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

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JUN 28 2007

File: [REDACTED]
LIN-04-161-51818

Office: NEBRASKA SERVICE CENTER Date:

In re: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner operates a business related to wireless sales, and seeks to employ the beneficiary permanently in the United States as a sales representative, communication equipment (“Cell Phone Market Specialist”). The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s December 12, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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 appeal.¹

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

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.²

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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 The petitioner initially filed the I-140 petition for the beneficiary as a skilled worker, 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. *See* Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As the petitioner only required one year of experience on the ETA 750, the director allowed the petitioner to have the petition considered under the “other worker” category.

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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$15.51 per hour, equivalent to \$32,260.80 per year based on a 40 hour work week. The labor certification was approved on March 22, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on April 29, 2004. The petitioner represented the following information on the I-140 Petition: date established: September 20, 1987; gross annual income: \$6,119,409; net annual income: -\$42,282; and current number of employees: five.

On March 9, 2005, the director issued a Request for Evidence ("RFE"), requesting that the petitioner submit evidence related to the petitioner's ability to pay from 2001 onward. The RFE also noted that the petition as filed did not meet the professional or skilled worker category, and the petitioner should indicate whether it wished the petition to be filed based on the category of "other worker." The petitioner responded.

On June 8, 2005, the director issued a second RFE for the petitioner to submit any W-2 Forms or evidence that the petitioner had paid the beneficiary wages. The petitioner responded. Following consideration of the response, on December 12, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary listed that he has been employed with the petitioner from November 1999 to the present (date of signature, April 30, 2001). The petitioner provided the following evidence of wage payment:

<u>Year</u>	<u>1099 Income</u>
2004	\$19,580.25
2003	\$28,788.00
2002	\$36,930.25
2001	\$57,887.75

The director's decision notes that the beneficiary was paid on Form 1099 representing "non-employee" compensation, and that the petitioner refers to the beneficiary as an independent contractor.³ Further, the director's decision questions whether the amounts paid to the beneficiary were reflected on the petitioner's tax

³ The petitioner provided in its RFE response that the beneficiary was employed as an "independent contractor," but would be employed as a "direct employee" of the petitioner once the I-140 petition was approved.

return, as the amounts for non-employee compensation might appear as "costs of labor," rather than salaries or wages. The petitioner's tax returns do not reflect that the petitioner paid any costs of labor. We do note that the beneficiary's position is related to sales and that the petitioner's tax returns reflect significant payments in "commissions."⁴ We will accept the Forms 1099 as proof of the petitioner's ability to pay the proffered wage. Accordingly, the petitioner can show that it can pay the proffered wage in 2001, and 2002. The petitioner would need to demonstrate that it can pay the difference between the proffered wage and the wages paid in 2003 and 2004.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

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

<u>Tax year</u> ⁵	<u>Net income or (loss)</u>
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⁴ Regardless of whether the petitioner pays the beneficiary on a commission basis, the petitioner must pay the beneficiary the annual proffered wage of \$32,260.80 once the beneficiary adjusts his status.

⁵ The petitioner initially operated as a sole proprietorship, but incorporated on January 1, 2003 as an S corporation. For the years 2001 and 2002, the sole proprietor provided his Form 1040 Schedule C. A sole proprietor is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available

2004	\$3,739
2003	-\$41,823

The petitioner's net income would not demonstrate the petitioner's ability to pay the proffered wage in either of the above years.

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

<u>Tax year</u>	<u>Net current assets</u>
2004	\$454,936
2003	\$553,695

funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The sole proprietor provided his 2001, and 2002 individual Form 1040 Schedule C with business income, but did not provide the rest of his Form 1040, so that we are unable to determine the sole proprietor's adjusted gross income (AGI), or whether the sole proprietor supported any dependents. The Form 1040 Schedule C reflects the following information:

Petitioner	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2002	Cannot determine	\$6,989,320	\$121,598	\$21,430
2001	Cannot determine	\$3,561,766	\$131,335	\$27,542

As the petitioner can demonstrate its ability to pay in 2001, and 2002 based on the Forms 1099 provided, we will consider the petitioner's tax returns for these years generally.

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.

The petitioner's net current assets would allow for payment of the proffered wage in both 2003 and in 2004.^{7,8}

On appeal, counsel contends that the petitioner can pay the proffered wage, and that the petitioner can exhibit this through payments made to the beneficiary in 2001, and 2002. Counsel further contends that the petitioner has provided other evidence to show that the petitioner can pay the proffered wage, including bank statements; a statement from the petitioner's Vice President [formerly the company's office manager] that it can meet its payroll requirements, and that in the 10 years that the company's office manager had worked for the petitioner, meeting employee payroll requirements has never been an issue; a letter from the petitioner's president explaining diminished profits in 2003 as a result of a advertising dispute with T-Mobile, which resulted in the petitioner collecting \$140,000 less than a \$300,000 contract provided for. As a result of the foregoing, counsel contends that CIS failed to consider the totality of the petitioner's circumstances, and that in examining the totality, the petitioner can pay the proffered wage.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Based on the Forms 1099 provided, and the petitioner's net current assets, we conclude that the petitioner can pay the proffered wage, and that the petitioner has overcome the reason for denial on this issue.

However, although not raised in the director's decision, the petitioner has failed to document that the beneficiary meets the requirements of the certified labor certification. 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).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the

⁷ We additionally note the petitioner's tax returns reflected the following gross receipts: 2004: \$4,013,988; and 2003: \$6,119,409.

⁸ The petitioner additionally provided the business' bank statements for the months ending July 31, 2004 through June 30, 2005. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." Cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120S Schedule L and included in net current assets analysis above. The petitioner did not provide evidence to show that the funds listed in the bank statements represent funds beyond those listed on the petitioner's federal tax returns. We note that the bank statements reflect significant varying amounts from a high balance of \$137,295.39 (as of January 31, 2005) and a low balance of \$8,507.19 (as of May 31, 2005). As the petitioner can demonstrate its ability to pay the proffered wage in 2004 based on its net current assets, we will consider the bank statements generally as additional evidence of the petitioner's ability to pay the proffered wage.

labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires one year of experience in the related occupation of sales experience with job duties for the position including:

Outside sales of cell phones, service Spanish speaking clients (15% client base). Develop new clients. Accounting, inventory, purchasing, and stock management. Advise customers of the various plans and suit plans to customer needs. Program phones and perform general cell phone maintenance. Maintain accounts and send reports to upper management.

The petitioner listed no educational requirements, and listed special requirements for the position in Section 15 as: "Accounting knowledge, Spanish speaking abilities to communicate with customers."

On the Form ETA 750B, the beneficiary listed his prior experience as: (1) the petitioner, American Fork, UT, from November 1999 to present (signed on April 30, 2001), outside sales; (2) International Home Services, Salt Lake City, UT, from October 1999 to June 2000, salesman; and (3) Techocel Quito, Ecuador, July 1996 to August 1999, store administrator, cell phone stores.

The beneficiary additionally listed his education on ETA 750B as: (1) Colegio Dillon, Quito, Ecuador, general education from September 1972 to June 1978, studied public accounting; and (2) Universidad Central Quito, Ecuador, from September 1980 to June 1985, studied Finance.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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.

As evidence to document the beneficiary's qualifications, the petitioner submitted a copy of the beneficiary's degree in Business Management, along with translation. The petitioner additionally submitted a copy of the

beneficiary's resume, and translation. The petitioner failed, however, to document that the beneficiary had obtained one year of prior sales experience in the form of a letter from a prior employer confirming his title, job duties, dates of employment, and hours worked. Additionally, the petitioner failed to document that the beneficiary had accounting knowledge. The petitioner did not provide any transcripts to show that the beneficiary had taken any relevant accounting courses. A degree in business management is very broad, and could encompass the study of a number of areas. The petitioner must provide specific evidence to document that the beneficiary meets the requirements of the certified Form ETA 750. 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)). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

As the petitioner can demonstrate its ability to pay the beneficiary the proffered wage, the petitioner should be allowed an opportunity to address the issue related to the beneficiary's experience.

In accordance with the foregoing, we will remand the petition to the director to issue an RFE related to the documenting the beneficiary's prior experience to meet the requirements of the certified Form ETA 750. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.