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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 04 2007

EAC-06-035-51565

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, Chief
Administrative Appeals Office

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

The petitioner is an electrical contractor, and seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's June 15, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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).[1]

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $38.77 per hour, $70,561.40 per year based on a 35 hour work week. The petitioner listed an overtime rate of $58.16 per hour. The labor certification was approved on September 20, 2005. The petitioner filed an I-140 Petition for the beneficiary on November 14, 2005. The petitioner listed the following information on the I-140 Petition: date established: not listed; gross annual income: $266,516; net annual income: $66,521; and current number of employees: four.

On February 22, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide the following information: evidence of the petitioner's ability to pay the proffered wage, including the sole proprietor's federal tax returns with all schedules; a statement of the sole proprietor's monthly expenses to include all living expenses; to submit additional evidence to verify sufficient assets to pay the proffered wage; and for the petitioner to provide W-2 statements if it employed the beneficiary. The petitioner responded. On June 15, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary listed that he has been employed with the petitioner since March 2001. The petitioner submitted the following evidence of prior wage payment to the beneficiary:

Year	1099 Wages Paid	Remaining wage petitioner must show it can pay
2004	$45,501	$25,060.40
2003	$34,795	$35,766.40
2002	$23,600	$46,961.40
2001[2]	$3,600	$44,361.40
	$22,600	

The wages that the petitioner paid to the beneficiary were less than the proffered wage in each year. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary alone. The petitioner must show that it can pay the difference between the wages paid and the proffered wage for the years above.

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. 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).

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[2] The petitioner issued the beneficiary two Forms 1099 in 2001, which together totaled $26,200.

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

Tax Return for Year:	**Sole Proprietor's AGI (1040)**	**Petitioner's Gross Receipts (Schedule C)**	**Petitioner's Wages Paid (Schedule C)**[3]	**Petitioner's Net Profit from business (Schedule C)**
2004	$108,771	$266,516	$0	$66,521
2003	$107,957	$216,194	$0	$57,767
2002	$81,506	Schedule C not provided for this year	Schedule C not provided	Schedule C not provided
2001	$59,239	$78,164	$3,600	$6,196

If we reduced the sole proprietor's adjusted gross income (AGI) by the remainder amount of the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, which factors in the wages already paid to the beneficiary, the owner would be left with an adjusted gross income of: 2004: $83,710.60; 2003: $72,190.60; 2002: $34,544.60; and 2001: $14,877.60

The sole proprietor submitted a list of estimated monthly family expenses, which totaled $2,210 per month, or $26,520 annually. The sole proprietor's estimate included the following expenses: mortgage, food, utilities, and transportation. The sole proprietor indicated that health insurance was available through his wife's employment, and that they are able to pay all expenses from his wife's salary and investments to use all of the business income to "grow the business." We note that the list does not include expenses such as homeowner's insurance, property taxes,[4] and/or expenses for clothing for the family of four. The estimate,

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[3] The sole proprietor did not submit all relevant schedules for the tax returns to determine whether the sole proprietor paid wages under the category "costs of labor." We note that the RFE did request that the petitioner provide all relevant schedules for tax returns submitted. 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).

[4] For example, the sole proprietor's 2001 tax return lists that he paid $5,695 in real estate taxes in 2001. It is

therefore, would appear to be on the lower end of the estimated expense range. Further, the sole proprietor did not provide any evidence of representative bills to verify that the expenses listed were accurate, or any additional documentation to verify that the sole proprietor did have additional assets, such as bank accounts, or investments upon which the family could rely.

Based on the sole proprietor's stated estimate, if we were to accept his estimate without further documentation, and the amount that the sole proprietor would have remaining after payment of the proffered wage, the sole proprietor would be able to pay the proffered wage and support himself and his family in every year, but that of the priority date 2001, in which year the petitioner would have negative income of -$11,643. The petitioner did not provide any documentation of additional funds, such as bank accounts to show that it could pay the proffered wage in 2001. The petitioner, therefore, cannot establish that it can pay the proffered wage in every year since the priority date in accordance with 8 C.F.R. § 204.5(g)(2).

On appeal, counsel provides that CIS is in error:

> The Director used the D.O.T. [dictionary of occupational titles] for a Licensed electrician in his denial of the case. This was an error. The Employee is not licensed. He is an Apprentice Electrician.
>
> The D.O.T. number for an Apprentice Electrician is 824.261.010. The Federal World Service Contract Level 2 is $25,552.80 per year.
>
> However, [the beneficiary's] and Employer's Income is in excess of the salary of an Apprentice Electrician.

The director's decision does not delineate licensed electrician compared to an apprentice electrician. Form ETA 750 lists the position's rate of pay as $38.77, which as noted above is equivalent to $70,561.40 per year. DOL certified the position at that wage. The wage does not appear to have been changed during the labor certification process, but rather appears to be the wage initially listed by the petitioner. While the petitioner is not required to pay the proffered wage until the beneficiary obtains permanent residence, under 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate that it can pay the wage from the time of the priority date. The Form ETA 750 has been certified; the petitioner cannot now challenge the wage and suggest that it should be lower in order to show that it can pay the proffered wage. 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).

Further, DOL listed the "occupation code," or dictionary of occupational title ("DOT") code as 824.261-010, on Form ETA 750. Code 824.261-010 is for the position of Electrician (construction). The DOT description notes that the individual "may be required to hold a license," but does not refer to the position as a licensed Electrician. The DOT does have a separate code for an apprenticed Electrician (construction), which is listed as 824.261-014. Again, as the labor certification was certified as 824.261-010, the petitioner cannot assert that the position should be otherwise classified to show that the petitioner can pay the proffered wage.[5]

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unclear from the estimate whether the "mortgage" amount encompasses the real estate taxes as well.

[5] We additionally note that, while Form ETA 750 does not list a license as a requirement for the position, the petitioner provides that the beneficiary does not have a license, but will obtain one after the I-140 petition is approved. If the Form ETA 750 position requires that the beneficiary be licensed, then the beneficiary by counsel's own admission is not qualified for the position, as the beneficiary must meet all of the requirements

The sole proprietor additionally submitted a letter in which he asserts that the beneficiary was working as an apprentice electrician and was paid more than an apprentice electrician. Therefore, he asserts that he would be able to pay the proffered wage. Again, we note that the relevant figure that the petitioner must show it can pay is $70,561.40, the wage listed on Form ETA 750. Whether the petitioner presently employs the beneficiary as a licensed or as an apprentice electrician is irrelevant. The petitioner must demonstrate that it can pay the proffered wage from the time of the priority date. As set forth above, the petitioner has not demonstrated this.

On appeal, the petitioner failed to provide any additional evidence related to the petitioner's ability to pay. Therefore, the petitioner has failed to overcome the basis for the petition's denial.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the experience requirements of the certified Form ETA 750. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[6]

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" description for an Electrician provides:

> Repairs wiring, electrical fixtures, apparatus, and control equipment. Follows plans of installation and repair to minimize waste of materials. Provides access for future maintenance and avoids unsightly hazardous and unreliable wiring consistent with specifications and local electrical codes. Measures, cuts, splices, bends, threads,

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by the time of the priority date. 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).

[6] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

assembles and installs electrical conduits using various hand tools. Observes functioning installed and repaired equipment to ensure they are operable.

Further, the job offer listed that the position required:

Education:	none
Major Field Study:	none
Experience:	2 years in the job offered, Electrician
Other special requirements:	None.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which 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 workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Form ETA 750B lists the beneficiary's prior experience as: (1) the petitioner, March 2001 to the present (date of signature, April 23, 2001), electrical contractor; and (2) Elektro Servis "ISKRA," Prilep, Macedonia, January 1995 to November 1998, electrical contractor.

The petitioner failed to provide any evidence in the form of letters that the beneficiary had the two years of required prior experience in accordance with 8 C.F.R. § 204.5(l)(3).[7] Therefore, the petitioner has failed to demonstrate that the beneficiary had the required prior experience as listed on Form ETA 750.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750.

Accordingly, 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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[7] We note that counsel's filing cover letter references that he submitted a letter to evidence the beneficiary's prior experience. A review of the record, however, does not demonstrate that any such letter was submitted.

ORDER: The appeal is dismissed.