

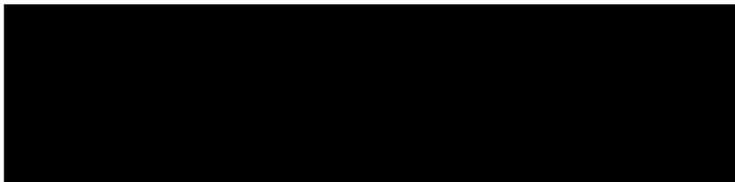
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Services**



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LIN-07-068-50261

Office: NEBRASKA SERVICE CENTER

Date: FEB 25 2010

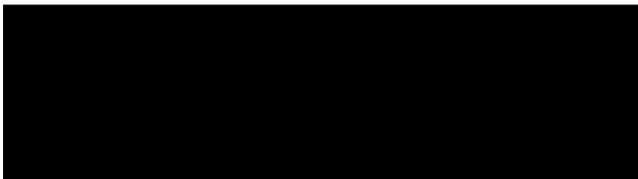
IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a purveyor of business machines. It seeks to employ the beneficiary permanently in the United States as a network and computer system administrator (network marketing manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 25, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 either 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1969 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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, USCIS will next examine the net income figure reflected

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).

on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 USCIS, 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 before the director closed on September 10, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120 stated net income² of (\$14,784).³
- In 2002, the Form 1120S stated net income⁴ of \$5,349.⁵

² While the petitioner was selected as an S corporation and filed its tax return on Form 1120S from 2002, the petitioner filed its corporate income tax return on Form 1120 as a C corporation in 2001. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

³ As counsel notes on appeal, there is a typo in the director's denial. The director erred in typing the petitioner's taxable income as (\$414,784.00) instead of (\$14,784) for 2001.

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2002-2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 10, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

⁵ The petitioner had relevant entries for additional income, credits, deductions or other adjustments other than income from a trade or business in that year, and thus, the petitioner's net income should be found on Line 23 of Schedule K instead of Line 21 of the Form 1120S. Therefore, the director erred in stating that the petitioner's net income in 2002 was \$7,845.00 in his decision; however, this error does not alter the ultimate

- In 2003, the Form 1120S stated net income of \$2,282.
- In 2004, the Form 1120S stated net income of \$12,759.⁶
- In 2005, the Form 1120S stated net income of \$21,156.
- In 2006, the Form 1120S stated net income of \$66,120.

For the years 2001 through 2006, the petitioner did not have sufficient net income to pay the instant beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 tax return demonstrates its end-of-year net current assets for 2005 as shown below.

- In 2001, the Form 1120 stated net current assets of \$5,503.⁸
- In 2002, the Form 1120S stated net current assets of (\$70,801).
- In 2003, the Form 1120S stated net current assets of \$22,712.
- In 2004, the Form 1120S stated net current assets of \$34,279.⁹
- In 2005, the Form 1120S stated net current assets of \$40,340.
- In 2006, the Form 1120S stated net current assets of \$46,256.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner failed to establish that it had sufficient either net income or net current assets in each of the years to pay the instant beneficiary the proffered wage. To establish its continuing ability to pay the proffered wage as of the priority date, the petitioner must demonstrate that it had additional funds to

outcome of the appeal. It was same in years 2003, 2005 and 2006 below.

⁶ Counsel submitted the first page only for the petitioner's 2004 tax return. Without Schedule K of the Form 1120S for 2004, it is not clear whether the petitioner had additional income (or loss) reported on Schedule K. Therefore, the AAO considers the figure on Line 21 of Form 1120S as net income.

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ The director erred in calculating the petitioner's net current assets as (\$34,497.00) for 2001; however, this error does not alter the ultimate outcome of the appeal.

⁹ The AAO takes the figures in the beginning of tax year 2005 from the petitioner's Schedule L of Form 1120S for 2005 as the petitioner's net current assets at the end of tax year 2004 because counsel did not submit Schedule L with the petitioner's 2004 tax return.

be used to pay the proffered wage in each of the relevant years: \$69,497 in 2001, \$69,651 in 2002, \$52,288 in 2003, \$40,721 in 2004, \$34,660 in 2005 and \$8,880 in 2006.

On appeal counsel asserts that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel contends that the petitioner could establish its continuing ability to pay the proffered wage if the totality of the circumstances, compensation of officers, year-end cash balance, inventory, depreciation and pro-rated proffered wage were fully considered.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 or Form 1120S. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's tax returns on Line 12 of Form 1120 or Line 7 of Form 1120S, Compensation of Officers, [REDACTED] elected to pay herself \$113,793 in 2001, \$57,890 in 2002, \$72,450 in 2003, \$10,712 in 2004, \$115,000 in 2005 and \$75,000 in 2006, respectively. We note here that the compensation received by the company's owner during these six years was not a fixed salary and amounted from \$10,000 to \$110,000 per year. However, these figures are not supported by the sole shareholder's W-2 Forms for 2001 through 2006 or the petitioner's Quarterly Federal Tax Returns (Form 941) for these years.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel submitted an affidavit of [REDACTED] on appeal. The affidavit stated in pertinent part regarding her compensation of officers that:

8. The total officer compensation is flexible and depends on the business productivity each year. The amount has varied over the years, which demonstrates that the total officer compensation does not represent some contractually obligated and fixed amount.

... ..

10. If necessary, I have the ability to reduce my compensation to pay the proffered wage of [the beneficiary].

It cannot be concluded based on the language of this affidavit, that [REDACTED] is willing to forgo a significant percentage of her officer compensation to pay the beneficiary the proffered wage in 2001 through 2007. In addition, without further supporting documents, such as [REDACTED] individual income tax returns and statements of her family living expenses for 2001 through 2006, this affidavit itself cannot be considered as primary evidence that the sole shareholder is able to forgo a significant percentage of her compensation of officer to pay the beneficiary the proffered wage as well as to support her family. Moreover, as previously discussed, to establish its continuing ability to pay the proffered wage, the petitioner must demonstrate that it had additional funds of \$69,497 in 2001, \$69,651 in 2002, \$52,288 in 2003, \$40,721 in 2004, \$34,660 in 2005 and \$8,880 in 2006. If even [REDACTED] documented that she would forgo all her officer compensation to pay the beneficiary the proffered wage, the petitioner still could not establish its ability to pay the proffered wage in 2002 and 2004 because the total officer compensation is not sufficient to pay the differences between the petitioner's net income or net current assets and the proffered wage in each of the years. Therefore, counsel's assertion on compensation of officer cannot overcome the ground of the director's denial.

On appeal, counsel claims that the petitioner had the year-end cash balance of \$46,244 in 2001, \$19,819 in 2002, \$37,474 in 2004, \$24,039 in 2005 and \$44,346 in 2006 and the inventory of \$46,682 in 2001, \$39,375 in 2002, \$32,319 in 2003, \$36,067 in 2004, \$18,883 in 2005 and \$13,637 in 2006; and that these amounts and funds should be added to the funds available to pay the proffered wage. Counsel's reliance on cash balance and inventory without balanced by the petitioner's liabilities is misplaced. USCIS reviews the petitioner's Net current assets, which are the difference between the petitioner's current assets and current liabilities. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's year-end current assets include cash balance and inventory. The petitioner's year-end cash balance and inventory have been carefully considered when the current assets reflected on Schedule L were considered in determining the petitioner's net current assets. They cannot be double calculated

Counsel's reliance on the petitioner's depreciation is also misplaced. With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

Counsel refers to a decision issued by the AAO concerning the depreciation, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year 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. Again, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the

petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, although the petitioner is in business for a long period, the tax returns submitted from the recent six years show that its gross receipts have never been over \$1 million, and its net income has never been sufficient to pay a single proffered wage at the level of this case. The petitioner is currently employing three workers. The fact that its gross receipts have dropped from almost \$1 million in 2001 to \$638,000 in 2006 does not support the conclusion that this business is expanding and growing. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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 provided regulatory-prescribed evidence to demonstrate that the beneficiary possessed the required experience for the proffered position prior to the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of network marketing manager. The applicant must have two years of experience in the job offered, and the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not reflect any special requirements.

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

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains an affidavit of employment, dated May 30, 2006 from [REDACTED] as the beneficiary's former colleague ([REDACTED] May 30, 2006 letter). This letter stated in pertinent part that:

I, [REDACTED], residing at [REDACTED] declare that [the beneficiary] was a fellow colleague at my previous employer, [REDACTED]. [The beneficiary] was employed in the capacity of Account Associate during the time period starting December 1997 and ending July 1999.

[REDACTED] is no longer functioning as a company. The agency ceased operations in 2001.

The [REDACTED] May 30, 2006 letter is from a former colleague of the beneficiary instead of a former employer or trainer. Although the regulation allows to consider other documentation relating to the alien's experience or training if evidence from an employer or trainer is unavailable, the petitioner did not submit any evidence that an experience letter from the beneficiary's former employer is unavailable. The record does not contain any documentary evidence, such as the corporate registration, personnel records, the beneficiary's taxation documents or income statements from the former employer to support the contents of the experience letter. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14

I&N Dec. 190 (Reg. Comm. 1972)). Without supporting document, the [REDACTED] May 30, 2006 letter cannot be considered as primary evidence to demonstrate that the beneficiary possessed the required qualifications for the proffered position prior to the priority date.

The [REDACTED] May 30, 2006 letter verifies that the beneficiary worked for the company as an account associate but does not include a specific description of the duties performed by the beneficiary while he worked for [REDACTED] as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's experience as an account associate with that company qualifies him to perform the duties set forth in Item 13 of the Form ETA 750A. 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. at 582. Because of these defects, the Libby May 30, 2006 letter will be given little weight in these proceedings.

The Libby May 30, 2006 letter indicates that the beneficiary worked with that company for a period of two years and a half from December 1997 to July 1999. Therefore, this letter failed to demonstrate that the beneficiary possessed the required two years of experience in the job offered in this case. The record does not contain any other documentary evidence to establish the beneficiary's qualifications for the proffered position. 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). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence.

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.