35,624).

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<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

<sup>8</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 expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 1993 through 1995, the petitioner did not have sufficient net current assets to pay the proffered wage, and thus, it failed to establish its ability to pay the proffered wage with its net current assets in these years. The petitioner's net current assets during its fiscal year of 1992 were just sufficient to pay the beneficiary the proffered wage that year.

The priority date in the instant case is April 11, 1988, and therefore, the petitioner must establish its continuing ability to pay the proffered wage from 1988 to the present. However, the petitioner did not submit its tax returns, annual reports, or audited financial statements for the years of 1989, 1991, 1998, 2000 and 2001. The tax returns, annual reports or audited financial statements would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage for the relevant years. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner's failure to submit these documents cannot be excused. The petitioner failed to establish its ability to pay the proffered wage for these years because it failed to submit any regulatory-prescribed evidence.

The petitioner failed to establish its ability to pay the proffered wage for 1989, 1991, 1993 through 1995, 1998, 2000 and 2001. Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition, which the petitioner did for some of the relevant years in the instant case. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

CIS records show that the petitioner had filed eighteen (18) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition and the one filed for the original beneficiary of the underlying labor certification. Nine petitions were approved.<sup>9</sup> The petitioner must establish its ability to pay for the eight

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<sup>9</sup> The nine approved petitions are as follows:

WAC-92-208-50461 filed on June 29, 1992 with the priority date of April 11, 1988, approved on July 8, 1992;

WAC-92-208-50578 filed on June 29, 1992 with the priority date of April 11, 1988, approved on July 8, 1992;

proffered wages each year from 1988 through 1992, four in 1993, three in 1994 and two for each year from 2001 to 2007. The record shows that although the petitioner had sufficient funds to pay the instant beneficiary the proffered wage, neither the petitioner's net income nor the net current assets in 1988 were sufficient to pay all the eight beneficiaries the proffered wages.

Given the record as a whole, the petitioner's history of filing immigrant petitions, we cannot determine that the petitioner established its continuing ability to pay all the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The director's decision is affirmed. The labor certification remains invalidated and the petition remains denied.

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WAC-92-208-50750 filed on June 29, 1992 with the priority date of April 11, 1988, approved on July 10, 1992;  
WAC-92-209-50684 filed on June 30, 1992 with the priority date of April 11, 1988, approved on July 10, 1992;  
WAC-92-255-51743 filed on September 3, 1992 with the priority date of April 11, 1988, approved on October 8, 1992;  
WAC-93-198-51408 filed on July 15, 1993 with the priority date of August 26, 1988, approved on July 21, 1993;  
WAC-94-004-50597 filed on October 6, 1993 with the priority date of April 6, 1988, approved on February 3, 1994;  
WAC-94-092-51003 filed on February 15, 1994 with the priority date of June 25, 1993, approved on March 8, 1994;  
WAC-01-218-51749 filed on April 30, 2001, approved on March 15, 2007.