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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

FEB 11 2011

IN RE:

Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Elizabeth McCormack*

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 an electrical installation business. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 4, 2008 denial, the issue in this case is 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.

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 at 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 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.86 per hour (\$28,828.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or two years related experience as an electrical helper.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner, at the time of filing the labor certification and the Form I-140 petitioner, was a sole proprietor. The petitioner indicated on its petition that it was established on August 10, 1996, and that it currently employed four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary indicates that he has been employed by the petitioner since January 1999.

The record indicates that the petitioner ceased operating in 2006 and, in 2007 a corporation called [REDACTED] began operations. As a threshold issue, on November 17, 2010, this office notified the petitioner that additional evidence and information was necessary before the AAO could render a decision. The AAO requested that the petitioner show its ability to pay the proffered wage; that the petitioner demonstrate a successor-in-interest relationship with [REDACTED] that the petitioner, as a sole proprietor, submit a list of his average annual recurring household expenses; that the petitioner submit complete copies of its tax returns, including all pages, schedules, and attachments for 2001 through 2006; that the petitioner submit as proof of the beneficiary's wages received Forms W-2 or 1099-MISC, or explain how the sole proprietor accounted for the beneficiary's wages on his tax returns; and that the petitioner provide evidence that the beneficiary is qualified and has obtained the necessary experience for the proffered position as an electrician as of the priority date.

With its response to the AAO, the petitioner submitted, through counsel, a copy of [REDACTED] income tax returns and the beneficiary's IRS Forms W-2 for 2007, 2008, and 2009; a copy of the sole proprietor's [REDACTED] IRS Forms 1040 for 2001 through 2006, including Schedules C; a copy of the 2008 annual report from the Virginia State Corporation Commission listing [REDACTED] as registered agent, president and director of [REDACTED] a statement from [REDACTED] a statement from the beneficiary; and a copy of a translated employment application by the beneficiary with [REDACTED] general earnings and leave statements of the beneficiary; and [REDACTED] Forms 941, Employer's Quarterly Tax Return for 2010.

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<sup>1</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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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).

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship from 2001 through 2006. 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.

The petitioner submits as evidence copies of its US Individual Income Tax returns, Schedules C for the 2001 through 2006 tax years. The sole proprietor asserts that the wage figures shown on Schedule C of its 1040 tax returns reflect the wages paid to the beneficiary, and that the beneficiary was his only employee during the time he was a sole proprietor business. He further states that the beneficiary was responsible for filing his own taxes with the government. The petitioner's Schedules C for 2001 through 2004 indicate wage figures of \$40,228.00, \$36,323.00, \$42,083.00, and \$45,066.00, respectively.<sup>2</sup> However, the petitioner has not submitted any IRS Forms W-2 or IRS Forms 1099-MISC to demonstrate that the wage amounts shown on its Schedule C for 2001 through 2004 were given solely to the beneficiary. It is noted that the petitioner submitted as evidence copies of its company checks made out to the beneficiary from 2001 through 2006. The record is as follows:

- In 2001, one check was written in the amount of \$2,600.00.
- In 2002, one check was written in the amount of \$750.00.
- In 2003, two checks were written totaling the amount of \$1,850.00.
- In 2004, six checks were written totaling the amount of \$3,850.00.
- In 2005, ten checks were written totaling the amount of \$7,102.50.
- In 2006, thirteen checks were written totaling the amount of \$15,316.10.

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<sup>2</sup> The petitioner's Schedules C for the 2005 and 2006 tax years did not show that any wages were paid by the petitioner in those years.

Although the beneficiary is listed as the payee on all of the above noted checks, in the "for" section of the checks the petitioner's notes vary; some were issued for hours worked, some named specific names; some appear to be loans; and some are blank on the line indicating the reason for the check. Regardless, the amounts listed above are inconsistent with the petitioner's wage amounts listed on the Schedules C, and are less than the proffered wage. It is noted that although the sole proprietor claims to have employed the beneficiary in 2005 and 2006, there are no wage amounts indicated on his Schedules C for those years. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It is noted that, as evidence of its ability to pay the proffered wage, the petitioner submitted a copy of the beneficiary's IRS Forms W-2, Wage and Tax Statement, issued by [REDACTED] for 2007, 2008, and 2009. Although the relevance of these documents has not been established (*see infra*), the AAO will alternatively consider the tax documents to determine if the petitioner has the ability to pay the proffered wage. The record of proceeding contains copies of the beneficiary's IRS Forms W-2 as:

- In 2007, the Form W-2 stated total wages of \$38,866.25.
- In 2008, the Form W-2 stated total wages of \$37,373.00.
- In 2009, the Form W-2 stated total wages of \$35,192.75.

The record also contains 2010 earnings and leave statements issued to the beneficiary by [REDACTED]. The earnings and leave statement dated November 26, 2010 indicates that the beneficiary's year-to-date wages are \$33,722.45. Although this evidence demonstrates [REDACTED] ability to pay the proffered wage for 2007, 2008, 2009, and 2010, the petitioner has not established its ability to pay the proffered wage in 2001 through 2006.

The petitioner has failed to establish by documentary evidence that it employed the beneficiary from the priority date at a salary equal to or greater than the proffered wage. Therefore, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, to determine its ability to pay the beneficiary the proffered wage with sufficient funds remaining to support the proprietor's family.

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); *Tuco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 claims to have been a sole proprietorship from 2001-2006, 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 is not legally separate from its owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 33 and 35, respectively. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

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.

The record shows that the sole proprietor has filed his personal tax returns with a status of married filing jointly, with one dependent. The proffered wage is \$28,828.80. In the instant case, the sole proprietor's IRS Form reflects his adjusted gross income (AGI) as follows:

- In 2001, the proprietor's IRS Form 1040 stated AGI of \$46,015.00.
- In 2002, the proprietor's IRS Form 1040 stated AGI of \$50,350.00.
- In 2003, the proprietor's IRS Form 1040 stated AGI of \$50,082.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$18,880.00.
- In 2005, the proprietor's IRS Form 1040 stated AGI of \$23,667.00.
- In 2006, the proprietor's IRS Form 1040 stated AGI of \$27,851.00.

Although the AGI balances for 2001, 2002, and 2003 exceed the proffered wage amount, there is no evidence in the record of proceeding about the petitioner's household expenses. As noted above, sole proprietors must show that they can sustain themselves and their dependents, if any, in addition to paying the proffered wage. In the RFE dated November 17, 2010, this office requested that the sole proprietor submit a list of his average annual recurring household expenses, including, but not limited to: mortgage and rent payments, automobile payments, transportation costs, installment loans, credit card payments, and other household expenses. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by this office, the petitioner declined to provide copies of his personal average annual recurring household expenses. The list

would have demonstrated the amount of personal expenses incurred by the sole proprietor and further revealed his ability to pay the proffered wage.<sup>3</sup> The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). As the petitioner has not submitted evidence of household expenses, it cannot be determined that the petitioner's AGI is sufficient to pay both the beneficiary's wage and his personal household expenses.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its adjusted gross income.

On appeal, counsel asserts that the director erred in determining that the petitioner had failed to establish its ability to pay the proffered wage since the priority date. Counsel further asserts that the petitioner has successfully operated his business and that the petitioner is readily available to finance all of its enterprises, including paying the proffered wage to the beneficiary.

The sole proprietor submits a copy of his bank statements as evidence. The sole proprietor's claim with respect to his bank statements and his reliance on the balances in the bank account 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, the bank statements, to the extent that they represent assets, have not been submitted in the context of audited financial statements which would also consider the sole proprietor's debts and other obligations. Accordingly, these bank statements are not probative of the petitioner's ability to pay the proffered wages.

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

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<sup>3</sup> The expenses listed on the sole proprietor's 2005 and 2006 Forms 1040, Schedule A reflect mortgage interest payments which are considered household expenses and must be deducted from the petitioner's AGI in 2005 and 2006.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, and 2006. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation or the occurrence of any uncharacteristic business expenditures or losses in 2001 through 2006. The petitioner has not submitted sufficient evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750, or that it entails outsourced services. Finally, it appears that the petitioning sole proprietor is no longer operating. *See infra*. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that the original job offer still exists. The Form ETA 750 and petition were filed by the sole proprietorship, [REDACTED]. However, based on the 2006 Form 1040 and the 2007 Form 1120 contained in the record, the sole proprietorship ceased operating at the end of 2006. Beginning in 2007, [REDACTED], a Virginia corporation, began operating out of the same address as the petitioner's business. The instant petition was filed on July 5, 2007 by the sole proprietor using the social security number of its owner, [REDACTED].

A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the petitioner that filed the labor certification and petition is a different entity from the Virginia corporation for which a 2007, 2008, and 2009 tax return was submitted as evidence of the petitioner's ability to pay the proffered wage.

Given that the petitioner, [REDACTED] is no longer operating, it must establish that [REDACTED] is its successor-in-interest. Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981) and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it

satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

The sole proprietor implies that [REDACTED] is a successor-in-interest to [REDACTED]. The sole proprietor indicated in his statement submitted in response to the AAO's RFE that in 2007 he incorporated [REDACTED] in the Commonwealth of Virginia; that he is the sole owner of the corporation and is also its president; and that [REDACTED] naturally assumed the business that he was conducting as a sole proprietor. As evidence, the petitioner submitted a copy of the 2008 annual report from Virginia State Corporation Commission listing [REDACTED] as registered agent, president and director of [REDACTED].

The record contains no evidence to establish a valid successor relationship. There is no evidence of the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer. The fact that [REDACTED] is owned and operated by the former sole proprietor, [REDACTED] is not sufficient alone to establish a successor-in-interest relationship. Therefore, the evidence in the record does not establish that [REDACTED] is a successor-in-interest to the sole proprietor, and that its payment of wages to the beneficiary from 2007 – 2010 may be considered as evidence of the petitioner's ability to pay.

Further, as the petitioner is no longer an active business, the petition and its appeal to this office have become moot,<sup>4</sup> and the appeal shall be dismissed as moot. For this additional reason, the petition will be denied.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary meets the qualifications set forth on the Form ETA 750. According to the Form ETA 750, the position requires two years of experience as an electrician or two years experience as an electrical helper. In support of this claim, the petitioner submitted a translated copy of a one page printout from the web site of [REDACTED] that discusses the company's history, and a translated copy of the beneficiary's claimed job application dated October 20, 1993. The petitioner also submitted a translated letter dated July 18, 2005 from the head of the industrial relations department of [REDACTED] located in Mexico, in which he stated that the company employed the beneficiary as an electrician from October 20, 1993 through December 27, 1996. Although this letter indicates that the beneficiary was employed for more than two years, the declarant fails to provide specifics with respect to a description of the beneficiary's job duties. It is further noted that the beneficiary did not list [REDACTED] as a former employer on the Form ETA 750B, that he signed under penalty of perjury. 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. *See Matter of Ho, supra*. The petitioner also submitted a letter dated December 10, 2010 in which [REDACTED] stated that he has employed the beneficiary, initially as an electrician helper and later as an electrician. The declarant fails to describe in the letter the beneficiary's duties. The declarant fails to specify when the beneficiary began working for the company and at what point in time the beneficiary began working as an electrician for the company. Accordingly, it has not been established that the beneficiary has the requisite two years experience in the job offered. 8 C.F.R. § 204.5(g)(1) and (L)(3)(ii)(A). The appeal will be dismissed for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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<sup>4</sup> Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

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.