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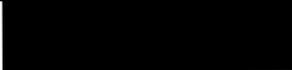
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: TEXAS SERVICE CENTER

Date:

JUL 26 2007

SRC-06-026-50405

IN RE:

Petitioner:

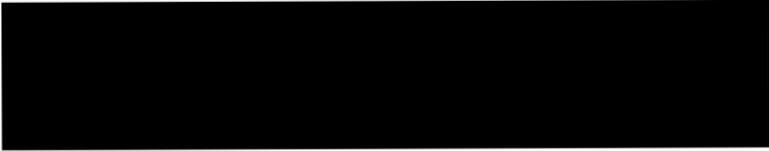


Beneficiary:

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:



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 employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director.

The petitioner is an electric contractor. It seeks to employ the beneficiary permanently in the United States as an electric engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification because the beneficiary did not have a U.S. bachelor's degree in electrical engineering.

The record shows that the appeal is properly filed and 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.

As set forth in the director's November 23, 2005 denial, the first issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed a US bachelor's degree or foreign equivalent in engineering prior to the priority date, and thus qualified for the proffered position as a professional.

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 provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must 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. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 10, 2003.

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 appeal¹. Relevant evidence in the record includes the beneficiary's certificate of graduation and transcripts from Dongguk University in South Korea, four experience letters from the beneficiary's former employers, and two credentials evaluations. The record does not contain any other evidence relevant to the beneficiary's educational background and work experience.

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).

On appeal, counsel asserts that the DOL reviewed all the experiences and education of the beneficiary and certified the Form ETA 750; and that the evaluation combining the beneficiary's bachelor degree in physics and 8 years of experience supported that the beneficiary had the equivalent to a US bachelor's degree and met the requirements for the proffered position.

As noted above, the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. § 1182(a)(5)(A), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two

grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and

available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The DOL must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

At the outset, DOL's certification of the Form ETA 750 does not supercede Citizenship and Immigration Services' (CIS) review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) and (ii) of the Act and 8 C.F.R. § 204.5(1)(3). CIS has the authority to evaluate whether the alien is eligible for the classification sought and whether the alien is qualified for the job offered.

In the instant case, 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 electric engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	6
	College	4
	College Degree Required	Bachelor or equivalent
	Major Field of Study	Engineering

Item 15 of Form ETA 750A contains the petitioner's definition of the equivalent stating that: "employer will accept equivalent degree of education and experience (three years of experience equal to one year of college)."

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 Dongguk University in the field of “Physics (Minor: ComSci)” from March 1987 through February 1994, culminating in the receipt of a “Bachelor of Science” degree. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

Section 203(b)(3)(A)(ii) of the Act defines professionals as qualified immigrants who hold baccalaureate degrees and who are members of the professions. The proffered position requires a bachelor’s degree in engineering. The proffered position may qualify as a professional and the director considered the petitioner Section 203(b)(3)(A)(ii) as a “professional”.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” 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.

In the instant case, the petitioner submitted the beneficiary’s certificate of graduation and transcripts from Dongguk University in South Korea. The evidence shows that the beneficiary holds a bachelor of science degree in physics from a four-year program which is evaluated as the equivalent to a Bachelor of Science in Physics at a regionally accredited institution in the United States. However, the petitioner did not demonstrate that the beneficiary has a foreign equivalent degree to a US bachelor’s degree in engineering as required by the Form ETA 750. Guiding the actual credentials held by the beneficiary is provided through two credential evaluations from [REDACTED] of Applied Electronics S.F., Inc. submitted into the record of proceeding for this case. One credential evaluation dated December 9, 2001 (Dr. Szabo’s first evaluation) stated in pertinent part that:

[The beneficiary] majored in Physics. He met all of the requirements set forth for the Bachelor of Science degree program (four-year, full-time academic program), and graduated with the Bachelor of Science degree, major in Physics, minor in Computer Science, on February 25, 1994. [The beneficiary] completed the equivalent of 144 academic credit hours, with a GPA: B.

Equivalent degree: Bachelor of Science in Physics, at a regionally accredited institution in the United States.

The academic credentials of [the beneficiary] indicate that, in the judgment of the undersigned, he has achieved the equivalent of a Bachelor of Science degree in Physics, at a regionally accredited institution in the United States.

(Emphasis on original).

However, holding the equivalent to a U.S. bachelor's degree in physics cannot be considered as the equivalent to a U.S. bachelor's degree in engineering as required by the Form ETA 750 and cannot demonstrate that the beneficiary is a member of the profession. On appeal counsel submits a second evaluation from [REDACTED], dated December 29, 2001 ([REDACTED] second evaluation). In his second evaluation, [REDACTED] added professional work experience part to his first evaluation. After evaluating the beneficiary's bachelor of science degree in physics as the equivalent to a U.S. bachelor's degree in physics, [REDACTED] continued his analysis on the beneficiary's work experience. [REDACTED] summaries as follows:

[The beneficiary] has seven and half years of professional work experience in the area of electrical and mechanical engineering. Since he already possesses a Bachelor of Science degree from an accredited institution of higher education, [the beneficiary] only needed an additional 4-4.5 years of professional work experience or (40-45 academic credit hours) to achieve the equivalent of a Bachelor of Science Degree in Electro-mechanical Engineering, as a second Bachelor degree, at a regionally accredited institution in the United States.

Following the three-to-one rule of the United States Immigration and Naturalization Services formula, [the beneficiary]'s professional work experience can be equated to seventy-five (75) academic credit hours of college level study in combined Electrical and Mechanical Engineering degree program. This number of credit hours grants him the equivalent of a Bachelor of Science degree in Electro-mechanical Engineering, as a second degree, at a regionally accredited institution in the United States.

Based on my professional experience, I conclude that [the beneficiary] has achieved, through his academic credentials the equivalent of a Bachelor of Science degree in Physics with minor in Computer Science; and through his academic credentials with his professional work experience, the equivalent of a Bachelor of Science Degree in Electro-mechanical Engineering, at a regionally accredited institution in the United States.

(Emphasis on original).

The first credential evaluation concludes that the beneficiary attained the equivalent to a US Bachelor's degree in physics which does not qualify the beneficiary for the proffered position as a professional because the petitioner failed to demonstrate that the beneficiary holds a bachelor's degree in the specifically required field and failed to establish that the beneficiary was a member of that profession. The second credential evaluation concludes that that the beneficiary holds the equivalent to a bachelor's degree in electro-mechanical engineering from a regionally accredited university or college. However, this credentials evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). CIS may, in its discretion, use as advisory

opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, [CIS] is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Therefore, the credential evaluations provided by _____ carry little evidentiary weight in these proceedings.

The AAO concurs with the director's findings that the petitioner did not establish that the beneficiary possessed the requisite educational requirement for the proffered position as a professional. However, the AAO finds that the director erred in not considering the instant petition as a skilled worker under the third preference. The petitioner checked the box e. "A professional or a skilled worker" in Part 2. Petition type on the Form I-140. The record does not contain any documents showing that the petitioner specifically cited and quoted Section 203(b)(3)(A)(ii) of the Act and requested adjudication of the instant petition under the professional category only or excluded consideration of the skilled worker category as an alternative. As discussed below the labor certification set forth the possibility to consider the instant case as a skilled worker.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

DOL assigned the occupational code of 17-2071.00, electrical engineer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=003.061-010+&g+Go> (accessed July 11, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See <http://online.onetcenter.org/link/summary/17-2071.00#JobZone>* (accessed July 11, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Considering the instant petition as filed to classify the beneficiary as a skilled worker, the applicable regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” As noted previously, the certified Form ETA 750 requires four years of college studies, Bachelor’s degree or equivalent in the filed of engineering. The certified labor certification also defines the equivalent as that “employer will accept equivalent degree of education and experience (three years of experience equal to one year of college).” The petitioner’s specific definition of the equivalent makes it possible for the beneficiary to be qualified for the proffered position either through a U.S. bachelor’s degree or foreign equivalent degree in engineering as a professional, or through a bachelor’s degree from four year program and six years (three years of experience equal to one year of college) of post-graduate experience in engineering as a skilled worker. The singular degree requirement is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification in addition to showing two years of qualifying employment experience.

On the Form ETA 750B, the beneficiary set forth his work experience. He listed his experience as a full-time (working 40 hours per week) “Electric Engineer” at the petitioner from July 2002 to the present (as of June 2, 2003 the date when the Form ETA 750B was signed); as a full-time “Technical Manager” at [REDACTED] Auto Repair from January 2002 to June 2002; as a full-time “Technical Manager-Mechanical Engineer” at Bosung Motors in South Korea from February 1998 to October 2001; and as a full-time “Technical Manager-Mechanical Engineer” at [REDACTED] a machine repair shop, in South Korea from March 1994 to February 1998.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

In corroboration of the regulatory requirements, the petitioner provided two certificates of experience from the beneficiary’s former employers. One certificate of experience from [REDACTED] verifies that the beneficiary worked as a technical manager-mechanical engineer in the company’s mechanical department from March 1994 to February 1998 specializing in the system for electronic automobile parts, and the other certificate of experience from Bosung Motors verifies that the beneficiary worked as a technical manager-mechanical engineer in the company’s mechanical department from February 1998 to October 2001 performing excellent job on ECU, ABS module, airbag system, air control system, and electronic shower for Hyundai motors and Kia motors. These certificates of experience from the beneficiary’s former employers in South Korea with the company’s address and contact information have verified the beneficiary’s employment experience with them for seven and a half years from March 1994 to February 1998, and also include the beneficiary’s titles and job descriptions. The AAO finds that these experience letters meet the requirements for evidence of the beneficiary’s prior experience as set forth at 8 C.F.R. § 204.5(g)(1).

The labor certification in this case expressly permits the combination of education and employment experience as equivalent to a U.S. bachelor degree in engineering. The evaluation report from Dr. Szabo submitted on appeal evaluated the beneficiary's seven and a half years of professional work experience in the area of electrical and mechanical engineering and that a combination of the beneficiary's education (bachelor's degree in physics from a four year program) and seven and a half years of professional experience in the area of electrical and mechanical engineering is the equivalent to a bachelor of science degree in electro-mechanical engineering from a regionally accredited institution in the United States. Therefore, the petitioner has demonstrated that the beneficiary meets the requisite requirements set forth on the Form ETA 750 and qualifies for the proffered position as a skilled worker.

However, beyond the director's decision and counsel's assertions on appeal, the AAO will discuss whether or not the petitioner has demonstrated that it had the continuing ability to pay the proffered wage from the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (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 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 C.F.R. § 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).

Here, the Form ETA 750 was accepted on June 10, 2003. The proffered wage as stated on the Form ETA 750 is \$52,562 per year.

Relevant evidence in the record includes the petitioner's tax returns for 2002 through 2004, and the beneficiary's W-2 forms for 2002 through 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage. The tax return and W-2 form for 2002 are not necessarily dispositive since the priority date in the instant case is June 10, 2003. The evidence in the record of proceeding shows that the petitioner was a sole proprietorship in 2003 and was elected as an S corporation in

2004. On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of \$810,918, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on June 2, 2003, the beneficiary claimed to have worked for the petitioner since July 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. In the instant case, the submitted W-2 forms for the beneficiary show that the petitioner hired and paid the beneficiary \$20,400 in 2003 and \$18,700 in 2004. The petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2003 onwards. The petitioner is obligated to demonstrate that it could pay the difference of \$32,162 in 2003 and \$33,862 in 2004 between wages actually paid to the beneficiary and the proffered wage respectively.

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). Reliance on its gross income and gross profit is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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

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

The evidence shows that the petitioner was structured as an S corporation in 2004 and the record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2004. The petitioner's 2004 tax return demonstrates the following financial information concerning the petitioner's ability to pay the difference of \$33,862 between wages actually paid to the beneficiary and the proffered wage in 2004:

In 2004, the Form 1120S stated a net income² of \$49,032.

For the year 2004, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage that year, and therefore, the petitioner established its ability to pay the proffered wage in 2004.

As previously noted, the evidence indicates that the petitioner was a sole proprietorship in 2003. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they must show that they can sustain

² Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of the sole proprietor's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2003. The sole proprietor's 2003 tax return demonstrated adjusted gross income of \$(39,819), which is not sufficient to pay the difference of \$32,162 between wages actually paid to the beneficiary and the proffered wage that year.

CIS will consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage from the proffered wage at the end of 2003.

The petitioner as a sole proprietorship is required to establish its ability to pay the beneficiary the proffered wage as well as to support himself, his spouse and dependents on his adjusted gross income and other liquefiable assets. The record does not contain a statement of monthly expenses for the sole proprietor's family of four. Without the statement of monthly expenses for the sole proprietor's household, the AAO cannot determine whether or not the sole proprietor had sufficient liquefiable assets to pay the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage as well as to cover the sole proprietor's living expenses.

Therefore, the record does not contain sufficient evidence to determine whether or not the petitioner as a sole proprietorship established that it had the ability to pay the beneficiary the proffered wage and met its personal expenses in the year of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets while the petitioner as a corporation established its ability to pay the proffered wage in 2004.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue pertinent to the petitioner's ability to pay as stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

³ The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 34 for 2003.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.