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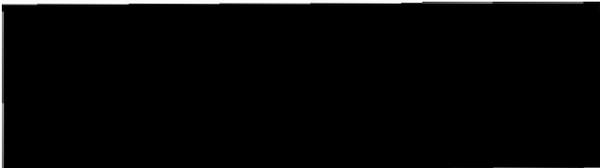
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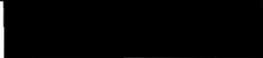
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 26 2009

WAC 04 002 53664

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the experience letter submitted by the beneficiary does not meet the requirements of 8 C.F.R. § 204.5(l)(3). The director denied the petition accordingly.

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 July 6, 2004 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the experience letter submitted by the beneficiary meets the requirements of 8 C.F.R. § 204.5(l)(3).

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 either 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 DOL. *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 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 April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$2,350 per month or \$28,200 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of cook.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel failed to submit any additional evidence. However, the AAO noted on appeal that the director had failed to request the sole proprietor's monthly recurring personal expenses (and the petitioner did not submit them) and that the beneficiary is listed as a brother of the sole proprietor on the sole proprietor's tax returns. Therefore, the AAO issued a request for evidence (RFE) on October 16, 2007. The AAO specifically requested:

Updated evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2001 to the present, including a list of the sole proprietor's recurring personal monthly expenses, any additional assets the sole proprietor wishes to include in the determination of the petitioner's ability to pay the proffered wage, evidence of the relationship between the sole proprietor and the beneficiary, and a complete copy of the Form ETA 750 as certified by the Department of Labor (DOL) including any communication relevant to the relationship between the sole proprietor and the beneficiary and documentation that summarizes our organization's recruitment efforts. We also ask that you provide evidence of the petitioner's business status.

In response to the RFE, counsel submitted a brief; a copy of a county of Los Angeles Public Health Operating Permit for the petitioner, issued on October 5, 2007 with an expiration date of June 30, 2008; a copy of a City of Los Angeles Department of Public Works Invoice for the billing period July 1, 2007 through September 30, 2007; a copy of a City of Los Angeles Municipal Services notice made out to the sole proprietor at the same address as the petitioner; a copy of a City of Los Angeles Tax Registration Certificate, issued on August 5, 2000; a Seller's Permit from the California State Board of Equalization, issued on July 24, 2000; a copy of a gas company invoice for the period October 18, 2007 through November 19, 2007, made out to the sole proprietor at the same address as the petitioner; an undated copy of the petitioner's menu containing coupons that expire on July 11,

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).

2007; a list of the sole proprietor's monthly recurring personal expenses (estimated at \$1,100 per month or \$13,200 per year with no documentation in support); a copy of a Merchant Financial Activity Statement form American Express for the period October 23, 2007 through November 22, 2007 for [REDACTED] (with the same address as the petitioner); a copy of the petitioner's bank statement for the period October 30, 2007 through November 30, 2007; a copy of the sole proprietor's bank statement as of December 4, 2007; a complete copy of Form ETA 750; a letter, dated November 28, 2002, from the California Employment Development Department; a copy of an undated job posting notice; copies of newspaper ads advertising the proffered position; and a letter from counsel, dated December 5, 2002, to the California Employment Development Department. Other relevant evidence in the record includes copies of the petitioner's 2001 and 2002 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1990 and to currently employ 3 workers. On the Form ETA 750B, signed by the beneficiary on March 30, 2001, the beneficiary did not claim the petitioner as a past or present employer. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the proffered wage of \$28,200 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

On appeal, counsel asserts:

The Services erred when it denied the petition in that the employer provided taxes with sufficient income to pay the proffered wage, the excess amounts should be sufficient to maintain petitioner through the balance left and his savings. Furthermore, the employment of the beneficiary should enhance the business and increase the restaurant's income.

A review of the recruitment efforts by the employer in Exhibit C clearly shows that the employer has undertaken recruitment in good faith and such recruitment has not produced applicants who are qualified. Therefore, the relationship between the employer and the beneficiary should not invalidate the labor certification.

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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors 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 supported a family of four in 2001 and a family of two in 2002. The sole proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Sole Proprietor's adjusted gross income (Form 1040, line 33)	\$39,855	\$45,294

In 2001 and 2002, the sole proprietor would have needed an adjusted gross income of \$41,400 in order to pay the proffered wage of \$28,200 and his undocumented, estimated monthly recurring expenses of \$13,200 yearly. In addition, USCIS records reveal that the petitioner has filed two additional visa petitions with the same priority date year (2001) or subsequent year. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the wages of all of the beneficiaries petitioned for with the same priority date year or subsequent year. Based on the information in the record, the sole proprietor would not be able to demonstrate that it could pay each sponsored worker the proffered wage from the priority date onward. Thus, the petitioner has not established its ability to pay the proffered wage in either 2001 or 2002.

On appeal, counsel claims that the remaining balances from the sole proprietor's adjusted gross income after paying the beneficiary's wage of \$28,200, plus the owner's savings, would evidence the petitioner's ability to pay the proffered wage. Additionally, he asserts that the beneficiary's employment will enhance and increase the restaurant's income.

In the instant case, however, counsel has submitted only one personal bank statement for the sole proprietor as evidence of the sole proprietor's savings. The statement is dated December 4, 2007 and has a balance of \$1,011.30. The 2007 tax return was not submitted,² and a savings account balance of \$1,011.30 is not sufficient evidence of the sole proprietor's ability to pay the proffered wage at the priority date of April 16, 2001 and continuing until the beneficiary obtains lawful permanent residence.³ The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *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)).

² It is noted that the sole proprietor's 2007 tax return would not have been available at the time counsel responded to the AAO's request for evidence. However, in its RFE, the AAO did request that the petitioner submit updated evidence of its continuing ability to pay the proffered wage beginning on the priority date in 2001 to the present. The petitioner provided no additional tax returns (i.e., 2003, 2004, 2005, or 2006) in its response to the AAO's RFE.

³ It is noted that the petitioner submitted one bank statement for the period October 30, 2007 through November 30, 2007 that shows a beginning balance of \$0 and an ending balance of \$3,404.00. Again, one bank statement is not sufficient evidence of the sole proprietor's ability to pay the proffered wage at the priority date of April 16, 2001 and continuing until the beneficiary obtains lawful permanent residence. In addition, the sole proprietor's business checking account shows funds that are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements would be considered as part of a "totality of circumstances" analysis.

With regard to counsel's claim that the beneficiary will enhance and increase the petitioner's income, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Absent documentary evidence to support the claim, the AAO will not consider the beneficiary's ability to increase the petitioner's income in the future.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case on the Form I-140, the petitioner claims that the business was established in 1990. The petitioner has provided Forms 1040 for only the years 2001 and 2002. The petitioner has filed for multiple workers and cannot establish its ability to pay the proffered wage for all the sponsored workers. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing

until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record does not resolve the petitioner's need to demonstrate an ability to pay the proffered wage for the beneficiary in this matter in addition to paying the additional beneficiaries represented by the other immigrant petitions filed by the petitioner. In addition, the petitioner's tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the experience requirements of the labor certification at the time of filing of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 16, 2001.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set

forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess six years of grade school and two years of experience in the job offered of restaurant cook. Block 15 states that the hours of operation are from 11:00 a.m. to 10:00 p.m., seating capacity is 40,⁴ and the number of persons served daily is between 100 to 150.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of restaurant cook must have six years of grade school, two years of experience in the job offered, be able to work from 11:00 a.m. to 10:00 p.m., and serve between 100 and 150 persons daily.

In the instant case, counsel submitted a letter, dated August 17, 1997, from [REDACTED] owner of [REDACTED], that states that he employed the beneficiary as a chef specializing in Indian cuisine since April 1, 1995.

The letter does not specifically list the Indian dishes the beneficiary cooked. Additionally, the letter fails to state the beneficiary's exact dates of employment or that he was still employed as of August 17, 1997. The letter also fails to state whether the prior employer employed the beneficiary on a full-time or part-time basis. The letter states that the beneficiary earned a monthly salary of \$1,200, which would appear to reflect part-time employment. The director noted the letter's deficiency in his decision. However, the petitioner failed to submit any additional evidence related to the beneficiary's experience. The petitioner merely resubmitted the initial letter sent. Therefore, after further review of the beneficiary's experience letter, the AAO retracts its statement in its RFE, and finds that the beneficiary does not meet the two year prior experience requirement of the labor certification.

Finally, in its RFE, the AAO requested that the petitioner provide evidence of the relationship between the sole proprietor and the beneficiary, a complete copy of the Form ETA 750 as certified by DOL including any communication relevant to the relationship between the sole proprietor and the beneficiary, and documentation that summarizes the petitioner's recruitment efforts. The AAO further requested that the petitioner provide evidence of its business status.

⁴ The petitioner's 2007 operating permit states that the restaurant seats only 11 – 30 maximum. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

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.

In response to the AAO's RFE, the petitioner submitted a copy of a county of Los Angeles Public Health Operating Permit for the petitioner, issued on October 5, 2007 with an expiration date of June 30, 2008; a copy of a City of Los Angeles Department of Public Works Invoice for the billing period July 1, 2007 through September 30, 2007; a copy of a City of Los Angeles Municipal Services notice made out to the sole proprietor at the same address as the petitioner; a copy of a City of Los Angeles Tax Registration Certificate, issued on August 5, 2000; a Seller's Permit from the California State Board of Equalization, issued on July 24, 2000; a copy of a gas company invoice for the period October 18, 2007 through November 19, 2007, made out to the sole proprietor at the same address as the petitioner; an undated copy of the petitioner's menu containing coupons that expire on July 11, 2007; a complete copy of Form ETA 750; a letter, dated November 28, 2002, from the California Employment Development Department; a copy of an undated job posting notice; copies of newspaper ads advertising the proffered position; and a letter from counsel, dated December 5, 2002, to the California Employment Development Department.

The evidence in the record does show that the petitioner is in business (at least through 2007), and that the petitioner conducted recruitment in accordance with DOL regulations. In addition, it is noted that the petitioner asserts that it received no responses or referrals to the advertised job opportunity in the newspaper or to its internal posting notice. As the petitioner is a small company, with only three employees listed on Form I-140, whether DOL would have required more information prior to certification is unclear. The record does not establish that the petitioner informed DOL that the beneficiary was related to the sole proprietor so that DOL had the opportunity to determine whether additional information would be required.

However, as noted above, the AAO has determined that the petitioner has not established its ability to pay the proffered wage from the priority date of April 16, 2001 or that the petitioner documented that the beneficiary has the required two years of prior experience in the position offered; and, therefore, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.