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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER Date: **JAN 28 2009**

WAC-06-067-50544

IN RE:

Petitioner:

[Redacted]

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (“director”), denied the employment-based immigrant visa petition.¹ The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a private school, preschool through first grade, and seeks to employ the beneficiary permanently in the United States as a preschool teacher (“Montessori Teacher”).² 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 13, 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).³

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:

¹ The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

² If the petitioner is licensed or is required by California law to file a Private School Affidavit, the petitioner should submit such documentation in any further proceedings. *See* <http://www.cde.ca.gov/sp/ps/cd/psfaq.asp> (accessed January 23, 2009).

³ 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).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 15, 2002. The proffered wage as stated on the Form ETA 750 is \$51,510 per year based on a 40 hour work week. The labor certification was approved on June 16, 2005. The petitioner filed an I-140 Petition for the beneficiary on December 23, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1976; gross annual income: \$158,845.38; net annual income: not listed; and current number of employees: four.

On April 13, 2006, the director issued a Request for Evidence (“RFE”) for the petitioner to provide the following information: W-2 statements if it employed the beneficiary; evidence to establish that the beneficiary had the required two years of prior experience necessary for the position; evidence that the beneficiary had the required “Montessori Method Teacher Certificate” for the position. The petitioner responded. On June 13, 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.

On November 15, 2007, the AAO issued a Notice of Derogatory Information (“NDI”) for the petitioner to address conflicting position requirements between Form ETA 750 filed on behalf of the beneficiary, and a Form I-129 H-1B petition filed previously for the beneficiary. The requirements conflicted as the position offered on Form ETA 750 for a Montessori Teacher did not require a bachelor’s degree, and the I-129 H-1B nonimmigrant petition filed for the beneficiary required a bachelor’s degree for the same position as a Montessori Teacher. The petitioner also listed an annual wage of \$18,564 on the Form I-129 petition, which required a bachelor’s degree, and listed an annual wage of \$51,510 on Form ETA 750, for the position, which did not require the candidate to have a bachelor’s degree. The petitioner responded.

We will first address the petitioner’s ability to pay, and then examine additional issues raised on appeal. First, in determining the petitioner’s ability to pay the proffered wage during a given period, U.S. Citizenship & Immigration Services (USCIS) 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 22, 2002, the beneficiary did not list that she has been employed with the petitioner. The petitioner submitted the following evidence of prior wage payment to the beneficiary:

<u>Year</u>	<u>W-2 Wages Paid</u>	<u>Remaining wage petitioner must show it can pay</u>
2007 ⁴	\$6,585.60	\$44,924.40
2006	\$9,408	\$42,102
2005	not provided	\$51,510
2004	\$12,763.20	\$38,746.80

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, USCIS 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

⁴ The petitioner submitted the beneficiary's 2006 and 2007 W-2 statements on appeal. The statements would not have been available at the time that the I-140 petition was initially filed.

We further note that based on the H-1B petition filed, the petitioner listed that it would employ the beneficiary 30 hours per week, and pay the beneficiary \$18,564 per year for the time period October 30, 2004 to October 29, 2007. The wages paid to the beneficiary were less than the wages listed on the I-129 Petition. Further, it would appear that the petitioner either employed the beneficiary substantially less than 30 hours per week, or paid the beneficiary substantially less than the wage certified on the labor condition application (LCA) Form 9035.

While the petitioner is not required to employ the beneficiary in the petitioned for position until the time of permanent residency, here two points are relevant: (1) the petitioner must show that the Form ETA 750 job offer is realistic from the time of the priority date; and (2) a beneficiary must properly maintain his or her nonimmigrant status to later adjust to permanent residence. See 8 C.F.R. § 245.1(b)(10).

(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 herself and resides in Winnetka, California. 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)	Petitioner's Net Profit from business (Schedule C)
2004⁵	\$47,846	\$158,845	\$86,203	\$13,769
2003	-\$15,432	\$170,189	\$95,264	\$12,637
2002	-\$229	\$149,872	\$79,440	\$11,449

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 AGI of: \$9,099.20 in 2004; -\$66,942 in 2003; and -\$51,739 in 2002.

The AAO RFE requested that the petitioner provide a detailed statement of the sole proprietor's expenses. Counsel stated that the sole proprietor owns two homes, which are fully paid, and that her tax liability on the two homes amounts to approximately \$4,350. In support, counsel provided two

⁵ The sole proprietor did not provide her 2005 tax return, which would not have been available at the time of filing the I-140 petition, but would have been at the time of filing the appeal.

copies of the sole proprietor's tax bills, although no documentation was provided to verify that the sole proprietor owned the two homes outright. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Further, counsel provided that the sole proprietor had informed him that her monthly expenses total approximately \$3,500 per year. As the information was presented, it is unclear whether the sole proprietor meant her expenses totaled \$3,500 per month, which annually would amount to \$42,000, or \$3,500 in total expenses for the year.⁶ In support, the sole proprietor provided an annual auto insurance bill reflecting an annual payment of \$638, property insurance in the amount of \$264, and electricity bills for both properties for one month reflecting combined totals due of \$270.45. The sole proprietor also submitted copies of several credit card bills.

Assuming the sole proprietor's annual expenses totaled between \$10,000 to \$42,000 per year,⁷ the sole proprietor would be left with -\$900.89 to -\$32,900.20 in 2004 after paying her expenses and paying the proffered wage; -\$76,942 to -\$99,842 in 2003; and -\$61,739 to -\$93,739 in 2002.

Additionally, we note that the petitioner has filed immigrant petitions for other workers, and the sole proprietor would need to establish that she could pay for all the sponsored workers. The AAO's NDI requested that the petitioner provide the names, positions, proffered wages, and priority dates for any additional sponsored workers, as well as W-2 statements for all employees from the year 2002 onward. In response, the petitioner provided information related to its current employees, as well as W-2 statements for the years 2006, and 2007. The petitioner, however, did not respond to, or provide any information related to other workers sponsored, or W-2 statements for all employees for the years 2002, 2003, 2004, or 2005 as requested.⁸ USCIS records reflect, however, that the petitioner had filed petitions for at least two other workers, and based on the priority dates for those petitions, the sole proprietor would need to demonstrate that she could pay for three workers in the years 2002, 2003, 2004, and 2005. The petitioner did not provide the proffered wages for the other sponsored workers so that we are unable to calculate the total wage obligations that the petitioner would need to demonstrate that it could pay.

⁶ This would allow for expenses of \$291.66 per month, which appears to be a very low estimate, and that it would not include all of the sole proprietor's expenses.

⁷ The figure of \$10,000 would allow for the sole proprietor's property taxes, and the extremely low annual spending estimate unsupported by complete documentation, while the higher range calculates the amount of \$3,500 as a monthly amount annualized. *See Matter of Soffici*, 22 I&N Dec. at 165.

⁸ The purpose of a 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 additional evidence of its ability to pay, the sole proprietor provided copies of her bank account statements for the months ending May 16, 2002 through June 15, 2007.⁹ The bank statements show significant variation from a low balance of \$164,095.36 (in November 2002) to a high balance of \$293,762 (in June 2005).

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.

While the sole proprietor's bank account demonstrates significant personal funds, as noted above, the sole proprietor would need to demonstrate her ability to pay for three workers total, in addition to supporting herself. See *Ubeda v. Palmer*, 539 F. Supp. at 647.

If the petitioner sponsored two other teachers at a similar wage of \$51,500,¹⁰ the sole proprietor would need to show that she had funds in the amount of \$154,500 to pay the proffered wages, and that she could also pay her living expenses. Therefore, in 2002, the sole proprietor would have utilized all the funds in her savings account as of December 16, 2002 (\$166,382) to pay the proffered wages and living expenses. As the sole proprietor would have used all the available funds in 2002, the sole proprietor would have not funds remaining to demonstrate her ability to pay any of the proffered wages in 2003, or any year thereafter. The sole proprietor did not provide any other evidence of personal liquid assets through which to pay the proffered wage.

On appeal in response to the AAO's NDI, the petitioner also provided quarterly wage statements for 2006 and 2007, as well as W-2 statements for all of its current workers. The 2006 W-2 statements reflect that the petitioner paid the following wages: preschool teacher: \$13,440; a second preschool teacher: \$24,000; a third preschool teacher: \$2,551.50; the beneficiary: \$9,408; and the school administrator: \$36,000. The 2007 W-2 statements reflect that the petitioner paid the following wages: preschool teacher: \$14,760; a second preschool teacher: \$24,000; a third preschool teacher: \$11,600.63; the beneficiary: \$6,585.60; and the school administrator: \$36,000. The petitioner also submitted payroll summaries for 2002 through 2007.

As the beneficiary's W-2 statements were considered above, the W-2s would not demonstrate the petitioner's ability to pay the proffered wage. None of the other W-2 statements submitted were for any of the other sponsored workers. Similarly, the payroll statements do not exhibit wage payments to any of the other sponsored workers to show the petitioner's ability to pay the proffered wages.

⁹ The petitioner provided the bank statements as additional evidence of its ability to pay the proffered wage on appeal.

¹⁰ As the petitioner did not provide any information related to sponsored workers, or their proffered wages, we will use the same wage as the beneficiary's wage for an estimate.

Based on the foregoing, the petitioner has not provided evidence that the sole proprietor has sufficient funds to pay the wages of all sponsored workers, and support herself. *See Ubeda v. Palmer*, 539 F. Supp. at 647. Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2).

Further, 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. The evidence submitted on appeal demonstrates that the petitioner's job offer is not realistic.

On July 14, 2004, the petitioner filed a Petition for a Nonimmigrant Worker, Form I-129, for a Montessori Teacher pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petition (WAC-04-203-53441) was approved by the director.¹¹

The I-129-W Form indicated that the position required a bachelor's degree in the field of Childhood Education. Further, counsel submitted information from the *Occupational Outlook Handbook* ("*OOH*"), which provided that "public school teachers must at least have a bachelor's degree."¹²

The pay rate offered for the Montessori Teacher position was listed as \$18,564.00 per year, and the I-129 H-1B petition was approved on August 24, 2004.

The petitioner had filed a labor certification on behalf of the same beneficiary for the position of Montessori Teacher. The ETA 750 was filed on July 15, 2002, and listed a pay rate of \$51,510 per year.

Further, the job description on the ETA 750 reads as follows:

Will teach children ages 2 to 6 years of age using the Montessori Method of instruction; Teach a program which is divided in four categories; Practical Life

¹¹ Information contained within that petition showed that the petitioner additionally filed a prior petition on behalf of the beneficiary, WAC-02-066-50830, to classify the beneficiary as an H-1B worker.

¹² The petitioner is a private school. The OOH comment applies to public schools. The 2008-2009 OOH Edition related to Teachers – Preschool, Kindergarten, Elementary and Secondary states that, "Licensing requirements for preschool teachers also vary by State. Requirements [for public schools] are generally more stringent than those for private preschool teachers." *See* <http://www.bls.gov/oco/ocos069.htm>, accessed on October 15, 2008.

Exercises, which help the children develop neuromuscular coordination and independence; Sensorial Exercises [sic] which assist in the refinement of senses; Language (phonetic rules and reading); and Mathematics (addition, subtraction, multiplication and division). Will adapt teaching techniques and methods of instruction to meet individual needs of the students. Assist students in their academic subjects and activities especially designed to provide them with a learning experience. Plan curriculum and prepare lessons and other materials considering factors such as individual needs, abilities and learning levels of each student. Discuss students problems and progress with their parents.

While the I-129 extension filing did not contain a letter of support, the job title for the H-1B petition and the job title for the ETA 750 position were the same, and it would appear that the positions are the same. However, we note that the ETA 750 listed the following education requirement: Education: "C" for completion of grade school, and high school. The position certified did not require any degree, and specifically did not require a Bachelor's degree in Childhood Education, or the equivalent as listed in the H-1B petition.

In response to the RFE, counsel¹³ provided that the I-129 position was for a kindergarten teacher, a position which requires a bachelor's degree, and that the Form ETA 750 position was for a preschool teacher, which does not require a bachelor's degree. In support, counsel provided documentation from the DOL Foreign Labor Certification Data Center, Online Wage Library, which lists the occupation title, pay, O*Net Jobzone code, and education and training for the position. See <http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-2011&area=31084&year=8>.

Form ETA 750 does list the occupational title as a preschool teacher, so that the petitioner's explanation regarding the discrepancy in educational requirements is supported by the FLC data.

However, the wages listed for a preschool teacher ranged from \$19,968 per year to \$31,720.¹⁴ The wages for a kindergarten teacher ranged from \$35,380 to \$57,100 per year.¹⁵ The petitioner specifically listed a wage of \$51,510 per year. DOL did not assess the wage at a higher level following review.

As the Form I-129 position would require a higher level of skill and education to execute the duties of the position, it is unclear why the Form ETA 750 position lists a salary of more than twice as

¹³ New counsel submitted the petitioner's response to the AAO's NDI.

¹⁴ The wages are based on the FLC Wage Data submitted for the time period July 2007 to June 2008. The Form ETA 750 was filed in 2002 would have been posted at wages for the year 2002. A review of the FLC Wage Data for the year 2002 shows that Preschool Teachers in the Los Angeles area would have been paid a range from \$16,973 to \$29,557.

¹⁵ Again, the wages are based on the FLC Wage Data submitted for the time period July 2007 to June 2008. A review of the FLC Wage Data for the year 2002 shows that Preschool Teachers in the Los Angeles area would have been paid a range from \$16,973 to \$29,557.

much. The petitioner failed to address the NDI request for an explanation regarding the disparity in the wage rate. 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).

Further, based on the W-2 Forms provided for the petitioner's other employees, the highest paid employee is the school administrator, paid at a rate of \$36,000 per year. The next highest paid teacher was paid \$24,000 per year. The beneficiary received \$12,763 as her highest annual pay (based on the filed H-1B petition listing that the beneficiary would be employed 30 hours per week). Given the wages paid to the beneficiary previously, and wages paid to other employees, we find that it is unrealistic that the petitioner will employ the beneficiary full-time¹⁶ and pay the beneficiary in accordance with the terms of the certified labor certification.¹⁷

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

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).

As the wages paid to other workers, and the beneficiary's previous pay is substantially less than the proffered wage, we find that the petitioner has failed to establish that its job offer to the beneficiary is realistic.

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.

¹⁶ 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

¹⁷ Additionally, the petitioner failed to provide any information as requested regarding petitions filed for other sponsored beneficiaries. None of the information submitted evidences that the petitioner employed the other beneficiaries in accordance with the certified Forms ETA 750.