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

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: **DEC 18 2006**
EAC 04 249 51955

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an automobile repair and service business. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, a copy of Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary met the experience requirements of the ETA 750 as of the priority date. The director also determined that the beneficiary was ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c) and that the petitioner failed to submit an original Form ETA 750.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original May 2, 2005 denial, the issues in this case are whether or not the petitioner has established the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, whether the beneficiary met the experience requirements as of the priority date, whether the petitioner provided an original Form ETA 750, and whether the beneficiary is eligible for the benefit sought. The first issue that will be discussed is whether the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.00 per hour or \$37,440 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief; an affidavit, dated May 20, 2005, from the beneficiary; copies of medical records for the beneficiary; pictures of the beneficiary and his former spouse; a copy of a letter and a copy of Form G-884, Request for the Return of Original Document(s), from counsel; a copy of a letter from [REDACTED], dated January 1, 2001, confirming the beneficiary's work experience from 1995 to 1998; a copy of a letter from [REDACTED] dated March 8, 2001, confirming the beneficiary's work experience from June 1988 to February 1992; a letter from [REDACTED] dated May 23, 2005, confirming the beneficiary's work experience from June 1988 through February 1992 and from March 1995 to December 1998; a copy of the petitioner's Articles of Organization filed on March 12, 1997; a copy of the petitioner's Stock Certificate; a copy of the petitioner's Record of Incorporators' Meeting on March 13, 1997; a copy of net worth for the petitioner's owner; an affidavit, dated April 21, 2005, from [REDACTED] the petitioner's former counsel; and copies of the petitioner's 2001 through 2004 Forms 1120S, U.S. Income Tax Returns for an S Corporation.

Other relevant evidence includes a letter from the petitioner's former counsel requesting the director to obtain a duplicate ETA 750; an affidavit, dated August 9, 2004, from the petitioner's former counsel explaining that he had made several requests to both the director and to the Department of Labor (DOL) in an attempt to obtain a duplicate ETA 750; several letters from the petitioner's former counsel explaining that the petitioner's original ETA 750 was stolen; a copy of a denial notice, dated January 4, 2004, from CIS district director in Boston, Massachusetts denying the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, due to the beneficiary's former spouse's withdrawal of an affidavit of support on December 13, 2000; a Form I-129F, Petition for Alien Fiancé, approved on January 12, 2000; Forms I-864, Affidavits of Support Under Section 213A of the Act, from the petitioner's owner and the beneficiary's former spouse; copies of the petitioner's 1997 through 1999 Forms 1120S; and a letter from DOL to the petitioner's former counsel, dated June 24, 2004, informing him of the requirements for obtaining a duplicate ETA 750.

The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1997 through 1999 Forms 1120S reflect ordinary incomes or net incomes of \$6,196, \$18,931, and \$8,877, respectively. The petitioner's 1997 through 1999 Forms 1120S also reflect net current assets of -\$3,508, \$1,278, and \$1,025, respectively.²

The petitioner's 2001 through 2004 Forms 1120S reflect ordinary incomes or net incomes of \$7,443, \$36,730, \$702, and \$4,679, respectively. The petitioner's 2001 through 2004 Forms 1120S also reflect net current assets of \$12,939, \$30,660, \$22,769, and \$26,974, respectively.

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).

² Please note that the petitioner's 1997 through 1999 tax returns are before the priority date of April 30, 2001, and, therefore, have little relevance when determining the petitioner's continuing ability to pay the proffered wage of \$37,440 from the priority date. In the present case, they will only be considered when reviewing the totality of the circumstances affecting the petitioning business with regard to its ability to pay the proffered wage.

The petitioner's owner states his net worth at \$2,759,518 which includes investments in other businesses.

On appeal, with regard to the petitioner's ability to pay the proffered wage, counsel states:

The United States Citizenship and Immigration Service ('the Service') should consider the normal accounting practices of the company even if the ability to pay is not reflected in the company's tax returns. *See Matter of _____*, VSC, EAC 01-018-50413 (AAO Jan. 31, 2003). As a sole proprietorship, Petitioner routinely minimizes taxable income by distributing it to the owner as compensation to avoid double taxation. The Administrative Appeals Unit has recognized that this practice is acceptable and should be taken into account when evaluating whether the employer has the ability to pay the wage offered even if it is not reflected in the tax returns. *See id.*

Additionally, personal assets of a funding source, for example the assets of Petitioner's proprietor, should be considered by the Service when determining whether the employer has the ability to pay the wage offered. *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D.Mass. Sept. 29, 1987)(unpublished); *Matter of Ranchito Coletero*, 02-INA-105 (BALCA January 8, 2004) (en banc); *Ohsawa America*, 1988-INA-240 (AAO Aug. 30, 1988). In *Ranchito Coletero*, BALCA recognized that "there could be many reasons why such an operation would report a loss, but the sole proprietorship nonetheless has ample funds for payment of the salary." 02-INA-105 at 3.

Petitioner offers an audited financial statement revealing the value of Jay Imad's personal assets totaled more than \$3,000,000 on June 25, 2005. *See Exhibit G-4 attached, Audited Statement of Net Worth.* Thus, Petitioner demonstrates the ability to pay Beneficiary the wage of \$37,444.

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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary claims to have been employed by the petitioner from July 2000 to January 2001. However, counsel has not provided

any Forms W-2, issued by the petitioner for the beneficiary, indicating that the petitioner employed the beneficiary in 2000 and 2001.³

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The petitioner's 2001 tax return demonstrates that its net income in 2001 was \$7,443. The petitioner could not have paid the proffered wage of \$37,440 in 2001 from its net income. The petitioner's 2002 tax return demonstrates that its net income in 2002 was \$36,730. The petitioner could not have paid the proffered wage of \$37,440 in 2002 from its net income. The petitioner's 2003 tax return demonstrates that its net income in 2003 was \$702. The petitioner could not have paid the proffered wage of \$37,440 in 2003 from its net income. The petitioner's 2004 tax return demonstrates that its net income in 2004 was \$4,679. The petitioner could not have paid the proffered wage of \$37,440 in 2004 from its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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

³ It is noted that there is a discrepancy in the beneficiary's length of employment with the petitioner between the ETA 750 and the beneficiary's Form G-325A, Biographic Information, dated November 10, 2005. While the ETA 750 states that the petitioner employed the beneficiary from July 2000 through January 2001, the beneficiary's Form G-325 indicates that the petitioner employed the beneficiary from 2000 up to the present time. However, there is no evidence in the record that corroborates either claim. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

* * *

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.

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.⁴ 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2004 were \$12,939, \$30,660, \$22,769, \$26,974, respectively. The petitioner could not have paid the proffered wage of \$37,440 in 2001 through 2004 from its net current assets.

On appeal, counsel cites a non-precedent decision and states that CIS should consider the normal accounting practices of the company even if the ability to pay is not reflected in its tax returns. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS 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). In addition, even if CIS were to add back the officers' compensation to the net income, the petitioner would have only established its ability to pay the proffered wage of \$37,440 in one year, 2002 (\$14,300 officers' compensation + \$36,730 net income = \$51,030). Furthermore, in this case, the petitioner has not established that it exercises a large degree of financial flexibility in setting employee salaries, or that the petitioner easily fulfills its salary obligations. In fact, counsel has not provided any evidence that the compensation of officers is elastic or that the petitioner's owner would be willing to forego, or could forego, any portion of his officer's compensation in order to pay the proffered wage.

Counsel claims that the business owner's personal assets should be considered when determining whether the employer has the ability to pay the proffered wage. Counsel cites *O'Connor v. Attorney General of the United States*, *Ohsawa America*, and *Matter of Ranchito Coletero* in support of her contention. However, it is noted that all three cases counsel cites deal with sole proprietorships, not corporations as in the instant case. CIS 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In addition, counsel does not state how DOL precedents (*Ohsawa America* and *Ranchito Coletero*) are binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions

⁴ According 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.

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 asserts that an audited financial statement provided reveals the owner's net worth at over \$3,000,000. However, there is nothing in the record that establishes that the financial statement submitted is audited. In addition, the owner's personal assets will not be considered when determining the ability to pay the proffered wage of \$37,440 as the petitioner is a corporation and not a sole proprietorship, as discussed above.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has provided four relevant tax returns, 2001 through 2004, with none of the tax returns demonstrating the ability to pay the proffered wage of \$37,440. This is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry, its overall number of employees or the occurrence of any uncharacteristic business expenditures or losses.

The petitioner's 2001 tax return reflects an ordinary income or net income of \$7,443 and net current assets of \$12,939. The petitioner could not have paid the proffered wage of \$37,440 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects an ordinary income or net income of \$36,730 and net current assets of \$30,660. The petitioner could not have paid the proffered wage of \$37,440 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of \$702 and net current assets of \$22,769. The petitioner could not have paid the proffered wage of \$37,440 from either its net income or its net current assets in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of \$4,679 and net current assets of \$26,974. The petitioner could not have paid the proffered wage of \$37,440 from either its net income or its net current assets in 2004.

It is noted that although it appears that the petitioner employed the beneficiary from 2000 to the present, the petitioner has not provided any Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary for the pertinent years, 2001 through 2004. Therefore, any wages paid to the beneficiary during those years cannot be considered in determining the petitioner's ability to pay the proffered wage of \$37,440.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

The second issue to be discussed is whether the petitioner has provided an original Form ETA 750.

The regulation at 8 C.F.R. § 103.2(b)(4) states in pertinent part:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [CIS].

The regulation at 20 C.F.R. § 656.30(e) states:

Duplicate labor certifications.

- 1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
- 2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Officer or DHS tracking number.

In the instant case, the record contains several letters from former counsel, requesting both the director and DOL obtain a duplicate labor certification for this beneficiary. An affidavit from former counsel also explains that the original labor certification was stolen. Former counsel submitted a photocopy of the original labor certification showing a priority date of April 30, 2001. In addition, current counsel has filed a Form G-884, Request for the Return of Original Document(s) in an attempt to obtain a duplicate copy of the original labor certification.

Since there is no evidence in the record that the director attempted to obtain the labor certification as required by 20 C.F.R. § 656.30(e) and since the evidence in the record indicates that the petitioner did have an approved ETA 750 for the beneficiary, the AAO is willing to consider the photocopy of the ETA 750 as proof

of the approved ETA 750. Therefore, the issue of the petitioner establishing that it provided an original labor certification is resolved.

The third issue to be discussed in this case is whether the beneficiary met the experience requirements of the labor certification before the priority date of April 30, 2001.

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

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

The regulations for the skilled worker classification contain a minimum requirement that the position of two years training or experience. CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered. Block 15 does not require any additional education or experience.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of automobile mechanic must have two years of experience in the job offered.

In the instant case, the petitioner submitted a copy of a letter from [REDACTED] dated March 8, 2001, confirming the beneficiary's work experience from June 1988 to February 1992. The director denied the petition stating that "there was nothing to establish that the beneficiary met the job requirements in section 14 of the ETA-750."

On appeal, counsel states that evidence had been provided to establish that the beneficiary met the job requirements as of the priority date. In addition, counsel submitted a copy of a letter from [REDACTED]

dated January 1, 2001, confirming the beneficiary's work experience from 1995 to 1998 and a letter from Mr. [REDACTED] dated May 23, 2005, confirming the beneficiary's work experience from June 1988 through February 1992 and from March 1995 to December 1998.

The AAO finds that the current record provides no basis to dispute the validity of the employment letters from the beneficiary's prior employer, as at least two of the three letters conform to the content requirements under the regulation at 8 C.F.R. § 204.5(l)(3). Without further investigation from the director or other appropriate personnel, the AAO must concur that the beneficiary has met the experience requirements of the labor certification before the priority date of April 30, 2001.

The final issue to be discussed is whether the beneficiary is ineligible for the benefit sought due to marriage fraud under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c) which states in pertinent part:

Notwithstanding the provisions of subsection (b) no petition shall be approved if –

- 1) The alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or
- 2) The Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Evidence in the record indicates that the beneficiary applied for the benefits of Section 245 of the Act based upon his marriage to a United States Citizen [REDACTED]. During an interview at the district office in Boston, Massachusetts, the beneficiary's U.S. citizen spouse withdrew her Form I-864, Affidavit of Support Under Section 213A of the Act. The beneficiary's U.S. citizen spouse also stated "It was an arranged marriage. I am not in love with him. I no longer wish to shoulder the financial responsibility." The district director denied the application stating "You are not eligible for adjustment of status under INA 245(a)(2), because you are inadmissible as an alien who is likely at any time to become a public charge pursuant to INA 212(a)(4)(C)." The current petition was denied in part because the director determined that the beneficiary entered into an arranged marriage solely for the purpose of obtaining U.S. immigration benefits.

On appeal, counsel states that the "beneficiary married his first wife with the intention of spending the rest of his life with her. Thus, Beneficiary's marriage to his former wife is valid for immigration purposes and it was arbitrary and irrational for [CIS] to deny Petitioner's I-140 Petition for Immigrant Worker on the allegation that Beneficiary's first marriage was a sham." Counsel cites *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975) and *Matter of Boromand*, 17 I&N Dec. 450, 454 (BIA 1980) in support of her contention.

Also on appeal, the beneficiary submits an affidavit explaining his marriage and divorce to his first wife and his marriage to his second wife. The beneficiary provides copies of medical reports, pictures of his first wife and himself, and states that he has testicular cancer, thereby, making it very difficult for him to go back to his country.

While there are indicators that the beneficiary's first marriage may have been entered into solely for the purpose of obtaining U.S. immigration benefits (pictures of the beneficiary and his first wife are all from Lebanon, there are no financial documents for the first marriage, bank statements, utility bills, phone bills, leases, etc., the first

wife said the marriage had been arranged), the record of proceeding lacks clear and convincing evidence that corroborates the director's decision that the beneficiary's first marriage was a sham marriage or that the beneficiary attempted or conspired to enter into a marriage to evade immigration laws. Without further investigation and adequate documentation, the AAO finds the record to be inconclusive with regard to the issue of the beneficiary having entered his first marriage solely for the purpose of obtaining immigration benefits or that the beneficiary attempted or conspired to enter into a marriage to evade immigration laws.⁵

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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.

⁵ While the AAO is not basing its adverse decision on it, we additionally note, however, that the respondent may be ineligible to adjust his status based on 8 C.F.R. § 245.1(c)(6) which states in pertinent part as follows:

the following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act, . . . (6) any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless (i) in the case of a K-1 fiancée(e) under section 101(a)(15)(K)(i) of the Act or the K-2 child of a fiancée(e) under section 101(a)(15)(K)(iii) of the Act, the alien is applying for adjustment of status based upon the marriage of the K-1 fiancée(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancée(e) pursuant to 214.2(k) of this chapter. (8 CFR 245.1(c)(6))

In the instant case, the respondent entered the United States as a K-1 fiancée of a United States citizen and although he married the United States citizen fiancée within 90 days of his entry, he is now applying for adjustment of status based upon his marriage to a different United States citizen and not the United States citizen fiancée who petitioned for him to come to the United States as a K-1. Thus, as stated above pursuant to 8 C.F.R. § 245.1(c)(6) the respondent may be ineligible to adjust his status to that of a lawful permanent resident. There is only one exception to that section of ineligibility and as stated above the respondent has failed to meet that particular exception pertaining to marrying the United States citizen fiancée(e) within 90 days of entry as a K-1 and that the adjustment of status application sought pertains to the marriage to that fiancée(e). There are no exceptions to this prohibition for adjustment of status for immediate relative as defined in section 201(b) of the Act nor a special immigrant as defined in section 101(a)(27) (H), (I), (J), or (K) of the Act. Thus, the respondent who falls squarely into this prohibition is clearly ineligible to adjust his status in the United States. However, this issue is before the director or the Executive Office for Immigration Review to adjudicate.