

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

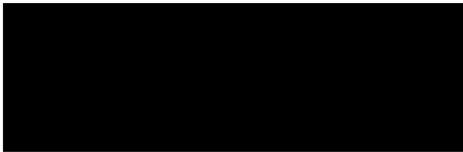


U.S. Citizenship
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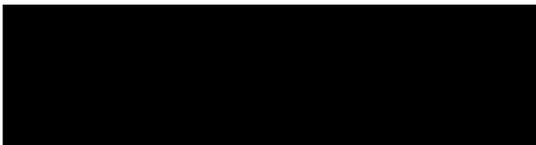
FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Vermont Service Center. Following the criminal conviction of the representative who prepared the petition and supporting documents for immigration fraud, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the petition. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is a construction/general contractor. It seeks to employ the beneficiary permanently in the United States as a cement mason. The petition was filed for classification of the beneficiary under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL).

The record shows that the appeal is properly filed and timely. 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The petitioner filed the Form ETA 750 with DOL on April 30, 2001. The DOL certified the labor certification application on July 25, 2002. The petitioner subsequently filed the instant Form I-140 with United States Citizenship and Immigration Services (USCIS) on November 27, 2002, which the director approved on February 4, 2004.

On September 10, 2008, the director sent a NOIR to the petitioner stating that its representative of record, [REDACTED] had pled guilty to conspiracy to commit immigration fraud in violation of Title 18, United States Code, sections 371 and 1546(a). The director further stated that because of the broad scope of malfeasance perpetrated by the representative, USCIS would scrutinize all immigrant worker visa petitions filed with USCIS by the representative or his

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).

company. The director's NOIR sufficiently detailed the specific evidence needed to overcome the grounds of the NOIR to include:

- A statement attesting to whether or not the petitioner authorized the representative or his company to obtain a *bona fide* labor certification relating to a *bona fide* job offer, and to file a *bona fide* Form I-140 immigrant worker visa petition.
- The petitioner's 2001 through 2007 Internal Revenue Service (IRS) certified tax returns and the beneficiary's certified tax transcripts reflecting any wages paid from 2001-2007, to establish the petitioner's ability to pay the proffered wage;
- Certified tax records of the beneficiary such as Forms W-2 Wage and Tax Statement and/or Forms 1099 Miscellaneous Income Statements issued by the beneficiary's previous employer for the claimed period of qualifying employment, to demonstrate that the beneficiary had the two years of experience as a cement mason at the time of filing the labor certification.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. Here, the director notified the petitioner that if USCIS did not receive the requested documentation, the evidence of the petitioner's ability to pay the proffered wage and the beneficiary's qualifications to perform the duties of the position would be called into question, and would warrant revocation of approval of the petition. 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).

In response to the NOIR, the petitioner provided:

- A statement from the petitioner's owner stating that the original representative was authorized to obtain a labor certification for the beneficiary relating to a *bona fide* job offer and to file a *bona fide* immigrant worker petition.
- A letter from the president of the petitioner stating that it employed approximately 100 employees; that the petitioner's gross revenue for fiscal year ending March 31, 2008 was \$9,807,092; and its net income was \$272,693.
- The president also stated that the petitioner paid wages in 2007 of \$3,384,298.98.

On July 24, 2009, the director revoked the approval of the Form I-140 visa petition, as the petitioner had not submitted IRS certified transcripts of the petitioner's 2001 through 2007 tax returns or certified tax records of the beneficiary's claimed qualifying employment, and thus had not established the authenticity of the evidence of record. The director found that the petitioner had not established through credible documentation that it had the ability to pay the beneficiary the proffered wage as required and that the beneficiary was qualified as of the priority date to work as a cement mason as defined in the labor certification application.

On appeal, counsel asserts that the requested evidence was beyond the power of the petitioner to produce in the short time frame presented by the director and that the director's conclusion that the absence of these records should result in the revocation of approval of the instant petition was an error. Counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days. Counsel dated the appeal August 7, 2009. As of this date, more than 44 months later, the AAO has received nothing further. The record is complete.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 (Acting Reg'l Comm'r 1977).

Here, as noted above, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120 per year). The Form ETA 750 states that the position requires two years of experience in the occupation of cement mason as of the priority date.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1973 and to currently employ 84 workers. According to the tax returns in the record, the petitioner's fiscal year is from April 1 to March 31. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner from February 1996 until the date he signed the application on May 24, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later

based on the 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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'l Comm'r 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 submitted a copy of the beneficiary's Form W-2 for 2001 reflecting that it employed and paid the beneficiary \$22,455.73 in that year alone.² The proffered wage is \$29,120 per year. Thus, in 2001, the petitioner must establish that it can pay the beneficiary \$6,664.27, the difference between the proffered wage and the amount already paid.³

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 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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.

² The petitioner also submitted the beneficiary's Form W-2 for 2000. This form does not establish the petitioner's ability to pay the proffered wage beginning on the priority date in April, 2001, and will be only generally considered.

³ The petitioner did not submit a certified tax transcript as requested by the director. For purposes of this analysis, the AAO will accept the 2001 W-2 issued to the beneficiary. In any further filing, because of the circumstances of this case, the petitioner should submit certified tax transcripts of the beneficiary to reflect payment of wages for any year that the petitioner claims to have employed the beneficiary.

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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

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. The record before the director closed on October 14, 2008 with the receipt by the director of the petitioner’s submission in response to the director’s NOIR. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$62,230.⁴

⁴ The petitioner also submitted tax returns for 1999 and 2000. These returns will be generally considered as evidence of the petitioner’s financial health, but they do not establish the petitioner’s ability to pay the proffered wage beginning on the priority date in 2001.

The petitioner failed to produce any tax transcripts from the IRS as requested by the director. For purposes of providing an analysis, the AAO will review the information in the uncertified tax return for 2001.⁵ The 2001 Form 1120 establishes the petitioner's ability to pay the difference between the proffered wage and the wage paid to the beneficiary for that year. The petitioner failed to submit tax returns for the years 2002 – 2007. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner did not show sufficient net income to pay the proffered wage in any of the years after 2001 as obligated by regulation.

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, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 has failed to provide tax returns for any year after 2001, and has not provided any certified IRS transcripts of tax returns for any relevant year. Thus, it has failed to demonstrate that it has the continuing ability to pay the proffered wage from its end-of-year net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In response to the director's NOIR, counsel asserts that the petitioner employs more than 100 people, and that USCIS has previously waived the requirement that the petitioner submit tax returns, audited financial statements or annual reports. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

⁵ However, if the matter is pursued, the petitioner must submit certified tax records for all years from 2001 - 2012 to establish its ability to pay the proffered wage.

⁶According 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.

Given the record as a whole and the petitioner's failure to provide IRS certified tax transcripts from the petitioner for any relevant year, we find that USCIS need not exercise its discretion to accept the letter from [REDACTED]. Further, the regulation does not apply in this case, as the petitioner stated on the petition that it currently employs 84 people, and on appeal "approximately 100 people," neither of which number is above the 100 employees required by the regulation. [REDACTED] is not a financial officer of the petitioner, but the petitioner's president. For all of these reasons, the AAO declines to accept the letter from [REDACTED] as evidence of the petitioner's ability to pay the proffered wage.

Counsel's assertions on appeal do not establish by a preponderance of the evidence that the petitioner has the continuing ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 (Reg'l Comm'r 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, the petitioner has failed to submit any certified tax returns as requested by the director. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has not submitted any evidence of growth, its reputation within the industry, or that its failure to establish the ability to pay is due to uncharacteristic expenditures in relevant years. 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.

The director also revoked the approval of the petition because the petitioner failed to establish the beneficiary's qualifications for the position. 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'r 1986). *See also, Madany 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he worked for [REDACTED] as a cement finisher from February 1995 to August 1998. In support of the beneficiary's qualifications, the petitioner submitted an undated copy of a letter from [REDACTED] who indicated that the beneficiary worked for the company from February 1995 through August 1998 performing duties such as: trace and leveling; iron paymaster; framing for strained [sic] of columns and joints; concrete preparation; making of blocks, bricks and paving stone; making of pre-fabricated tile; pavement of sidewalks and garrisons; smoothed and finished [sic] in walls; maintenance of tools and equipment of the company; recovering in walls and floors; tile and ceramic tile.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

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

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

In the NOIR, the director requested the petitioner to submit corroborating evidence of the qualifying employment such as tax transcripts of the beneficiary's Forms W-2 and/or 1099-MISC. The petitioner failed to address the director's concern about the authenticity of the experience letter in response to the

NOIR, or on appeal. 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). The AAO agrees with the director that in the circumstances of this case, where the representative was convicted of wide-ranging fraud for preparing and submitting fraudulent documents to USCIS, further scrutiny of the petitioner's evidence is required to establish eligibility for the visa. The petitioner's failure to address the director's concerns about the authenticity of the beneficiary's experience letter is grounds for revoking the approval of the petition. The petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide IRS certified tax returns for the years from 2001-2007 to establish its ability to pay the proffered wage. The petitioner also failed to submit any corroborating evidence of the beneficiary's work experience. This evidence would have established the reliability of the evidence submitted into the record by the preparer, and would have established that the petitioner had the ability to pay the proffered wage and that the beneficiary had two years of experience as a cement mason as of the priority date. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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 approval of the petition remains revoked.