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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
SRC 07 188 50947

Office: TEXAS SERVICE CENTER

Date: FEB 02 2010

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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).

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a property management business. It seeks to employ the beneficiary permanently in the United States as a remodeling specialist. As required by statute, the petition is accompanied by a ETA Form 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 (1) it will pay the beneficiary the prevailing wage; (2) that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and, (3) the petition requires at least two years of training or experience, such that the beneficiary may be found qualified for classification as a skilled worker. 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.

Beyond the decision of the director, additional issues in this case are whether or not the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage, as well as the proffered wage of an additional beneficiary that it sponsors, beginning on the priority date of the visa petition; and, whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 first issue in this appeal is whether or not the petitioner had established that it will pay the beneficiary the prevailing wage.

During the pendency of the U.S. Citizenship and Immigration Services' (USCIS) review of the petition, the director noted that the petition offered a wage substantially less<sup>1</sup> than the proffered wage. Counsel wishes to amend the petition filed June 6, 2007 (the amendment is dated October 16, 2007) after it was filed to now state the proffered wage. However, the petition cannot be amended retroactively. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner had not established that it will pay the beneficiary the prevailing wage at the time it filed the I-140 petition, and the petition may not be approved for this reason.

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<sup>1</sup> Form I-140, Part 6, Item 9 "wages per week," stated a weekly wage of \$600.00, although the proffered wage rate stated in the labor certification is \$20.08 per hour that equates to \$803.20 per week.

The second issue in the present matter is whether the petitioner has established that it has the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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 ETA Form 750, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 750 was accepted on February 21, 2002. The proffered wage as stated on the ETA Form 750 is \$20.08 per hour (\$41,766.40 per year). The ETA Form 750 states that the position requires two years in the offered position, although the certification was amended to reduce the required experience to six months.

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.<sup>2</sup>

On August 8, 2007, the director issued a Request for Additional Evidence (RFE) requesting a completed Form G-28, and instructing the petitioner to submit information regarding the petitioner's organizational form, the hourly wage the beneficiary will receive, the petitioner's tax returns for 2002 to 2006, and letter(s) from the beneficiary's current or former employer(s) stating his job duties and dates of employment. Further, the director noted that the financial records, e.g. tax returns, reputedly submitted for the petitioner are for Paul Lansdorf who, according to the evidence submitted, is not the sole proprietor of the business.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

In response to the RFE, the petitioner submitted on October 29, 2007, an undated letter from the petitioner; Form 1099-MISC statements from the sole proprietor to the beneficiary in the amounts of 2002-\$26,697.70; 2003-\$30,937.40; 2004-\$31,716.50; 2005- \$35,283.50, and 2006-\$32,887.00; a letter dated September 3, 2007, from the petitioner stating that the beneficiary was employed by the petitioner from March 2001 to “present,” e.g. September 3, 2007; a reputedly “amended” Form I-140; the sole proprietor’s tax returns with W-2 statements for 2002, 2003, 2004, 2005 (with Form 1099-R), and 2006 (with Form 1099-R).

The director questioned the *bona fides* of the above listed Form 1099-MISC statements which are handwritten with the year of issue of the Form 1099-MISC statements for 2002, 2003 and 2004, overwritten. According to the petitioner, the statements were altered, but as a matter of convenience to the sole proprietor, rather than as an attempt to deceive U.S. Citizenship and Immigration Services (USCIS). However, the AAO notes that aside from that assertion by both counsel and the sole proprietor to the same effect, no independent objective evidence was submitted by the petitioner such as the beneficiary’s personal tax returns, cancelled checks, pay stubs, or bank deposits that the beneficiary received the compensation stated in the 1099-MISC statements in each year. Moreover, the petitioner’s tax returns do not appear to contain entries which correspond to its claim to have paid the beneficiary income in 2002, 2003, or 2004. It does not appear from the evidence submitted that the Form 1099-MISC statements were *bona fide*. The AAO will not consider the Forms 1099-MISC statements as sufficient evidence of compensation paid to the beneficiary and the petitioner’s ability to pay the proffered wage.

If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Other evidence submitted by the petitioner was a letter dated May 25, 2007, from the sole proprietor; a letter from prior counsel dated September 23, 2002; letters from the California Employment Development Department dated June 14, 2002, August 8, 2002, and October 2, 2002; a letter statement from the petitioner dated September 20, 2002, reputedly amending the rate of pay to \$20.08; a Fictitious Business Name statement filed by the sole proprietor on February 23, 2006; an affidavit from the sole proprietor; a letter statement from the petitioner’s accountant dated December 20, 2007; an IRS publication “2007 Instructions for Schedule E (1040)” as well as two other similar publications; two unaudited financial statement for tax year 2006, and one for the period 2001 to 2006;<sup>3</sup> property tax bills, 2007-2008, for the petitioner’s properties; a “Residential Tenancy

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<sup>3</sup> Counsel’s reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Agreement;" and a USCIS Interoffice Memorandum (HQPRD 70/6.2.8-P) dated May 12, 2005 with five pages of commentary on the memorandum's contents.

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 1999, and to currently employ five workers. On the ETA Form 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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 Forms 1099-MISC statements submitted are insufficient evidence that the petitioner employed and paid the beneficiary the full proffered wage from the priority date onwards for the reasons already stated.

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 (1<sup>st</sup> 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 generally 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 (7<sup>th</sup> 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 is single with no dependents. The proprietor's tax returns reflect information for the following years:

	<u>2002</u>	<u>2003</u>
Proprietor's adjusted gross incomes (Forms 1040, lines 35 and 34)	\$79,332.53	\$72,427.11
	<u>2004</u>	<u>2005</u>
Proprietor's adjusted gross incomes (Forms 1040, lines 36 and 37)	\$61,590.46	\$80,230.55
	<u>2006</u>	
Proprietor's adjusted gross income (Form 1040, line 37)	\$77,036.84	

The petitioner did not submit a statement of personal expenses, but there are Schedules A included with the tax returns in the record that detail some, but not all, of the sole proprietor's yearly personal expenses.<sup>4</sup> The Schedules A state some of the sole proprietor's personal expenses such as medical and dental expenses, taxes expenses, home mortgage interest, gifts, un-reimbursed employee expenses and various miscellaneous expenses. On the 2002 Form 1040, Schedule A, Line 28, the sole proprietor stated total itemized deductions of \$36,766.96;<sup>5</sup> in 2003-\$39,906.99; in 2004-\$26,507.05; in 2005-\$35,175.47; and in 2006-\$39,670.00.

<sup>4</sup> A statement of personal expense should detail the petitioner's recurring household expenses. This statement should indicate such items generally includes housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, personal loans, clothing, and any other recurring monthly household expenses. *See Ubeda v. Palmer, id.*

<sup>5</sup> The AAO notes that while the sole proprietor had medical and dental expenses of \$12,892.64 in 2002, the allowable deduction on Schedule A, Line 4, was \$6,942.70. Similarly in other tax years in

In years 2002, 2003, 2004, 2005 and 2006, the sole proprietor's adjusted gross incomes above stated fail to cover the proffered wage of \$41,766.40 and the sole proprietor's personal expenses stated in Schedule A of each year's tax return. It is improbable that the sole proprietor could support himself on the small differences or a deficit, which is what remains after reducing the adjusted gross incomes by the amount required to pay the proffered wage.

In a letter dated May 25, 2007, from the sole proprietor, he stated his owner's equity in his residential and commercial rental properties is evidence of the petitioner's ability to pay the proffered wage. The petitioner uses the properties in its property management business. Those 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. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

In the same letter dated May 25, 2007, the petitioner refers to a checking account with a credit union and has submitted statements from February 1, 2007, to April 1, 2007, and one statement dated May 1, 2007, that appears to be a direct deposit account for the sole proprietor's employee wages from the City of San Francisco's Building Inspection Commission. The petitioner's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on his tax return. Further, since the petitioner did not submit a 2007 tax return, the AAO cannot analyze or review these accounts relative to the sole proprietor's adjusted gross income.

A recurring issue in this case is the fact that although the sole proprietor is in the property management business and the owner of residential and commercial properties generating lease income, the petitioner reports that income or loss not on Schedules C, but on the Schedules E accompanying the Forms 1040 submitted. The petitioner's accountant has opined that Schedules E are the proper method to reflect the rental business activity. Unfortunately, the petitioner has not submitted complete copies of the Schedules E as page two is missing in each year from 2002 to 2006. Further, the income or loss from the rental activity is already reflected on the Forms 1040, Line 17, and thereby, already reflected in the sole proprietor's adjusted gross income. It is not "extra" income, not already considered.

The petitioner mentions in passing that he is the "Beneficiary of two family trusts and two real estate holdings ... and a valuable art collection." The implication is that these assets are available to pay the proffered wage. However, without more, there is no other information concerning these holdings

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which the sole proprietor's medical and dental exceed the allowable deduction, the total itemized deductions states a deductible amount which is less than the sole proprietor's actual expenses.

and no information if the trusts can be invaded by the sole proprietor to pay the proffered wage or if the sole proprietor can or would sell art pieces held in a collection. The AAO has insufficient information to analyze or review such reputed assets.

The petitioner has submitted the personal joint tax returns (Form 1040) for years 2003, 2004 and 2005 for two married individuals, one whom is identified in the record as the sole proprietor. There is no statement provided in the record that the adjusted gross incomes stated for this married couple residing in California are available to pay the proffered wage. Similarly, counsel has submitted one credit card statement of the sole proprietor with a \$300.00 credit line for a small purchase without any explanation for its relevance to the ability to pay. Other documents submitted without explanation are an accident investigation report, the sole proprietor's utility bills, and an auto insurance bill.

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. 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, the property management business was established in 1999, and according to the record involves wholly owned residential and some commercial properties located in California. No information relating to the vacancy rate of the properties was provided, but the income loss derived from the rentals is reported on the petitioner's tax returns on Forms 1040, Line 17, that is derived from Schedules E of those returns. The income loss was in 2002- $\langle \$25,000.00 \rangle$ <sup>6</sup>, 2003- $\langle \$25,000.00 \rangle$ ; in 2004- $\langle \$24,920.00 \rangle$ ; in 2005- $\langle \$25,000.00 \rangle$ ; and in 2006- $\langle \$25,000.00 \rangle$ . All of the

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<sup>6</sup> The symbols  $\langle a \text{ number} \rangle$  indicate a negative number, or in the context of a tax return or other financial statement, a loss.

positive income, that the sole proprietor's reports on his tax returns, is derived from wages from the City of San Francisco and a pension, not from the rental properties.

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 third issue in this case is whether or nor the beneficiary may be found qualified for classification as a skilled worker since the petition classification selected requires at least two years of training or experience.

On appeal, counsel asserts that although the petitioner selected the professional or skilled worker visa preference classification on the Form I-140 that was filed (I-140(e)), counsel acknowledges that the beneficiary does not meet the skilled worker classifications requirements and desires to retroactively amend the petition to select the other worker classification (I-140(g)).

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the proffered position requires, at a minimum, six months of experience in an alternate related occupation. However, as noted above, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. The petitioner will be denied for this additional reason.

Beyond the decision of the director, an additional issue is whether or not the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as well as the proffered wage of an additional beneficiary that it sponsors beginning on the priority date of the visa petitions.

USCIS electronic database records show that the petitioner filed an I-140 petition on behalf of one other beneficiary on June 29, 2007. Although the evidence in the instant case indicated financial resources of the petitioner substantially less than the beneficiary's proffered wage, it would be

necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. The petitioner must demonstrate the petitioner's ability to pay the total amount required to pay the wages offered to all the beneficiaries sponsored by the petitioner. The record in the instant case contains no information about wages offered or paid to the other potential beneficiary of an I-140 petition filed by the petitioner. The record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to all the beneficiaries of the instant petition.

Beyond the decision of the director, another issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must also demonstrate that on the priority date, the beneficiary had the qualifications stated on its ETA Form 750, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

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. 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 petition is accompanied by an ETA Form 750 prepared by the petitioner that was approved by the DOL. The ETA 750, Part A of the labor certificate requires two years in the offered position, and six months job experience in an unnamed related occupation.

Further, 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.

According to ETA Form 750, the beneficiary stated that he attended the Univerzita Pardubice, in the Czech Republic majoring in English from September 1993 to June 1997.

The beneficiary listed three prior employment positions on ETA Form 750, Part B. From July 1992 to August 1992, the beneficiary stated in the labor certification that he was a computer lab assistant with SPS Otokovice, Otokovice, the Czech Republic, and worked 40 hours each week. According to the beneficiary, his duties there were computer related.

From January 1997 to June 1997, the beneficiary stated that he was an English language advisor with TOW ZLIN, Zlin, the Czech Republic, and worked 40 hours each week. According to the beneficiary, he taught English as a second language.

From April 1998 to June 2000, the beneficiary stated that he was employed by European Craftsman located in Concord, California, as a property manager. Although the beneficiary stated that European Craftsman was a construction company, according to the job duties stated, the beneficiary worked with tenants and no remodeling specialist duties are stated. Further, the petitioner has submitted no evidence such as letters from prior employers that the beneficiary has remodeling specialist skills.

The beneficiary's job duties as a remodeling specialist are not stated in documents in the record to substantiate his prior job experience, the name and address, or title of the beneficiary's trainer or employer, or a description of the training received, or the experience of the beneficiary as a remodeling specialist. Therefore, there is no statements in the record of proceeding as required under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a remodeling specialist from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.<sup>7</sup>

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.<sup>8</sup> In visa petition proceedings, the burden of proving eligibility for

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<sup>7</sup> The labor certification and its amendments have not identified the "Related Occupation" requiring six months experience in contradistinction to the offered occupation of remodeling specialist that requires two years experience. That being the case, the AAO cannot analyze and review the beneficiary's qualifications to perform the unnamed related occupation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>8</sup> 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

the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not been met that burden.

**ORDER:** The appeal is dismissed.