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U.S. Citizenship
and Immigration
Services



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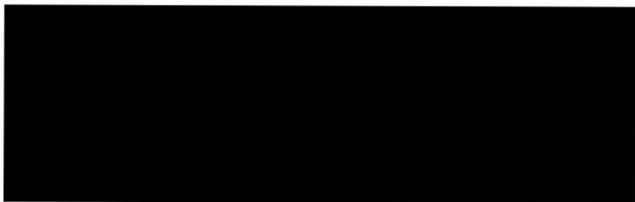
Date: MAR 17 2009

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)

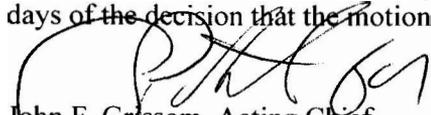
ON BEHALF OF PETITIONER:



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 or reopen, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner identifies itself as a construction company on the I-140 petition.¹ It seeks to employ the beneficiary permanently in the United States as a Marmur/tile installer.² As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary had the required two years of prior work experience as a tile installer, based on the letter of work verification that the petitioner submitted in response to the director's RFE. The director also determined that the I-140 petitioner did not establish that it was a successor-in-interest to the business that filed the original Form ETA 750. The director also noted that the original sole proprietor that submitted the Form ETA 750, based on its Forms 1040 did not appear to have the ability to pay the proffered wage. 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 January 25, 2007 decision, the primary issue was whether the beneficiary had the requisite two years of prior work experience as a tile installer. However, the AAO views the primary issue in this case as whether or not the petitioner is the successor-in-interest to the applicant that filed the Form ETA 750, which in turn determines whether the petitioner established its ability and the ability of the Form ETA 750 applicant to pay the proffered wage. Thus, the relationship between the I-140 petitioner and the applicant that filed the Form ETA 750 is crucial to this petition.

The AAO will first examine the issue of successor-in-interest with regard to the instant petitioner and the applicant that filed the Form ETA 750. For illustrative purposes, the AAO will then examine

¹ The I-140 petition states that the petitioner's business was established in 1989. In response to the director's RFE, counsel submitted a Fictitious Business Name Statement from the Alameda County records that identify the petitioner as [REDACTED], doing business as [REDACTED] with the commencement of business under the fictitious business name on April 21, 2003. The record does not clarify the relationship between [REDACTED] and the petitioner, Fosters [REDACTED]. The petitioner does submit client liability insurance reports dated April 2005 to March 2006, written by [REDACTED] that list the officers and employees of [REDACTED] t. Based on these reports, the petitioner has two officers, and six employees working in carpet/upholstery cleaning, and five employees in clerical positions. The documentation suggests that the petitioner is a carpet and upholstery cleaning business, and not a construction company.

² The petitioner submitted a certified Form ETA 750 filed by [REDACTED]. The record does not contain a cover letter from the Department of Labor, listing the actual date of receipt of the submitted Form ETA 750.

whether the I-140 petitioner established its ability to pay the proffered wage, and whether the Form ETA 750 applicant had the ability to pay the proffered wage. Finally, the AAO will examine whether the petitioner established that the beneficiary has the required two years of work experience for the proffered position.

To document that the petitioner qualifies as a successor-in-interest to the initial labor certification applicant requires evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the applicant for the labor certification is identified as [REDACTED]. The petitioner that filed the I-140 petition with the certified labor certification is identified as Fosters [REDACTED]. The petitioner submitted no documentation to establish a change of ownership of the Form ETA 750 applicant, such as a purchase agreement, to establish that the petitioner is a successor and may properly use the certified labor certification with its I-140 petition.

In the director's Request for Further Evidence dated September 12, 2006, he requested evidence as to when the petitioner became the successor-in-interest to the Form ETA 750 applicant. In response, the petitioner failed to provide any documentary evidence that it has assumed all of the rights, duties and obligations of the predecessor company, or any documentation to establish when the petitioner bought or acquired the Form ETA 750 applicant's business. The petitioner did submit copies of the I-140 petitioner's and the ETA 750 applicant's tax returns for relevant periods of time, in addition to documentation of properties owned by both the petitioner and the applicant. The director also requested evidence that the applicant that filed the Form ETA 750 had the ability to pay the proffered wage as of the priority date of April 27, 2001. In response, the petitioner submitted its Forms 1040 for tax year 2001 and 2002, and its Forms 1120S for tax years 2003, 2004, and 2005. It also submitted Forms 1040, Individual U.S. Tax Return, for [REDACTED] and [REDACTED], the sole proprietorship of the initial Form ETA 750 applicant, for tax years 2001 through 2005. The Forms 1040 for tax years 2001 2002, 2003, and 2005 on accompanying Schedules C identified a business identified as [REDACTED] Fremont, California. The 2004 Form 1040 tax return for the sole proprietorship submitted to record did not contain a Schedule C, and the first page of the tax return did not indicate any business income or loss on line 12.

In his decision, the director specifically stated that the petitioner had not provided evidence to establish that it was a successor-in-interest to the initial applicant of the Form ETA 750 and noted that based on this lack of evidence, the U.S. Citizenship and Immigration Services (USCIS) could not determine when the I-140 petitioner became the beneficiary's prospective employer.

On appeal, the petitioner submits no further evidence to prove the successor relationship. It states

⁴ The AAO also notes that the petitioner has provided no evidentiary documentation to establish that Marmur, the business identified as the applicant on Form ETA 750A, is the same business or is doing business as [REDACTED] the business identified on Forms 1040 submitted for the sole proprietor.

that the applicant that filed the Form ETA 750 was [REDACTED] and that the petitioner is a successor-in-interest to the original applicant. However, the I-140 petitioner does not provide any evidence as to the sale, acquisition, or merger between the two companies. 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)). Therefore, the record contains no evidence that the I-140 petitioner qualifies as a successor-in-interest to [REDACTED]. For this reason alone, the petition can be denied.

In addition, in order to maintain the original priority date, a successor-in-interest must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto*, 19 I&N Dec. at 481. In response to the director's RFE, the petitioner did submit the Forms 1040 for the claimed predecessor company, as well as bank records and mortgage information for [REDACTED] a sole proprietorship. However, as the I-140 petitioner failed to establish that it was the successor-in-interest to the ETA 750 applicant, or when it purchased the predecessor company, it is unclear for what time period the predecessor's tax returns would be relevant, if any.⁴

The AAO will now turn to the issue of whether the petitioner established its ability to pay the proffered wage. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$50,000 per year. The Form ETA 750 states that the position requires two years of experience as a terrazzo/marble worker.

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.⁷

On appeal, counsel submits a brief with no additional evidence. With the initial petition, the petitioner submitted the following evidence: Copies of four reports generated by [REDACTED] for [REDACTED]. The reports are for periods of time ending June 30, 2005; September 30, 2005; December 31, 2005; and March 31, 2006. The petitioner also submitted the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation for tax years 2003 and 2004 filed under [REDACTED] and the petitioner's IRS Form 1040, Individual U.S. Tax Return, for tax year 2002.

In response to the director's RFE dated September 12, 2006, the petitioner submitted the following evidence for the petitioner:⁸

Fictitious Business Name Statement issued by the Alameda County on April 21, 2003 that indicates [REDACTED] has commenced business as [REDACTED]

Copies of the petitioner's forms 1120S for tax year 2005, and the petitioner's Form 1040 for tax year 2001;

⁷ 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).

⁸ For greater clarity, the AAO will list the RFE evidence first, for the I-140 petitioner, and then the evidence for the Form ETA 750 applicant.

A list of five properties including land, commercial properties or a house under construction owned by the petitioner and the dates when purchased and purchase price;⁹ Copies of five of the petitioner's owner's Alameda County property tax statement for fiscal year 2005, with various payment dates in 2006 noted on the documents; and

A copy of the petitioner's Bank of America bank statement for August 2006 that indicates a balance of \$222,947.27.

The petitioner also submitted the following evidence with regard to the Form ETA 750 applicant, [REDACTED]

Copies of Forms 1040 for the sole proprietorship for the ETA 750 applicant, [REDACTED] Fremont, California for tax years 2001 through 2005;

A copy of the Form ETA 750 applicant's statement from the Polan Federal Credit Union, Redwood City, California, dated June 30, 2006, that indicates a mortgage balance of \$618,004.55;

A copy of an appraisal report for the applicant's residence at [REDACTED] [REDACTED] that indicates a value by cost approach of \$785,000 as of June 8, 2005; and

A copy of a report apparently from the Polan Federal Credit Union that reviews the applicant's partial 2005 mortgage payments and identifies a current mortgage balance of \$622,558.26 as of December 7, 2005.

The record does not contain any other evidence relevant to either the current petitioner's ability to pay the wage, or to the ability of the predecessor ETA 750 applicant to pay the proffered wage.

The evidence in the record of proceeding indicates that the I-140 petitioner was a sole proprietor in tax years 2001, and 2002, and that in tax year 2003 the I-140 petitioner restructured as an S corporation. On the petition, the petitioner stated it was established in 1989, and had gross annual income of \$2,848,112 in 2005, and currently employs 12 workers. On the Form ETA 750, signed by the beneficiary on October 20, 2003, the beneficiary did not claim to have worked with the I-140 petitioner.¹⁰

⁹ This document does not indicate who generated the list.

¹⁰ The beneficiary did claim that he worked for [REDACTED] from July 1998 to December 2000 as a terrazo/marble Installer. The petitioner submitted no letter of work verification for this claimed employment. [REDACTED] is the business identified on the Form 1040 Schedules C submitted to the record, and is located at the same address as [REDACTED]. However, the record does not contain definitive evidence that [REDACTED] and [REDACTED] and [REDACTED] are the same company, or that one company "does business as" the other.

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, 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 examining either the I-140 petitioner's or the Form ETA 750 applicant's ability to pay the proffered wage, USCIS will first examine whether either entity employed and paid the beneficiary during that period.¹¹ 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. However, the record only reflects that the beneficiary noted he had worked for [REDACTED] from July 1998 to December 2000 before the 2001 priority date. Neither the I-140 petitioner nor the Form ETA 750 indicates in the record that it employed the beneficiary or paid him the \$50,000 proffered wage during the relevant period of time. Thus, neither entity can establish its ability to pay the entire proffered wage of \$50,000 based on the beneficiary's wages.¹²

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. 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 the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded 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 USCIS, had properly relied on the petitioner's net income figure, as

¹¹ As the petitioner failed to indicate a date for any respective purchase, we will consider, hypothetically, each entity's ability to pay for the entire time period.

¹² In addition, if the petitioner could establish its successor-in-interest status to the Form ETA 750 applicant, the petitioner would have to establish the Form ETA 750 applicant's ability to pay the proffered wage prior to the successor's take over.

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court 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. [USCIS] 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 Chang* 719 F. Supp. at 537

As previously stated, without clarification as to when the instant petitioner bought or assumed the rights, duties and responsibilities of the Form ETA 750 applicant, the issue of which entity must establish its ability to pay the proffered wage for which time period cannot be established. Therefore, the petition must be denied.

For illustrative purposes only, the AAO will briefly examine first the Form ETA 750 applicant's ability to pay the proffered wage as of the 2001 priority date to the present, and then will briefly examine the I-140 petitioner's ability to pay the proffered wage during the same period of time. This examination does not support the petitioner's ability to pay the proffered wage because of the unresolved question of successor-in-interest status. However, the AAO's brief review may clarify whether the evidence submitted to the record was sufficient to establish either entity's ability to pay the proffered wage.

With regard to the Form ETA 750 applicant, the AAO will examine the Forms 1040 submitted by the petitioner to the record. A sole proprietorship is 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 a family of five individuals in 2001 and six individuals in tax years 2002 to 2005. The tax returns reflect the following information for the following years:

	2001	2002	2003
Proprietor’s adjusted gross income (Form 1040)	\$ 46,327	\$ 31,829	\$ 37,510
█s gross receipts or sales (Sch. C)	\$ 175,607	\$ 149,204	\$ 165,402
█ wages paid (Schedule C)	\$ 10,560	\$ 10,560	\$ 12,320
█ net profit from business (Schedule C)	\$ 49,849	\$ 34,249	\$ 40,362
	2004	2005	
Proprietor’s adjusted gross income (Form 1040)	\$ 34,596	\$ 54,722	
█ gross receipts or sales (Schedule C)	\$ NA ¹³	\$ 165,754	
█ wages paid (Schedule C)	\$ NA	\$ 0	
█ net profit from business (Sch. C)	\$ NA	\$ 61,518	

During the priority year 2001, and through tax year 2004, the sole proprietorship’s adjusted gross income was not sufficient to cover the proffered wage of \$50,000. In tax year 2005, the sole proprietorship’s gross adjusted income would be sufficient to pay the proffered wage. However, the sole proprietor has to establish that it can both pay the proffered wage and pay his yearly household expenses, based on either his adjusted gross income, or other financial resources. In the instant petition, the record contains documentation with regard to the appraisal value of the applicant’s real estate property in Fremont, California, and a credit union statement with regard to transfer payments for a mortgage. Neither document can be viewed as a source of additional funds with which to pay the proffered wage. In the case of the applicant’s property appraisal for his residence, the appraisal does not represent funds readily available to the applicant for purposes of paying wages.

Further, the record contains no evidence of the Form ETA 750 applicant’s monthly or yearly household expenses. The AAO notes that sole proprietor’s federal tax returns for tax years 2001, 2002, 2003, and 2005 include itemized deductions for items such as home mortgage interest payments and real estate taxes and that these payments are considered household expenses. It does not appear reasonable that the petitioner could pay the entire proffered wage and his annual household expenses for six individuals, including the partial expenses indicated on the sole

¹³ The petitioner did not submit a Schedule C for tax year 2004, and its 2004 tax return indicates no business income on the Form 1040. Further, as noted above, the petitioner has not established a successorship, or the date of any successorship in order to determine the time period for which the predecessor company would need to establish its ability to pay.

proprietor’s tax returns during any of tax years in question. Thus, the petitioner has not established the Form ETA 750 applicant’s ability to pay the proffered wage in any relevant year.

With regard to the petitioner that filed the I-140 petition, the record indicates that in tax years 2001 and 2002, the petitioner was a sole proprietor. In the instant case, the sole proprietor supports a family of five individuals in 2001 and 2002. The tax returns reflect the following information for the following years:

	2001	2002
Proprietor’s adjusted gross income (Form 1040)	\$ 243,355	\$ 150,739
gross receipts (Sch. C)	\$ 1,298,558	\$ 2,317,049
wages paid (Schedule C)	\$ 235,736	\$ 196,586
net profit from business (Sch. C)	\$ 249,432	\$ 169,551

Thus, the petitioner had sufficient adjusted gross income to pay the proffered wage of \$50,000 in tax years 2001 and 2002. However, as previously stated, the petitioner has to establish that it can pay both the proffered wage and also pay the petitioner’s household annual expenses. As previously stated, the tax returns reflect some household expenses such as mortgage interest and real estate taxes. In the petitioner’s Schedules A for tax years 2001 and 2002, its combined mortgage interest and real estate taxes are \$150,361 in tax year 2001 and \$78,319 in tax year 2002. These would leave the following sums to both pay the proffered wage of \$50,000 and pay the remainder of the petitioner’s household expenses: \$99,071 in tax year 2001 and \$91,232 in tax year 2002. The petitioner has not established that these sums are realistic to cover its household expenses of a family of five individuals. The record also does not reflect additional financial resources that the petitioner can utilize to pay both the proffered wage and its household expenses. The petitioner’s real estate properties are not viewed as assets that are liquidable and could be used to pay the proffered wage.¹⁴

With regard to tax years 2003 to 2005 when the petitioner is structured as an S corporation,¹⁵ with regard to the petitioner’s net income in these two years, the petitioner’s tax returns demonstrate the following financial information:

- In 2003, the Form 1120S stated a net income¹⁶ of \$136,163.

¹⁴ Further, from the record, the AAO cannot determine whether the I-140 petitioner’s assets are relevant in these years since the petitioner has not established a valid successorship, or the date of successorship.

¹⁵ The AAO notes that based on its tax returns submitted to the record, the I-140 petitioner was incorporated in tax year 2003. Therefore, the instant petitioner’s ability to pay the proffered wage in tax years 2001, 2002, and 2003, while operating as a sole proprietor and not the petitioning entity may be a moot point. The I-140 petitioner’s S Corporation tax returns and sole proprietorship tax returns reflect different federal tax identification numbers and would, therefore, be separate entities.

¹⁶Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources

- In 2004, the Form 1120S stated a net income of -\$112,093.
- In 2005, the Form 1120S stated a net income of -\$16,520.

Therefore, for the year 2003, the I-140 petitioner did have sufficient net income to pay the proffered wage of \$50,000, but would still need to establish its valid successorship. However, in tax years 2004 and 2005, the I-140 petitioner does not have sufficient net income to pay the entire proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The I-140 petitioner's net current assets during 2004 were \$44,461.
- The I-140 petitioner's net current assets during 2005 were -\$155,959.

other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. The AAO notes that the petitioner in tax years 2003, 2004, and 2005 had additional deductions or income losses that reduced the petitioner's actual net income in those years. The petitioner's net income for each of these three tax years is found at 17E, Schedule K.

¹⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

For the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage of \$50,000.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, neither the applicant that filed the Form ETA 750 or the petitioner that filed the I-140 petition would have the ability to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date onward. Further, as stated previously, the I-140 petitioner has not established if or when it acquired a successor-in-interest status in the instant petition. Therefore, the evidence submitted does not establish that the petitioner was the successor-in-interest, or that it had the continuing ability to pay the proffered wage in any year.

The AAO will now examine the issue raised by the director of the beneficiary's qualifications to perform the duties of the proffered position.

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

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 printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4
	College	None
	College Degree Required	N/A
	Major Field of Study	N/A

The applicant must also have 2 years of experience in the job offered, terrazzo/marble worker, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. The petitioner did not allow for experience in any alternate occupation. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked full-time as a

Terrazza/Marble Installer, from July 1998 to December 2000 for [REDACTED], California. The beneficiary also represented that he had worked for [REDACTED], in Elk, Poland as the manager of a restaurant/food store chain from June 1997 to June 1998 and as a manager/maintenance assistant for the same company from 1986 to June 1997. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In response to the director's RFE requesting work experience documentation, the petitioner submitted a translated copy of the beneficiary's diploma from Solkolka Vocational High School in 1994 as a specialist in wood technology, or furniture making. The petitioner also submitted an English language document written by [REDACTED] Poland. Ms. [REDACTED] states that from 1986 to June 1997, the beneficiary worked for the company in the capacity of Manager/Maintenance Assistant, maintaining and repairing facilities at restaurant and food store chains, and serving as Assistant Manager. Ms. [REDACTED] also stated that from 1997 to June 1998, the beneficiary worked for [REDACTED] as a manager of a restaurant.

The director in his denial of the petition stated that the letter of work verification submitted by the petitioner verified his work experience within a restaurant and food store chain, initially as an assistant manager, maintaining and repairing facilities and then as a restaurant manager. The director stated that the petitioner had not provided any evidence as to the beneficiary's work experience as a tile installer, marble worker, the job duties outlined on the Form ETA 750. The AAO concurs with the director, and adds further that the letter of work verification submitted by the petitioner does not establish the beneficiary's prior work experience. The AAO also notes that the letter indicates that the beneficiary, who was born in 1974, began working for the claimed employer in 1986, when the beneficiary was twelve years old.

Further, the AAO would question whether the petitioner is offering a realistic job to the beneficiary. The record reflects that the petitioner's employees as of 2005 and 2006 consisted of individuals

working in either clerical areas or in the carpet/upholstery cleaning field. The record does not reflect any business operations by the petitioner in the field of tile installation or that it would need a marble installer. Thus, the petitioner has not established that the beneficiary has the requisite two years of work experience, or that it has a realistic job offer for the beneficiary.

With the initial petition, 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.