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U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 14 2005

WAC 03 141 54130

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[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, Director
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting services company. It seeks to employ the beneficiary permanently in the United States as a painter. 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, that the job offered was a full time position, and that the beneficiary had the requisite experience. Accordingly, the director denied the petition.

On appeal, counsel states that the petitioner is capable of paying the beneficiary the proffered wage and that the beneficiary has the requisite two years of experience. Counsel submits new documentation.

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

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

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

With regard to the first issue raised in the director's decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on November 30, 1999. The proffered wage as stated on the Form ETA 750 is $20.15 per hour, which amounts to $41,912 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of $119,797, and to currently employ two workers. In support of the petition, the petitioner submitted a letter of support, copies of its Form 1040 U.S. individual income tax return for 1999, 2000, and 2001; a copy of the petitioner's business license; copies of Form DE-6, Quarterly Wage Report, for three quarters of 2002; and a copy of a certificate of employment issued by Bill Rigo, Bill Rigo Painting, that described the beneficiary's previous work experience as a painter from June 1993 to December 1995.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 17, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide its federal income tax return for 2002, and also provide some missing pages of Schedule C's in the tax returns already submitted. The director noted that the petitioner's 1040's identified it as a sole proprietor, while the on-line license status check submitted by the petitioner indicated that the petitioner was a corporation. The director requested that the petitioner clarify this discrepancy and submit a copy of the petitioner's actual current valid business license. With regard to the petitioner's status as a sole proprietor, the director requested that the petitioner submit a statement of monthly expenses for the petitioner's family. The director stated that this statement must indicate all of the household living expenses, such as housing, car payments, insurance, utilities, credit cards, student loans, food, clothing, school, and daycare, among other recurring monthly household expenses.

With regard to the beneficiary's qualifying work experience, the director noted that Form ETA-750 indicated that the beneficiary was unemployed as of June 25, 1999, and asked that the petitioner indicate whether the beneficiary was still unemployed. If the beneficiary was employed, the director requested a list of all employers and dates of employment from the date June 25, 1999 to the present. The director also requested proof of the beneficiary's employment history in the United States, as well as pay statements to establish that the beneficiary worked for Bill Rigo Painting. The director also requested copies of the beneficiary's federal and state tax returns for 1993, 1994, and 1995, along with all IRS Form W-2 statements for 1993, 1994, and 1995.

In response, counsel submitted the petitioner's IRS Form 1040s for the years 1999, 2000, 2001, and 2002. Counsel also submitted a statement from the petitioner that established monthly expenses of $1,810 a month. Counsel noted that the petitioner's adjusted gross income for the years 1999, 2000, 2001 and 2002 were sufficient to both cover the proffered wage of the beneficiary and the petitioner's monthly expenses. Counsel also noted that the petitioner had been operating g as a sole proprietor company since it stated operations in 1992 until 2002. Counsel stated that the company began to officially operate as a corporation in 2003.

Counsel stated that the petitioner would file a Form 1120 U.S. corporation income tax return for the tax year 2003. Counsel submitted the petitioner's articles of incorporation, filed in March 2002, Form 2553, Election By A Small Corporation, that identified the petitioner's owner and his wife as the two shareholders, and also stated that the election of this status would be effective for the tax year beginning April 1, 2002. Counsel also resubmitted the online copy of the online business contractor license submitted with the initial petition. and a copy of the petitioner's contractor state license issued on February 11, 1997.

With regard to the beneficiary's qualifications, counsel stated that the beneficiary had worked with the petitioner from 1997 to the present as a full-time painter; however, the beneficiary had been paid on a cash basis. According to counsel, no W-2 forms or other documentation of payment of salary were available. To substantiate this assertion, counsel submitted two affidavits from the beneficiary, both dated September 3, 2003. One affidavit stated that the beneficiary worked with Bill Rigo Painting, a defunct business, from June 1993 to December 1995 as a full-time painter. Both letters also stated that the beneficiary had no employment authorization while working for Bill Rigo Painting, and as a result no paychecks, W-2 forms and DE-6 Forms were available to document this employment. The other affidavit stated that the beneficiary had been working with the petitioner from 1997 to the present. The beneficiary also stated that due to the lack of a valid work authorization, while working for the petitioner, he was paid on a cash basis, and that he was issued no W-2 forms, or Forms 1099s. The beneficiary also stated that since he was not issued a W-2 form or a Form 1099 Miscellaneous Income, he did not file any income tax returns. As a result, the beneficiary stated that he had no Form 1040s to submit to the record.

On September 25, 2002, the director denied the petition. The director noted that the petitioner had changed its business operation from sole proprietor to that of a corporation; however, the director drew attention to the IRS Form 2553 that stated the petitioner incorporated on March 27, 2002, and began conducting business as a corporation on April 1, 2002. The director also noted that the petitioner submitted an incomplete copy of IRS Form 1040 for 2002 that contained no evidence of a business of any sort. The director also noted that the petitioner submitted no IRS Form 1120 or 1120S for tax year 2002. The director reached the conclusion that the petitioner did not exist from at least January 1 until March 31, 2002. The director further noted that the petitioner had not submitted documentary evidence to show that it had the ability to pay the beneficiary from April 1, 2002 to December 31, 2002. As a consequence, the director determined that the petitioner had not submitted sufficient documentary evidence to establish the petitioners' ability to pay the proffered wage in 2002. Finally, the director stated that the petitioner had not established the existence of a bona fide United State company for the first quarter of 2002, or that it had the ability to pay the proffered wage for 2002.

With regard to the beneficiary's previous work experience, the director determined that the petitioner had not submitted documentary evidence to substantiate the employment letter previously submitted from Bill Rigo Painting. In addition, the director stated that the beneficiary's signed declaration of September 2002 which stated he worked for [redacted] om June 1993 to December 1995 directly contradicted his signed statement on From ETA-750 that stated he worked for Bill Rigo Painting from June 1991 to December 1994. In addition the director pointed out that the beneficiary had signed Form ETA 750 in 1999, and indicated that he had been unemployed from October 1996 to the date of signing the ETA750. However, in his statement of September 2003, the beneficiary indicated that he had worked for the petitioner from 1997 to at least September 3, 2003. The director further noted that the business address and telephone numbers listed on the

Bill Rigo Painting letter of employment verification were listed in the telephone directory as residential address and phone numbers. The director also noted that the letter from Bill Rigo Painting listed dates of employment that differed from the dates listed on Form ETA-750. The director cited to *Matter of Ho*, 19 I & N Dec. 582, 591-91(BIA 1988) in denying the petition.

On appeal, counsel resubmits the petitioner's Form 1040 federal income tax returns, for 1999, 2000, and 2001, along with the petitioner's Form 1120S for 2002, dated April 3, 2003. Counsel asserts that the petitioner has continuously conducted business for more than ten years without any disruption, and the fact that the petitioner incorporated in 2002 does not change the nature of the business and its operation. Counsel states that the petitioner's monthly expenses would not preclude the petitioner's ability to pay the proffered wage to the beneficiary.[1] Counsel also submits an additional affidavit from the beneficiary dated October 10, 2003, that states the information on the ETA 750 B regarding his employment with Bill Rigo Painting was written in error. The beneficiary further states that the correct dates of his employment with Bill Rigo Painting were from June 1993 to December 1995. Furthermore, counsel submits two additional affidavits from individuals identified as the beneficiary's co-workers when he worked for Bill Rigo Painting. Jose Rocha, Pasadena, California, affirms that he worked with Rigo Painting from 1991 to 1999 as a supervisor or under the supervision of [redacted] states that from 1994 to 1996, he worked with the beneficiary and at times he was the beneficiary's supervisor. [redacted] also states that as of July 2003, Rigo Painting was no longer in operation. Another affiant, Jay Larson, affirms that he lives in Glendale, California, and that the worked for Bill Rigo painting from 1990 to 1996 as a journeyman painter. [redacted] affirms that he worked with the beneficiary for the two years that he worked with Bill Rigo Painting. [redacted] identifies the two years of the beneficiary's employment as the summer of 1994 to 1996.

The director's determination that the petitioner did not exist from January 1, 2002 to April 1, 2002 is unfounded and appears to be conjecture. The record contains the petitioner's Form DE-6 Quarterly Wage Report, that indicates salaries paid to three employees during the first quarter of 2002. In addition, in response to the director' request for further evidence, the petitioner submitted Form 1040 for the tax year January to December 2002. This form indicates on Schedule E, Part II, a business income of $25,493 for 2002. Furthermore the 1120S corporate income tax form submitted by the petitioner on appeal reflects a similar sum of $26,441 for business income. While the 1120S form indicates that the petitioner is only documenting business activities from April to December 2002, either tax form is sufficient to answer any questions with regard to whether the petitioner conducted its business during any part of 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Although the beneficiary and the petitioner claim that the petitioner employed the beneficiary full-time from 1997 to the present, neither the petitioner nor the beneficiary provided any further substantiation of their assertions, such as pay slips, or documentation of

[1] Although counsel, on appeal, identifies the proffered wage as both $20,540 and $41,912, the proffered wage is $41,912.

method or schedule of payments to the beneficiary, that could more conclusively establish such lengthy employment. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Since the beneficiary did not indicate such employment on the ETA Form 750B, the provision of corroboratory evidence is that much more essential to establishing such employment. Therefore, without more persuasive evidence, as established by the ETA Form 750, the petitioner did not employ or pay the beneficiary the proffered wage prior to or following the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure 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. 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).

The petitioner submitted its Form 1040 individual income tax returns for 1999, 2000, and 2001 with the original petition. The petitioner also submitted a Form 1040 for 2002 filed on March 31, 2003 as well as a Form 1120S for 2002, filed in April 2003. The AAO will consider both of these 2002 tax documents as they pertain to the petitioner's ability to pay the proffered wage as of the priority date and onward, prior to its final determination with regard to the petitioner's ability to pay the proffered wage.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner has to establish that it has the ability to pay the proffered wage as of the priority date and continuing. With regard to the petitioner's Form 1040 federal income tax returns from 1999 to 2002, the petitioner established the following adjusted gross income figures: in 1999, $78,161; in 2000, $81,387; in 2001, $71,972, and in 2002, $74,848. The petitioner had to establish that it had sufficient funds to pay the beneficiary a salary of $41,192 from 1999 to 2002. Accordingly, the petitioner's adjusted gross income for all four years is sufficient to cover the proffered wage as of the priority date of November 30, 1999 and onward.

However, from 1999 to the first quarter of 2002, the petitioner was 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 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 for these years, 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 (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.

In his federal income tax returns fro 1999, 2000, and 2001, the petitioner indicated he is married and filing jointly, and therefore, supported a family of two. The petitioner also submitted a monthly expense statement that indicated monthly expenditures of $1,810, or $21,720 for yearly personal expenses. If the proffered wage of $41,912 and the petitioner's recurring personal expenses are subtracted from the petitioner's adjusted gross income for the years 1999 through 2002, the following sums are still available to cover any additional personal expenses: in 1999, $14,529; in 2000, $17,755; in 2001, $8,340; and in 2002, $11,216. Therefore the petitioner appears to have sufficient financial resources to both cover the proffered wage and his personal expenses as of the priority date onward.

As stated previously, the petitioner filed both a 1040 individual income tax return for tax year 2002, as well as a Form 1120S corporate income tax return that covered the months of May to December 2002. With regard to the director's question as to when the petitioner incorporated, this issue is not viewed as dispositive in the current proceedings. The petitioner can choose to change its business status at any time to obtain better tax advantages or efficiencies. The question with regard to the present proceedings is did the change in tax status in 2002 affect the petitioner's ability to pay the proffered wage. The AAO will analyze the petitioner's 1120S tax return with the ability to pay issue in mind.

As stated previously, the petitioner did not provide sufficient documentation that it employed the beneficiary and paid the beneficiary an amount equal to the proffered wage in 2002. Therefore the petitioner cannot establish that it is capable of paying the proffered wage in 2002 through its employment of the beneficiary. As also noted previously, if the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the period of time in question, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. The petitioner functioned as a sole proprietor for the first four months of the 2002. $24,949, one third of the sole proprietor's adjusted gross income of $74,848 for 2002 is greater than $21,210, which is the sum of $7,240, the petitioner's recurring monthly expenses for the four initial months of 2002, and $13,970, four months worth of the proffered wage.[2] Thus, the petitioner established that it has the ability to pay the proffered wage for the first four months of 2002.

The evidence indicates that as of April 2002, the petitioner was structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's 1120S tax return for eight months of 2002 shows the following amount of ordinary income: $26,441. This figure by itself fails to establish the ability of the petitioner to pay the remaining eight months of the proffered wage for 2002, or $27,941[3]. In addition, after the petitioner became a corporation, the petitioner's owner can no longer show the ability to pay the proffered wage based on his personal assets or

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[2] The proffered wage for four months is based on the beneficiary's proffered wage of $41,921 divided by twelve months ($3,492) and then multiplied by four to arrive at the proffered salary for four months of work, or $13,970.

[3] This figure is based on the beneficiary's proffered wage of $41,912 divided by twelve months ($3,492) and then multiplied by eight to arrive at the proffered salary for eight months of work, or $27, 941.

adjusted gross income. Citizenship and Immigration Services (CIS), formerly the Service or 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); *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.

Therefore, the petitioner has demonstrated the ability to pay the proffered wage for the first four months of 2002 as a sole proprietor, but has not shown the ability to pay the proffered wage for the remaining eight months of the year as a corporation.

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 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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. As previously stated, the petitioner established that it has the ability to pay the proffered wage for the first four months of 2002 based on the petitioner's adjusted gross income. The AAO will examine only the final eight months of 2002 for purposes of establishing whether the petitioner had the ability to pay the proffered wage during the last eight months of 2002 based on its net current assets. The petitioner submitted the following information for the last eight months of 2002 as an S Corporation:

| | 2002 |
|---|---|
| Ordinary Income | $ 26,441 |
| Current Assets | $ 18,551 |
| Current Liabilities | $ 0 |
| Net current assets | $ 18,551 |

[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.

These figures fail to establish the ability of the petitioner to pay the entire proffered wage of $41,912 in 2002. As previously stated, the petitioner established that it could pay the proffered wage for the first four months of the year as a sole proprietor. With regard to the last eight months of the year, the petitioner's net current assets of $18,551 for the last eight months of 2002 are not sufficient to meet the proffered salary for eight months of work, namely, $27, 941. Thus, while the petitioner established its ability to pay the proffered wage from 1999 through April 2002, it failed to establish that it had the ability to pay the proffered wage during the final eight months of 2002. Therefore the petitioner has not established that it had the ability to pay the proffered wage as of the priority date onward.

With regard to the second issue raised by the director, namely, the beneficiary's requisite two years of work experience, Form ETA 750, Part A, indicates that the beneficiary needed two years of work experience in painting to qualify for the position. The director requested additional documentation in his request for further evidence with regard to the beneficiary's work experience. The petitioner submitted a letter from Bill Rigo Painting, a previous employer that stated a different date of employment from that stated by the beneficiary in the Form ETA 750. In addition, the petitioner submitted affidavits with regard to the beneficiary's employment by the petitioner since 1997, which the director found to be another ETA 750 discrepancy. The director in his decision determined that the petitioner had not overcome the discrepancies found in the documentation and denied the petition. On appeal, counsel submits an additional affidavit from the beneficiary that states the period of time identified in the ETA 750 as the beneficiary's work experience with Bill Rigo, namely, June 1991 to December 1994, was written in error. Counsel also submits two additional affidavits from the beneficiary's former co-workers at Bill Rigo Painting. These two individuals state the beneficiary worked for [redacted] from 1994 to 1996. These dates are inconsistent with both the beneficiary's affidavits and the information contained on the ETA 750B.

Upon review of the record, the petitioner has not established that the beneficiary has the requisite work experience. First, the beneficiary's total work experience time in the United States is not sufficiently established in the record. Neither the petitioner nor the previous U.S. employer provides sufficient documentation of employment, such as pay stubs, or a work identification, to establish the beneficiary's work experience. It is noted that any employment of the beneficiary by the petitioner prior to the 1999 priority date could be utilized to establish the beneficiary's requisite two years of work experience as a painter. However, the petitioner provided no documentation whatsoever of this employment. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. Although both the beneficiary and the owner of Bill Rigo Painting and the beneficiary's two work colleagues all state that the beneficiary worked for Bill Rigo Painting for two years, the ETA 750 signed by the beneficiary describes three years of work, while the letter from [redacted] and the letters from the two work colleagues submitted on appeal describe a third version of which two years the beneficiary worked for Bill Rigo Painting. While the affidavits from the beneficiary's work colleagues appear legitimate, they introduce yet another inconsistent description of the beneficiary's work experience as a painter, that is distinct from the ETA 750B information and from the beneficiary's affidavits. Without more persuasive documentation, the director's reference to *Matter of Ho* is well founded. Without more

persuasive and consistent documentation to clarify these discrepancies, the petitioner has not established that the beneficiary is qualified to perform the duties of the position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden with regard to its ability to pay the proffered wage from 1999 to the present time, nor has it met its burden with regard to the beneficiary's qualifications to perform the duties of the position.

**ORDER**: The appeal is dismissed.