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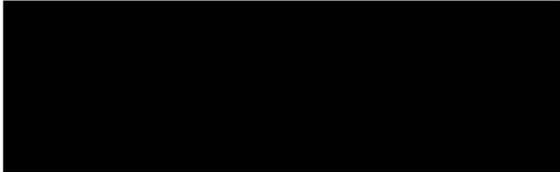
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: LIN 06 205 51912 Office: NEBRASKA SERVICE CENTER Date: **NOV 29 2007**

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial embroidery business. It seeks to employ the beneficiary permanently in the United States as a machine operator. As required by statute, a 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 denied the petition accordingly.

It appears that the petitioner wishes to be represented in these proceedings. 8 C.F.R. § 103.2(a)(3) specifies that a petitioner may be represented “by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.” In this case, the person listed on the G-28 is not an authorized representative. Therefore, the AAO will not recognize the person listed on the G-28 as representing the petitioner in this matter.

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 January 24, 2007, decision, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation at 8 C.F.R. § 204.5(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. 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$10.08 per hour or \$20,966.40 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. Relevant evidence submitted on appeal includes a statement, copies of the 2004 through 2006 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, a copy of the petitioner's previously submitted front page of its 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, copies of the petitioner's 2004 and 2005 Schedule Ls from its Forms 1120S, copies of the petitioner's previously submitted 2001 through 2003 front page of its Schedule C, and copies of the petitioner's second page of its 2001 through 2003 Schedule C. Other relevant evidence includes an unaudited copy of an income statement as of May 31, 2006.<sup>2</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 and 2005 Forms 1120S reflect an ordinary income or net income of \$0 and [REDACTED] respectively. The petitioner's 2004 and 2005 Forms 1120S also reflect net current assets of \$70,410 and [REDACTED] respectively.<sup>3</sup>

The petitioner's 2001 Schedule C reflects gross receipts of \$477,702, wages paid of \$0, net profit of -\$10,046, and cost of labor of \$145,194.<sup>4</sup>

The petitioner's 2002 Schedule C reflects gross receipts of \$505,433, wages paid of \$0, net profit of \$376, and cost of labor of \$191,507.

The petitioner's 2003 Schedule C reflects gross receipts of \$509,632, wages paid of \$0, net profit of \$5,434, and cost of labor of \$185,724.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. **Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.** Therefore, the AAO will not consider the unaudited income statement when determining the petitioner's ability to pay the proffered wage of \$20,966.40.

<sup>3</sup> It is noted that the petitioner did not submit its entire Forms 1120S which would have included its Schedule K.

<sup>4</sup> The sole proprietor did not submit his complete 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns. It is also noted that the director did not inform the petitioner that if it was organized as a sole proprietor that it would be necessary for the sole proprietor to submit his entire Form 1040 nor did the director request the sole proprietor's monthly recurring personal expenses for 2001 through 2003. However, the burden of proof is on the petitioner.

The beneficiary's 2004 through 2006 Forms W-2 reflect wages paid to the beneficiary by the petitioner of \$11,086.37 + \$1,143.58, \$15,819.86, and \$16,349.13, respectively.<sup>5</sup>

On appeal, the petitioner asserts that it has established its ability to pay the proffered wage of \$20,966.40 based on its payment of salaries and wages and the beneficiary's Forms W-2.

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).

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<sup>5</sup> It appears that the beneficiary is currently using a social security number that does not belong to her. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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 750, signed by the beneficiary on April 16, 2001, the beneficiary does not claim the petitioner as a past or present employer. However, the petitioner has submitted copies of the beneficiary's 2004 through 2006 Forms W-2. Therefore, the petitioner has established that it employed the beneficiary in 2004 through 2006, but not in 2001 through 2003.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$20,966.40 and the actual wages paid to the beneficiary. Since the petitioner has not established that it employed the beneficiary in 2001 through 2003, it must establish that it had sufficient funds to pay the entire proffered wage of \$20,966.40 in those years. In 2004 through 2006, the differences between the proffered wage of \$20,966.40 and the actual wages paid to the beneficiary of \$12,229.95 (\$11,086.37 + \$1,143.58 = \$12,229.95) in 2004, of \$15,819.86 in 2005, and of \$16,349.13 in 2006 are \$8,736.45, \$5,146.54, and \$4,617.27, respectively.

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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *Chi-Feng Chang* further noted:

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

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

In 2004 and 2005, the petitioner was organized 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).

In the instant case, the petitioner has not provided Schedule K for its tax returns, and, therefore, it is unclear whether the petitioner had income from sources other than from a trade or business. Therefore, the AAO will consider its ordinary income to be that income listed on line 21 as its net income. In 2004 and 2005 the petitioner's net income was \$0, and -\$42,015, respectively. The petitioner could not have paid the difference of \$8,736.45 in 2004 or the difference of \$5,146.54 in 2005 between the proffered wage of \$20,966.40 and the actual wages paid to the beneficiary of \$12,229.95 in 2004 and \$15,819.86 in 2005 from its net income in those years. The petitioner did not submit a tax return for 2006. Therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$4,617.27 between the proffered wage of \$20,966.40 and the actual wages paid to the beneficiary of \$16,349.13 in 2006 from its net income in 2006.

Nevertheless, with regard to a company organized as an S corporation, 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 depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. In 2004 and 2005, the petitioner's net current assets were \$70,410 and [REDACTED] respectively. The petitioner could have paid the difference of \$8,736.45 in 2004 and the difference of [REDACTED] between the proffered wage of \$20,966.40 and the actual wages paid to the beneficiary of [REDACTED] and of \$15,819.86 in 2005 from its net current assets in 2004 and 2005. Since the petitioner did not submit its 2006 tax return, the AAO is unable to determine if the petitioner had sufficient net current assets to pay the difference of [REDACTED] between the proffered wage of \$20,996.40 and the actual wages paid to the beneficiary of [REDACTED] in 2006.

In 2001 through 2003, the petitioner was organized as a sole proprietorship, 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

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 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 (7<sup>th</sup> Cir. 1983).

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

In the instant case, the sole proprietor did not provide complete copies of his 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns. Therefore, the AAO is unable to determine how many family members the sole proprietor supported in 2001 through 2003. In addition, due to the lack of the complete tax returns, the AAO cannot determine the sole proprietor's adjusted gross income, and because the petitioner failed to submit the sole proprietor's monthly recurring personal expenses, the AAO is unable to determine if the sole proprietor could pay the proffered wage of \$20,966.40 and his monthly recurring expenses in the pertinent years (2001 through 2003) from the sole proprietor's adjusted gross income.

On appeal, the petitioner contends that it has established its ability to pay the proffered wage based on the beneficiary's Forms W-2 and the salaries and wages paid.

While the petitioner has shown that it has paid salaries and wages, that fact alone is not sufficient to establish its ability to pay the proffered wage of \$20,966.40, especially when the petitioner was organized as a sole proprietorship, and the determination of its ability to pay the proffered wage is based in good part on the sole proprietor's adjusted gross income minus the sole proprietor's personal recurring monthly expenses. In any case, the petitioner's net profits as shown on its Schedule C for 2001 through 2003 are considerably less than the proffered wage of \$20,966.40 (-\$10,046 in 2001, \$376 in 2002, and \$5,434 in 2003). Therefore, with the limited evidence provided, the AAO has determined that the petitioner has not established its ability to pay the proffered wage of \$20,966.40 in the years 2001 through 2003.

Beyond the decision of the director, there are additional issues that must be determined before the visa petition may be approved. 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 (9<sup>th</sup> 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). Those issues include a clarification between the beneficiary's name on the Form I-140 and on the ETA 750. The director requested that the petitioner submit evidence that the persons listed on the two forms are the same person (i.e. legal name change, marriage certificate, divorce decree with name change, etc.). The petitioner has not addressed this issue.

The second issue in this proceeding is whether the beneficiary met the experience requirements of the labor certificate at the priority date of April 24, 2001.

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

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 24, 2001.

Citizenship and Immigration Services (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 of machine operator. Block 15 states that the beneficiary must have an eye for detail and lots of patience.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of machine operator must have two years of experience in the job offered and an eye for detail and lots of patience.

Even though requested by the director, the petitioner has not submitted any evidence that the beneficiary met the experience requirements of the labor certification at the priority date of April 24, 2001. Therefore, the petitioner has not established that the beneficiary met the experience requirements of the labor certification as of the priority date of April 24, 2001.

The final issue in these proceedings is whether or not the position of machine operator meets the requirements of other worker as requested on the Form I-140. The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part:

*Definitions.* As used in this part:

*Other worker* means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than 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(1)(4) states in pertinent part:

*Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. . . .

In the present case, the petitioner has placed a two year experience requirement on the position of machine operator. The labor certification was certified as such; therefore, the position should have been filed as a skilled worker requiring two years of experience and not as an other worker requiring less than two years of experience.

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.

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**ORDER:** The appeal is dismissed.