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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

Date: **JUL 16 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

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 rejected.

The petitioner is an independent contractor who is the [REDACTED] for [REDACTED] a tax-exempt not-for-profit organization. The petitioner seeks to employ the beneficiary permanently in the United States as an administrative assistant/manager. The petition is accompanied by a copy of 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 and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 15, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

First, the AAO lacks jurisdiction as the record does not contain an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

The regulation at 8 C.F.R. § 204.5(g) provides: "In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval." (Emphasis added). Here, the petitioner submitted only a color copy of Form ETA 750.¹ The petitioner has not provided any authority permitting USCIS to accept a photocopy of the Form ETA 750.

¹ The document is stamped "copy" in the upper right hand corner, and, therefore is not the original document. It appears that the petitioner was not in possession of the original labor certification when the I-140 petition was filed. The petitioner suggests he can "conduct a reverse trace to possibly locate the original . . . from [the] [REDACTED] to the [REDACTED] to the Lincoln, Nebraska Service Center." The petitioner is incorrect.

The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer.² The record contains no evidence that the petitioner has obtained an official duplicate labor certification or requested the director to do so. Therefore, even if the petitioner's evidence had established the petitioner's ability to pay the proffered wage during the relevant period, which it does not, the evidence would not support an approval of the Form I-140 petition unless a duplicate original of the Form ETA 750 labor certification had first been obtained.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Because the petition was filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i), the copy of this labor certification in the record would be rejected. The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. §

however; the petitioner is responsible for submitting the original document with its Form I-140 filing. The record does not contain the original Form ETA 750.

² The regulation at 20 C.F.R. § 656.30(e) provides:

(e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, “except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act.” 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the record contains only a copy of the labor certification and not the original as required by regulation, the petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director’s decision.

Second, even if the AAO had jurisdiction over this matter, the petitioner would not be able to establish its ability to pay the beneficiary the proffered wage.

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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Acting Reg’l Comm’r 1977).

Here, the Form ETA 750 was accepted on May 10, 2002. The proffered wage as stated on the Form ETA 750 is \$886 per month (\$10,632 per year).³ The Form ETA 750 states that the position requires

³ The AAO notified the petitioner in the May 11, 2012 Notice of Intent to Reject or Dismiss and Request for Evidence (RFE) that the wage listed on Form ETA 750 is unclear and appears to conflict with information in the Foreign Wage Labor Certification Data Center (FLCDC) from which DOL would have determined the wage. Accordingly, the AAO requested that the petitioner provide additional documentation it had received from DOL regarding changes to the certified wage. The petitioner did not provide this documentation in response. 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).

a general BA/BS degree, one year of experience in the job offered or one year of experience in a related occupation.⁴

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.⁵

The evidence in the record of proceeding shows that the petitioner [described as an “independent contractor”] is structured as a sole proprietorship. On the addendum to the Form ETA 750, the petitioner states that it began operation in 1988. On the Form ETA 750B, signed by the beneficiary on May 18, 2004, 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 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’l Comm’r 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 record does not contain any evidence that the petitioner employed and paid the beneficiary the full proffered wage, or any wages, from the priority date on May 10, 2002 onward.⁶

⁴ Under this section and section 15 of Form ETA 750, the petitioner states “see attachment 15 hereto,” but the record does not contain this attachment to determine the related occupation and other special requirements.

⁵ 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).

⁶ The petitioner states in response to the director’s RFE, dated November 28, 2008, that, “Beneficiary has not been employed by petitioner during the period of the pending Labor Permit Certification. Unable to furnish Forms W-2 of pay vouchers.” However, the beneficiary clearly states on Form G-325A, dated November 19, 2007, and filed with the beneficiary’s Form I-485 Application to Register Permanent Residence or Adjust Status, that he has been employed by the

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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'r 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. *See 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 petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports only himself.⁷ The information provided by the sole proprietor regarding his adjusted gross income (AGI)⁸ and net profit reflects the following:

petitioner, and living at the petitioner's address, since March 2002 to "present." Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁷ The sole proprietor filed his tax return for 2002 as married filing jointly, but for 2003 through 2007, he filed as single.

⁸ From the sole proprietor's federal income tax returns (Forms 1040, line 33 for 2001; line 35 for 2002; line 34 for 2003; line 36 for 2004; and, line 37 for 2005 and 2006).

Tax Year	Sole Proprietor's AGI (1040)
2002	\$1,433
2003	\$16,065
2004	\$1,398
2005	\$2,660
2006	\$4,849
2007	\$4,307

In 2002, 2004, 2005, 2006, and 2007 the sole proprietor's adjusted gross income fails to cover the proffered wage of \$10,632 per year.⁹ It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.¹⁰ The record contains a statement from the petitioner which lists his monthly personal expenses (credit card payments and household expenses) as \$659 per month (which equates to \$7,908 per year). The sole proprietor's AGI is insufficient to cover either his personal expenses or the beneficiary's proffered wage in 2002 and 2004 to 2007 and insufficient in 2003 to cover both the proffered wage and the sole proprietor's personal expenses.

On appeal, the petitioner asserts that personal credit cards issued by [REDACTED] of Omaha, with a credit limit of \$25,000 and a cash limit of \$12,742; a Choice Visa with a credit limit of \$24,910 and a cash limit of \$17,507; and a 40-year account with [REDACTED] with a homeowner credit line further demonstrate the ability to pay the proffered wage from the priority date onward. However, the record does not contain any evidence of these lines of credit. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Even if the record did contain evidence of the sole proprietor's lines of credit, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, lines of credit, or similarly, an equity line. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

⁹ As noted above, the required wage is unclear from the labor certification copy submitted. The petitioner failed to clarify this issue in response to the AAO's RFE.

¹⁰ This is especially true for 2002 when the sole proprietor listed his spouse as a dependent.

A line of credit is a “commitment to loan” and not an existent loan.¹¹ A petitioner must establish that unused funds from a line of credit are available at the time of filing the petition. As the record does not contain evidence of these credit lines, the AAO cannot determine whether the line of credit was available at the time of the priority date. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

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 Sonegawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioning entity in *Sonegawa* 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 *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.

¹¹ The petitioner’s existent loans would be reflected in a balance sheet provided in the tax return or an audited financial statement had one been submitted. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, or an equity line, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. The record does not contain such evidence. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977).

In the instant case, as demonstrated in the above chart, the tax returns reflect very low AGI. On appeal, the petitioner states that alimony payments to his former wife have decreased his financial status by \$6,258.00 annually. Although this may have been an unexpected expense at the time the labor certification was filed, this further diminishes the petitioner's ability to have paid the proffered wage, and the petitioner has not given any indication that he has increased his income by that same amount to offset this expense. 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. In any further filings, should the petitioner seek to rely on the totality of the circumstances, it should submit evidence to show how it would apply to the petitioner.

Additionally, the position offered must be for a permanent and full-time employment. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner must establish that the position is a realistic job offer from the priority date onward. The record contains an addendum to Form ETA 750 that appears to have been sent by facsimile to the DOL on January 5, 2007 that states the beneficiary's hours are variable depending on the work load with a maximum of 40 hours weekly. This calls into question whether the position is a *bona fide* job offer for full-time employment. 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).

Beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The sole proprietor states that Part 4 of the ETA 750A should have listed only his name instead of listing the name of [REDACTED] as well as his own, but he also states that it is past time for him to be replaced and the eventual fulfillment of his position would be an

understandable transition for [the beneficiary] to accept his position in working for the [REDACTED]. The sole proprietor further states the following:

At the time of this transition, and only upon that change, [the beneficiary] would be employed directly by the [REDACTED] in my place and maintaining the necessary funding for his compensation would become the responsibility of the corporation.

These statements by the sole proprietor that the time is already past for him to be replaced, and that he intends the beneficiary to replace him in his position, tend to diminish the likelihood that he will be the employer of the beneficiary. The sole proprietor's statement that the funding for the beneficiary's compensation would then shift to the corporation casts further doubt on whether the sole proprietor intends to be the actual employer in this case.¹²

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

Also beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires one year of experience in the job offered or a related occupation claimed to be listed as "attachment 15." The labor certification also states that other special requirements are included within "attachment 15." As stated above, the record does not contain this attachment.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record does not contain a letter from any prior employer providing this evidence.

¹² Additionally, the sole proprietor stated that "at the time of the original application it was apparent that someone was needed to be trained in the logistics of keeping this organization operational and [the beneficiary] is quite qualified to perform those duties." This also indicates that the sole proprietor intended the beneficiary to replace him in his position.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The appeal is rejected as it was not filed with an original valid labor certification. Alternatively, the petition would 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 rejected.