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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

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date: FEB 28 2011

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew
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 is a [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a real estate sales agent pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish the ability to pay the proffered wage as well as to sustain her household expenses from the priority date through the present, and therefore, denied the petition.

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.

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.¹

As set forth in the director's September 8, 2009 denial, the primary 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 as well as to sustain her household during the period.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, counsel did not submit any additional or new evidence with the brief.

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 \$22.93 per hour (\$47,694.40 per year). On the Form ETA 750B signed by the beneficiary on April 28, 2001, he did not claim to have worked for the petitioner. 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 1996, and to have a gross annual income of \$141,642, net annual income of \$62,831 and no employees.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not claim to have employed and paid the beneficiary for any period since the priority date and did not provide any documentary evidence showing that the petitioner paid the beneficiary any compensation for his services. Therefore, the petitioner failed to demonstrate that she paid the beneficiary the proffered wage from the priority date to the present, and thus, failed to establish her ability to pay the proffered wage through examination of wages actually paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco 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 is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In response to the director's request for evidence (RFE) dated April 20, 2009, counsel submitted a statement of monthly expenses for the sole proprietor. The monthly expenses statement shows that the petitioner's household spends a total of \$1,000 per month (approximately \$12,000 per year) including \$400 for residential mortgage, \$20 for maintenance, \$50 for gasoline, \$400 for food and clothing, \$55 for utility (cable, electricity, gas, water and trash), \$40 for real property tax, \$25 for homeowner insurance, and \$10 for landscaping. However, the sole proprietor's individual income tax return for 2006 shows that the sole proprietor reported on Schedule A a total of \$65,247 as itemized deduction related expenses in that year, including \$29,453 on medical and dental expenses, \$46,235 on real property tax, \$28,816 on home mortgage interests and points, and \$743 on gifts to charity. The only items on the Schedule A that overlapped with the petitioner's monthly expenses statement are the mortgage interests and real property tax. Since mortgage paid covers the principal repayment, mortgage interests paid and points paid, and real property tax, the petitioner's total expenses on her mortgage should be more than the amounts of mortgage interests and real property tax reported on the schedule A. However, in this case, the monthly expenses statement indicates that the sole proprietor spent only \$5,380 per year on residential mortgage and real property tax. Therefore, the AAO finds that the statement provided by the petitioner does not cover all expenses she spent in 2006. The reasonable total

expenses the petitioner's household spent in 2006 should be \$71,967.² Similarly, the reasonable total expenses the petitioner's household spent in each year 2001 through 2005 and 2007 should be \$59,274, \$47,175, \$50,921, \$56,495, \$72,248, and \$78,524 respectively.³ Thus, the AAO will not accept the petitioner's monthly expenses statement, but rather the figure calculated by this office as the proper amount for the petitioner's living expenses for these relevant years.

The record contains copies of the sole proprietor's Form 1040 U.S. Individual Income Tax Return for 2001 through 2007. The sole proprietor's tax returns and her household's living expenses calculated by this office above demonstrate the petitioning household's ability to pay the proffered wage as well as to cover the household's living expenses as following for all the relevant years:

Tax Year	Adjusted gross income ⁴	Household expenses	Proffered wage	Surplus or deficit
2001	\$51,071	\$59,274	\$47,694.40	(\$55,897.40)
2002	\$40,315	\$47,175	\$47,694.40	(\$54,554.40)
2003	\$43,383	\$50,921	\$47,694.40	(\$55,232.40)
2004	\$49,010	\$56,495	\$47,694.40	(\$55,179.40)
2005	\$63,030	\$72,248	\$47,694.40	(\$56,912.40)
2006	\$58,392	\$71,967	\$47,694.40	(\$61,269.40)
2007	\$68,991	\$78,524	\$47,694.40	(\$57,227.40)

Therefore, for 2001 through 2007, the sole proprietor did not have sufficient adjusted gross income to cover her household's living expenses alone and thus, the petitioner failed to establish her ability to pay the proffered wage from the priority date to 2007. The record does not contain the sole proprietor's tax return for 2008. Without the sole proprietor's tax return, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her household's living expenses that year. It is noted that the director failed to request for the sole proprietor's 2008 tax return in her April 20, 2009 RFE. However, by that time, the sole proprietor's 2008 tax return should have been available. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988);

² The total amount of \$12,000 claimed in the petitioner's living expenses statement for 2006 minus the residential mortgage and real property tax plus the total itemized expenses of \$65,247 reported on Schedule A to the Form 1040.

³ The sole proprietor did not submit the schedule As to her 1040 tax returns for 2001 through 2005 and 2007, and therefore, the office identifies chooses the figure on the line of itemized deductions on page 2 of the tax returns as the sole proprietor's total living expenses.

⁴ The line for adjusted gross income on Form 1040 varies every year. It is Line 33 for 2001, Line 35 for 2002, Line 34 for 2003, Line 36 for 2004 and Line 37 for 2005, 2006 and 2007.

Matter of Soo Hoo, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further revealed its ability to pay the proffered wage. Therefore, the petitioner failed to establish her ability to pay the proffered wage as well as to cover her household's living expenses for 2008 because she failed to submit requested evidence that precludes a material line of inquiry.

USCIS considers the sole proprietor's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. In the instant case, counsel submitted bank statements of the sole proprietor's personal cash maximizer account with Bank of America for the ending months of 2001 through 2008. The bank statements show that the sole proprietor had balances of \$66,954.36 at the end of 2001, \$74,240.75 at the end of 2002, \$84,229.63 at the end of 2003, \$77,570.02 at the end of 2004, \$90,242.99 at the end of 2005, \$75,517.63 at the end of 2006, \$100,074.93 at the end of 2007, and \$89,064.10 at the end of 2008.

On appeal, counsel asserts that the balance in the bank account for each year was sufficient to establish the sole proprietor's ability to pay the proffered wage as well as to cover her household's living expenses. The AAO concurs with counsel's assertion that the petitioner established the ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses for 2001 with the balance of the sole proprietor's personal bank account at the end of 2001. As previously discussed, the petitioner had a deficit of \$55,897.40 to establish her ability to pay for 2001. The balance in her account at the end of 2001 was sufficient to cover that deficit. However, the AAO finds that the petitioner failed to continue establishing her ability to pay for 2002 and subsequent years. The bank statements show that the sole proprietor had the balance of \$74,240.75 at the end of 2002. However, after the petitioner had established her ability to pay the deficit of \$55,897.40 in 2001 with the bank account balance, the sole proprietor's balance in her bank account would have had \$18,343.35⁵ at the end of 2002 instead of \$74,240.75. The amount of \$18,343.35 would not be sufficient to cover the deficit of \$54,554.40 for 2002, and thus, the petitioner failed to establish the ability to pay the proffered wage as well as to cover the sole proprietor's household living expenses for 2002 through 2007. Without the sole proprietor's tax return for 2008, the AAO cannot determine whether the petitioner had sufficient adjusted gross income to pay the proffered wage as well as to cover her household's living expenses that year and whether the balance of \$89,064 at the end of 2008 would still be available and sufficient to establish the ability to pay.

USCIS may also 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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11

⁵ The figure would be even smaller if calculating the interest on the amount reduced at the annual rate of 1.40% according to the bank statement for 2002.

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 *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.

The statement of the sole proprietor's household living expenses is not complete and thus is not acceptable as primary evidence in determining the petitioner's ability to pay. With the AAO's calculated figures of the household's living expenses, the petitioner failed to establish her ability to cover her family's living expenses only for all seven years from 2001 through 2007. The petitioner also failed to establish the ability to pay for 2002 through 2007 with the available balance in her personal bank account.⁶ Counsel did not submit the sole proprietor's 2008 tax return, and thus, the petitioner failed to establish the ability to pay for that year. Therefore, the petitioner failed to establish the ability to pay for 2002 through the present. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all the seven years were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioning household has not established that she had the continuing ability to pay the proffered wage as well as to support the household for all relevant years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner failed to establish its continuing ability to pay the proffered wage for all the years through the present except for 2001.

Counsel's assertions and evidence submitted on appeal cannot overcome the ground of denial in the director's September 8, 2009 decision. The petitioner failed to establish that she had the continuing ability to pay the proffered wage as well as to support her household beginning on the

⁶ In fact, even if we took her expense amounts only, she would not have enough cash in her bank accounts.

priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

Beyond the director's decision, the AAO has identified an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

An additional ground of ineligibility is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The petitioner must 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).

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).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirement: one year of experience in the related occupation of sales. The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 28, 2001 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 20-30 hours per week as a [REDACTED]. Prior to that, he worked 20-30 hours per week as an after school tutor and facilitator for [REDACTED]. The beneficiary did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In response to the director's April 20, 2009 RFE, counsel submitted a letter dated May 19, 2009 and addressed to the petitioner from Staples located at 500 Staples Drive, Framingham, MA 01702 (Staples May 19, 2009 letter). This letter states in pertinent part that:

This letter has been sent to verify that [REDACTED] employed [the beneficiary] as a full-time [REDACTED]. [The beneficiary]'s main duties included understanding all of the breadth of our product offerings, greeting customers, proposing customer solutions, operation cash registers and in general selling office supply products to our customers.

The letter appears to be computer-created and is from [REDACTED]. However, the letter does not include the name, title and signature of the writer and does not indicate the location where the beneficiary was employed. In addition, the letter provides inconsistent information with the beneficiary's statement on the Form ETA 750B. While the beneficiary stated on the Form ETA 750B that he worked for [REDACTED] (20-30 hours per week), the [REDACTED] letter verifies that the beneficiary was employed as a full-time employee. The record does not contain any independent objective evidence to support the content of the letter and to resolve the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." "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." *Id.*

For the reason above, the [REDACTED] letter does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1). The record does not contain any other letters or documents to demonstrate that the beneficiary possessed the required one year of experience in sales prior to the priority date. Counsel did not submit such evidence on appeal. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position.

Further, another ground of ineligibility is whether or not the petition was filed in the correct category supported by a valid labor certification for classification as an unskilled worker.

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.

It is important that the ETA-750 be read as a whole. In this case, the Form 750 indicates that the proffered position requires two years of college studies. The Form ETA 750 also states that the proffered position requires one year of experience in the related occupation of sales. The requirements in item 14 of the Form ETA 750 must be read together and requires the beneficiary to meet all educational, training and experience requirements. Two years of college studies and one year of experience in the related occupation of sales are more than two years of training and/or experience set forth for classification as a skilled worker. Therefore, it is necessarily concluded that the Form 750 in the instant case is filed and certified for a real estate sales agent position as a skilled worker.⁷ However, the petitioner requested the unskilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to re-adjudicate a petition under a different visa classification without the petitioner's request. In fact, counsel asserted that the petition was filed for the unskilled worker classification on the motion filed after the director initially denied the petition on the ground of wrong category. The AAO concurs with the director's determination in the January 8, 2009 decision. The record does not contain a properly approved labor certification to support the benefit sought by the petitioner on the petition. The petitioner failed to file the petition with a statutorily required labor certification and therefore, cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁷ Section 203(b)(3)(A)(i) of the Act 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.