U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 26 2005
EAC 02 288 52072

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 petition will be denied.

The petitioner states that it is a supermarket. It seeks to employ the beneficiary permanently in the United States as a supermarket manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director primarily determined that the beneficiary did not have the required baccalaureate degree as outlined in the ETA Form 750, and denied the petition accordingly. The director also commented on the petitioner's continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and the ability of the petitioner to pay its other employees without making a determination on these issues in her decision.

On appeal, counsel states that the beneficiary has the necessary educational credentials for the position and that the petitioner has sufficient funds to pay the proffered wage and the salaries of the petitioner's other employees. Counsel submits new documentation and resubmits documentation previously submitted to the record.

With regard to the primary issue raised by the director in her decision, namely, the beneficiary's qualifications, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is March 16, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of supermarket manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	4
	College Degree Required	Bachelor's
	Major Field of Study	Business

The petitioner also specified that any applicants have two years of experience in the job offered. Under Item 15, the petitioner initially requested language proficiency in Punjabi, Urdu, Hindi, and Pashto; however, the petitioner subsequently deleted these language requirements. The job offered lists the following duties on Item 13: "Estimates food and beversage (sic) costs and purchases supplies; directs hiring and assignment of personnel; investigates and resolves food quality; review financial transactions and monitors budget; and interacts and serves the Indian and Pakistani community."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Noor Memorial Medical from September 1996 to September 1999 where he studied "Medical Business" and received a degree or certificate in "business in medicine". Also, the beneficiary indicated that he attended Mayo Hospital from September 1987 to September 1988, studying nursing and in the box eliciting information about degrees or certificates received, he wrote "Dispenser." He provides further information concerning his educational background in Part 14, listing documents submitted as evidence that the beneficiary possessed the education, training, experience, and abilities listed in Part 11 on ETA Form 750. The petitioner submitted the following documentation: an enrollment card from the National Council for Homoeopathy, Islamabad, Pakistan, dated January 5, 1996; a certificate from the Mayo Hospital in Lahore, Pakistan that states the beneficiary is doing Dispenser Training course in the hospital from May 1, 1987, and that the course would be completed after a year on April 30, 1988; Marks Sheets for four years from the National Council for Homoeopathy at Noor Memorial Homeopathic Medical College in Lahore, Pakistan; a document from the National Council for Homoeopathy entitled "Final Examination," that states the beneficiary has passed the final examination of Diploma in the Homoeopathic Medical System in April 1999; Assessment Form IT-30-A, a Pakistani government form addressed to the beneficiary that is illegible in parts; and a Pakistani government tax assessment order addressed to the beneficiary that stated the beneficiary failed to pay his income tax.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he owned [redacted] a medical supplies company, in Pakistan, from January 1989 to August 1999. Duties for the beneficiary's work with the company are the following: "Hired and assignment of personnel; provided medicine and supplies to retail medical stores; reviewed financial transactions, monitored budget; and purchased goods to be sold."

Because the evidence submitted with the initial petition was found insufficient, the director requested additional evidence on December 12, 2002, specifically requesting evidence that the beneficiary had the requisite two years

of work experience prior to September 9, 2002, the date the petitioner filed the I-140 petition.[1] The director stated that evidence should be in the form of letters from current or former employers or trainers and should include the name, address, and title of the writer, and a specific description of the duties performed by the alien. The director also noted that the evidence submitted did not establish that the job offer requires the minimum of a baccalaureate degree in a related academic field. The director then stated that the petitioner needed to obtain an advisory evaluation of the beneficiary's formal education and its equivalency to a U.S. baccalaureate degree. The director noted that an acceptable evaluation should "[c]onsider formal education only, not practical experience; [state] if the collegiate training was post-secondary education, i.e., whether the applicant completed the U.S. equivalent of high school before entering college; [p]rovide a detailed explanation of the material evaluated; [and b]riefly state the qualifications and experience of the evaluator providing the opinion."

The director also stated that a letter submitted by the petitioner indicated that the petitioner employed ten individuals; however that a review of the petitioner's Form 1040 federal income tax return for 2001, which included a Schedule C, failed to indicate the salaries paid to these ten employees. The director requested the beneficiary to provide historical documentary evidence that it could sustain ten full time employees and the sole proprietor, and also pay the proffered wage.

In response to the director's request for evidence, the petitioner submitted a letter from the petitioner that stated it had indicated on the Form ETA 750 that a bachelor's degree in field of business was a minimum requirement for the position. The petitioner's owner also stated that the beneficiary must have the minimum educational requirement of a baccalaureate degree in business or the equivalent thereof. The petitioner also stated that the beneficiary received a business degree in medicine from the Noor Memorial Medical School in Pakistan and then ran his own business for over four years. The petitioner submitted the beneficiary's businesses licenses for his medical supply company from 1991 to 1999; tax records for his Pakistani business, as well as telecommunications bills in the beneficiary's name and in the name of his business.

With regard to the director's statement with regard to whether a baccalaureate degree is a realistic minimum requirement for the job offer, the petitioner submitted an amended letter of support that explained the job duties to be performed by the beneficiary and why it would be reasonable to expect the applicant for the position to have a baccalaureate degree. The petitioner also submitted two job advertisements; one for the manager of the Dartmouth University convenience store and the other for an assistant store manager position for a Bose store in Tysons Corner, Virginia.[2]

In addition, the petitioner submitted an equivalency evaluation determination from [redacted] New York City. In this document, Mr. [redacted] examined the beneficiary's formal education and determined that the beneficiary had the equivalence of two years of undergraduate study in business administration

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[1] The director's statement with regard to the beneficiary's requisite two years of work experience is incorrect. The petitioner has to establish that the beneficiary has the two years of requisite work experience prior to the priority date of March 16, 2001, not the date that CIS received the initial I-140 petition, which is September 12, 2002.

[2] It is not clear why the petitioner submitted these two job advertisements to the record, since neither job announcement required a baccalaureate degree to perform the job duties.

from a regionally accredited U.S. education institution. The evaluator also examined the beneficiary's professional experience and determined that the beneficiary's eight years of work with Gul Medicos in Pakistan represented the equivalent of two academic years of undergraduate studies in the United States. The evaluator then combined the beneficiary's formal studies and his work experience to determine that the beneficiary had the equivalent of a U.S. baccalaureate degree in business administration.

The petitioner also submitted an affidavit from the beneficiary dated March 3, 2003, that stated the beneficiary owned and operated Gul Medicos from 1991 to 1999 during which time the beneficiary was licensed and authorized by the government of Pakistan to sell, stock, and exhibit drugs for retail sales. The beneficiary also stated in a letter that his educational background and the degrees and programs completed in Pakistan created a strong basis for the beneficiary's operation of his own business. The beneficiary stated that he had obtained a business degree in medicine from the Noor Memorial Medical School in Pakistan.

The director denied the petition on December 17, 2003, finding that the Form ETA 750 established that the position required a bachelor's degree in business and two years with experience as a store manager. The director determined that the evaluator examined both the beneficiary's formal education and his work experience to establish that the beneficiary has the required baccalaureate degree. The director determined that "a functional equivalent or equivalency based on a combination of education and experience was unacceptable for a bachelor's degree."

On appeal, counsel asserts that the beneficiary has the necessary academic credentials as he obtained a master's degree in business administration and submits a copy of a document from the University of the Punjab. The document states that the university conferred the degree of Master of Business Administration, with a specialization in marketing on the beneficiary. Although the document has the year "1991" printed under the university seal; there is no date of graduation identified on the document. The petitioner submitted no other documentation such as the beneficiary's coursework, number of years of studies, marks sheets, or matriculation documentation. Counsel also submits an additional document from [redacted] entitled "Educational Equivalent in the United States." This document states that based on the combination of the beneficiary's two years of undergraduate study in business administration and his studies for a master's degree in business administration, the beneficiary had the equivalent of a U.S. baccalaureate degree in business administration in marketing.

In evaluating the beneficiary's qualifications, 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). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree in business (four years in college) and two years of experience in the job offered.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The regulations also define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

With regard to the initial educational equivalency document submitted to the record in response to the director's request for further evidence, based on the evidentiary documentation submitted by the petitioner, the document from [redacted] is given no weight in these proceedings. First, the evaluator lists the beneficiary's formal education as a bachelor of commerce degree obtained in 1985; however, the record contains no evidence of such a degree. Second, the document provides no explanation of why the evaluator would view the beneficiary's documented four years of studies in homeopathy and one year training as a dispenser to be the equivalent of two years of undergraduate studies in business administration or business in medicine. The four pages of marks submitted to the file indicate no business courses in the beneficiary's curriculum. The beneficiary's coursework included classes in such areas as physics, anatomy, philosophy, physiology practical, materia medica, homoeopathic philosophy, pathology practical, minor surgery, and forensic medicine. Finally the evaluator in his advisory opinion looked at both the beneficiary's formal studies and his work experience, although the director clearly indicated that the examination of both education and work experience would not be sufficient to further establish the beneficiary's academic credentials.

Thus, the evaluation submitted with the evidence in this proceeding suggesting that the beneficiary's university studies and his subsequent employment experience should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because it includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

With regard to the second equivalency document submitted by the petitioner on appeal that only examined the beneficiary's university studies, this document is also given no weight in this proceeding. First, the one page documentation submitted by counsel to establish that the beneficiary had a master's degree in business administration is incomplete. There is no actual date identified in which the beneficiary completed his studies in business administration, or received his diploma, no marks sheets, and no information on the years of study. Second, the evaluator provided no explanation as to how he reached his conclusions with regard to the combined university studies constituting a four-year baccalaureate degree in business administration.[3] Third, and most

[3] In addition, as previously noted, C.F.R. § 204.5(l)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes, rather than a combination of degrees.

importantly, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the evidence with regard to any further university studies to be considered, it should have submitted the documents in response to the director's request for evidence. The petitioner provided no explanation whatsoever as to why the information with regard to the beneficiary's claimed master's degree in business administration was not submitted with the initial petition. *Id.* It is noted that the beneficiary did not include any mention of the master's degree on the Form ETA 750 B, which the beneficiary signed under penalty of perjury, on March 1, 2001, ten years after the purported receipt of a master's degree. *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." Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted with regard to the beneficiary's academic graduate studies.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from Pakistan could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. As stated previously, the educational documentation submitted in response to the director's request for further evidence and on appeal are given no weight in these proceedings. The only documentary evidence considered in these proceedings is the documentation provided with regard to the beneficiary's four years of studies in homoeopathy. The petitioner has not established that this coursework is at a post secondary education level, or that it is the equivalent of the specific baccalaureate degree identified on the Form ETA 750, namely, business.

Item 14 of the Form ETA 750A does not expand the educational requirements to include work experience that is equivalent to a bachelor's degree. The words "four years and Bachelor's " listed under a questions eliciting "College Degree Required," or "Education, number of years" can lead to no alternate conclusion. The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, since it has not proven that the beneficiary holds a four-year baccalaureate degree in business. The director's decision shall stand, and the petition shall be denied.

With regard to the petitioner's ability to pay the proffered wage, as stated previously, the director did not explicitly address whether the petitioner established it had the capability to pay the proffered wage. Although the petition is denied based on the beneficiary's lack of proper academic credentials, to clarify the statements made by the director, the AAO will examine this issue.

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 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 March 16, 2001. The proffered wage as stated on the Form ETA 750 is $12.40 per hour, which amounts to $25,792 annually.[4]

The petitioner stated that it was established in 1989, and that it had five employees. With the petition, the petitioner submitted a letter of support, and its income tax returns for 1999, 2000, and 2001.[5]

The director did not request further evidence with regard to the petitioner's ability to pay the proffered wage in his request for further evidence. However, the director did comment that the petitioner's Schedule C for 2001 did not reflect any wages paid to employees, and requested further evidence as to how the petitioner could pay ten employees and also add another employee.

In its response to the director's request for further evidence, the petitioner stated that it listed five employees on the initial I-140 petition. The petitioner stated that in its amended letter of support it added the petitioner to the list of its employees, and the correct number of employees was six. The petitioner also submitted copies of its bank statements from July 1, 2002 to December 31, 2002, as well as copies of the four checks dated for four weeks of December 2002 for each of the following individuals: [redacted]

In his denial dated December 17, 2003, the director noted that the proffered wage was $33,530 and that the petitioner needed to have the ability to pay the proffered wage as of the priority date, namely March 16, 2001. The director stated that the petitioner had submitted a profit/loss statement for 2001 that indicated the petitioner's profit for 2001 was $22,827.[6] As stated previously, the director made no determination as to whether the beneficiary had the ability to pay the proffered wage as of the priority wage and onward, or any additional statements as to the petitioner's employees.[7]

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[4] The director in his denial stated the proffered wage is $33,350, which, as correctly noted by counsel, is incorrect.

[5] Although counsel on appeal notes that the petitioner submitted its 1998 income tax forms in the initial petition, these forms were not found in the record.

[6] The director erroneously used the net profit listed on one of the petitioner's Schedules C to establish the petitioner's adjusted gross income for 2001. The petitioner's adjusted gross income for 2001 is $25,868, as stated on line 33 of the petitioner's Form 1040.

[7] 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.

On appeal, counsel states that the petitioner has amended his 2001 U.S. Individual income tax return, and the amended return now indicates a profit of $42,183. Counsel submits the petitioner's federal income tax return for 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The petitioner has not established that it has previously employed the beneficiary.

Although the record indicates that the petitioner was a corporation based on its submission of Form 1120 in 2000, as stated previously, the remaining tax returns submitted to the record establish that the petitioner is constituted as a sole proprietorship. Since the priority date for the Form ETA 750 is March 16, 2001, the tax returns for the years 1999 and 2000 are not dispositive. Therefore, only the income tax forms for tax years 2001 and 2002 are considered in these proceedings.

Furthermore, the petitioner's amended tax return submitted on appeal will not be considered in these proceedings. On appeal, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Under the circumstances, the AAO need not, and does not, consider the sufficiency of the petitioner's amended federal income tax form for 2001.

Based on the petitioner's federal income tax returns for 2001 and 2002, the petitioner is 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 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 with more than one business will file multiple Schedules C to report their combined business income and expenses. 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 the instant case, the sole proprietor supports himself and five dependents in 2001 and himself and four dependents in 2002. In 2001, the sole proprietorship's adjusted gross income, based on the business income from two businesses, as established in the two Schedules C submitted by the petitioner, totaled $25,868. This adjusted

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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).

gross income would cover the proffered wage of $25,792; however, the petitioner would only have 76 dollars to pay for his monthly expenses and those of his dependents during 2001. Although the petitioner submitted copies of its 2002 bank statements in its response to the director's request for further evidence, these documents are not considered sufficient evidence to establish that the petitioner could support himself and his dependents and pay the proffered wage in 2001. First, the bank statements only cover a short period of time from July to December 2002, a period of time after the priority date of March 2001. Second, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

It is noted that even if the petitioner's amended 2001 Form 1040 had been accepted into the record on appeal, the petitioner's amended adjusted gross income of $43,857, minus the proffered wage of $25,792, would have only left $18,065 to pay the yearly expenses for the petitioner and his five dependents. Thus, the petitioner would have used over 50 percent of his annual income to pay the proffered wage. Under the *Ubeda* analysis of the percentage of the petitioner's income used to pay the proffered wage, it appears highly unlikely that the petitioner could support himself and five dependents on $18,065 a year. Thus, the petitioner would not have established its ability to pay the proffered wage and support himself and his dependents based on his 2001 amended federal income tax return.

In 2002, the sole proprietorship's adjusted gross income of $131,168, minus the proffered wage of $25,792, would leave $105,376 to cover the personal expenses of the sole proprietor and his four dependents. It is noted that in his request for further evidence, the director did not identify the petitioner as a sole proprietor and request information on the sole proprietor's personal expenses. Therefore, there is no list of household expenses or discussion of the sole proprietor's household expenses to allow further examination of this issue. Nevertheless, based on the analysis provided in *Ubeda*, the petitioner's adjusted gross income in 2002 appears sufficient to both pay the proffered wage and support the monthly expenses of the petitioner and his dependents. Nevertheless, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Since the petitioner has not established that it had the ability to pay the proffered wage as of the April 2001 priority date, the petitioner has not established that it has the ability to pay the proffered wage as of the April 2001 priority date and to the present time.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to whether the beneficiary has the educational credentials outlined in the Form ETA 750 or the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the petitioner has not met its burden. The director's decision shall stand. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.