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

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 22 2008
EAC-04-038-51741

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 Acting Director, Vermont Service Center ("director"), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a rehabilitation and restoration business, and seeks to employ the beneficiary permanently in the United States as a carpenter. 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 21, 2004 decision, the petition 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 establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the

[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).

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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 26, 2001. The proffered wage as stated on Form ETA 750 is $16.50 per hour, which is equivalent to an annual salary of $34,320 per year, based on a 40 hour work week. The labor certification was approved on December 9, 2002, and the petitioner filed the I-140 Petition on the beneficiary's behalf on November 25, 2003. On the I-140, the petitioner listed the following information: date established: August 1999; gross annual income: $1,331,973.00; net annual income: $80,291; current number of employees: 4.

On June 21, 2004, 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 750, signed by the beneficiary on April 9, 2001, the beneficiary did not list that he was employed with the I-140 petitioner. On appeal, the petitioner submitted the following evidence of wage payment.

Year	**Form 1099 earnings**[2]
2001	**$18,250 paid by** [redacted]

The applicant that filed Form ETA 750 is listed as: "J & S Contractors," with an address of: [redacted] The petitioner listed on Form I-140 is: [redacted] While the two companies have the same address, the petitioner did not provide any explanation regarding the different name, or any incorporation documentation, certificate of name change, doing business as, or fictitious name information. Further, the petitioner did not provide any evidence that the owner of Conhosa Construction was also the owner of J & S Contractors.[3]

Conhosa Construction, Inc. has not demonstrated that it is the successor-in-interest to the initial labor certification applicant. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of*

---

[2] We note that the Form 1099 is handwritten and we would require evidence that the Form 1099 was reported on the beneficiary's 2001 tax return, specifically in the form of a certified copy of the beneficiary's tax return, or tax transcript to verify the earnings paid.

[3] The petitioner's owner did sign Form ETA 750 on behalf of J & S Contractor's as "owner," however, the record does not contain evidence that he owned that entity. The sole proprietor's 2001 tax return reflects only that his business operates under the name "Conhosa." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986). Nothing in the record demonstrates that Conhosa Construction is the successor-in-interest to the initial applicant so that it may continue processing under the current labor certification.

Therefore, the money paid to the beneficiary in 2001 would not be considered as evidence of the petitioner's ability to pay the proffered wage for that year. The petitioner would need to demonstrate that it could pay the full proffered wage for the years 2001, and 2002.

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).

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 spouse and three children and resides in Chelsea, Massachusetts. The tax returns reflect the following information:

Tax Year	**Sole Proprietor's AGI (1040)**	**Petitioner's Gross Receipts (Schedule C)**	**Petitioner's Wages Paid (Schedule C)**	**Petitioner's Net Profit from business (Schedule C)**
2002	$100,279	$1,331,973	$0 (costs of labor $447,075)	$80,291
2001	$34,405	$384,147	$0 (costs of labor $188,953)	$3,681

If we reduced the sole proprietor's Adjusted Gross Income (AGI) by the proffered wage that the petitioner must demonstrate that it can pay the beneficiary ($34,320), the owner would be left with the following amounts through which to support himself and his family: 2002: $65,959; and 2001: $85. The sole proprietor would not be able to support himself and his family on $85. Even if we accepted and added the Form 1099 wages to the sole proprietor's income, he would be left with $18,335 in income. The sole proprietor did not

submit any estimate of his personal/family expenses so that we cannot ascertain the total amount that he would require to support himself and pay the proffered wage, and whether he could support himself and his family on $18,335.

Additionally, we note that CIS records reflect that the petitioner has filed for a second beneficiary. The sole proprietor would need to demonstrate that he could pay both beneficiaries from their respective priority dates until they obtain permanent residence and support himself and his family. In 2001, the sole proprietor would likely be left with negative income after paying both beneficiaries, even if we accepted that the petitioner was the successor-in-interest to "J&S Contractors," and accepted the wages Conhosa paid the beneficiary in 2001. Whether the sole proprietor could pay both beneficiaries and the proffered wage in 2002 would depend on how much the second beneficiary's proffered wage is, and how much income the sole proprietor's family requires to support themselves.

The director denied the petition as the sole proprietor's 2001 federal tax return did not reflect that he could pay the beneficiary the proffered wage and support himself and his family.

On appeal, counsel contends that the director failed to "properly analyze [the] Petitioner's 2001 federal income tax return in conjunction with Petitioner's bank statements and the alien beneficiary's Form W-2, Wage and Tax Statement."

The petitioner did not provide either its bank statements or the beneficiary's Form 1099 with the initial filing, but instead only submitted that documentation on appeal. Therefore, as the documentation was not available to the director, she was unable to analyze such documentation. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel submitted the petitioner's bank statements for the time period of May 23, 2001 to December 24, 2001. If we examined the bank statements specifically, the statements vary in the amount that the petitioner had in its account from a low balances of -$0.62 (as of June 22, 2001), and $54.39 (as of September 25, 2001) to high balances of $12,890.17 (as of November 26, 2001) and $57,865.16 (as of December 24, 2001). As noted above, 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. The business bank account records, as well as individual savings would be considered. However, the petitioner did not provide evidence that the funds from the business bank account were not already considered or accounted for on Schedule C of the sole proprietor's Form 1040. Further, the petitioner has not provided bank statements for the entire relevant time period from April 2001, and for the year 2002. The bank statements would represent only the amount that the petitioner had in its account in a few months of 2001, and would, therefore, be insufficient to demonstrate the sole proprietor's ability to pay both beneficiaries the proffered wage from the time of their respective priority dates until permanent residence, or to show sufficient sustained assets through which the sole proprietor could support himself and his family and pay the proffered wage. *See Ubeda v. Palmer*, 539 F. Supp. at 647.

Counsel additionally argues that the petitioner has paid the beneficiary $18,250 in 2001. As noted above, the petitioner has not established that it is the proper successor-in-interest to the petitioner on the labor

certification. Additionally, the petitioner has sponsored two workers, and the wages paid to the beneficiary would be insufficient to demonstrate that the petitioner can pay the instant beneficiary the full proffered wage, the second beneficiary his or her respective proffered wage, and support himself and his family.

Counsel further asserts that the director failed to consider the sole proprietor's depreciation expenses listed on the tax return.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, *available at* http://www.irs.gov/pub/irs-pdf/i4562.pdf. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage.

Further, although not raised in the director's denial, we find that the petitioner also failed to establish the beneficiary's qualifications based on the certified 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).

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" position description provides:

> Construct, erect, install and repair structures and fixtures of wood and plywood, using carpenter's hadtools [sic] and power tools. Assemble, cut and shape materials and fastern [sic] them together with nails, screws and other fasteners. Verify trueness of structure with plumb bob and carpenter's level. Fit and install prefabricated window frames, doors and doorframes.

Further, the job offered listed that the position required:

> Education: none listed.
>
> Experience: 2 years in the job offered, as a Carpenter.

The petitioner did not list any other special requirements.

On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary listed his prior experience as: (1) J & S Construction, Chelsea, Massachusetts, from February 2001 to present (April 9, 2001), position: Carpenter; (2) Sal's Painting and Maintenance, Chelsea, MA, from February 2000 to January 2001, position: Carpenter; and (3) LSR Refinishing, Everett, MA, from January 1999 to February 2001, position: Marble Refinisher.

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.

The petitioner submitted the following letter to document the beneficiary's experience:

> Letter from [redacted], Moran Carpenter's Shop, Metapan, Santa Ana [El Salvador], dated April 25, 2001;
> Position title: Carpenter;
> Dates of employment: January 6, 1989 to February 7, 1991;
> Description of duties: "was an employee to my company for a period of two years . . . performing the charge of Carpenter in which he demonstrated to be an honest worker, efficient and of very good conduct."

The letter to document the beneficiary's experience is deficient in a number of aspects. First, the document was not properly translated. The submitted translation of the beneficiary's work experience did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> ***Translations.*** Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The translation states "translation from Spanish to English (non-literal translation)." The statement is notarized, but it is unclear who translated the document, and does not contain the certification that the translation is complete and accurate, and that the translator is competent to translate from the foreign language in question into English.

Further, the experience verified was not listed on the beneficiary's Form ETA 750B. "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." *Matter of Ho*, 19 I&N Dec. at 591-592. *See further Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. The petitioner did not provide any other evidence of the beneficiary's experience.

The letter also fails to identify whether the beneficiary was employed on a full-time or part-time basis, or the amount of hours that the beneficiary worked while he was employed. If the beneficiary worked less than full-time, the experience may be less than two years, and, therefore, insufficient to document that the beneficiary had the required two years of requisite experience.

Lastly, the author of the letter did not sign the original Spanish version, although the letter does contain the business' stamp listing the author's name, and that he is the proprietor. However, the lack of signature raises questions regarding the letter's authenticity. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the foregoing, the petitioner failed to document that the beneficiary had the required experience for the position offered.

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.

ORDER: The appeal is dismissed.