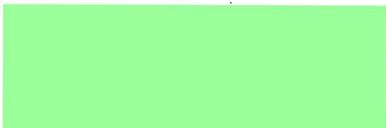


(b)(6)

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



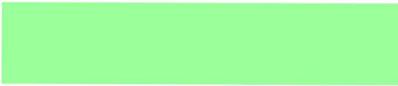
U.S. Citizenship  
and Immigration  
Services



DATE: **FEB 28 2013**

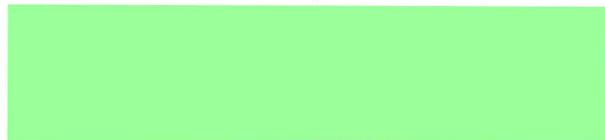
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary: 

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

ON BEHALF OF PETITIONER:



**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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stone carver. 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 petition did not meet the requirements of Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act for classification as a professional. The director also determined that the petitioner had not established its ability to pay the proffered wage. 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 for in the director's April 19, 2012 denial, an issue in this case is whether the petitioner has established that the petition requires a bachelor's degree or equivalent such that the beneficiary may be found qualified for classification as a professional.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." 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.

Here, the Form I-140 was filed on September 7, 2010. On Part 2 of the Form I-140, the petitioner checked box "e" and indicated that it was filing the petition for a professional.<sup>1</sup> In the denial, the director stated that the ETA 750 listed the requirements for the proffered job as four years of experience in the job offered.

On appeal, counsel asserts that on the I-140, the petitioner checked the box requesting professional or skilled worker classification. However, on the I-140, part 2, box "e" is checked for professional

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<sup>1</sup> When USCIS revised the I-140 petition as of January 6, 2010, it separated the professional (now box "e") and skilled worker (now box "f") categories. Previously, the two categories were combined into one box (box "e").

classification, and not box "f" for skilled worker classification. Therefore, the petition only supports professional classification and not skilled worker classification.

In this case, the labor certification indicates that there are no education or training requirements for the proffered position. The labor certification requires four years of experience in the job offered as a stone carver. However, the petitioner requested the professional classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the alien holds a bachelor's degree or its equivalent and is a member of the professions. Additionally, the petitioner has not submitted evidence that the minimum of a bachelor's degree is required for entry into the occupation such that the beneficiary may be found qualified for classification as a professional. See 8 C.F.R. § 204.5(I)(3)(ii)(C).

As set forth in the director's April 19, 2012 denial, another issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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 January 14, 2003. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year based on forty hours per week). The Form ETA 750 states that the position requires four years of experience in the job offered as a stone carver.

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>2</sup>

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 1997 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on January 3, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner resubmits the 2010 Form 1099 issued to the beneficiary. The petitioner does not submit any new evidence on appeal. The record of proceeding also contains the following evidence: the sole proprietor's Forms 1040 with Schedule C for 2003, 2004, 2005, 2006, 2007, and 2008; a list of the sole proprietor's monthly expenses for 2006 to 2010; the petitioner's declaration; bank account statements for [REDACTED] from [REDACTED] Bank for 2005, 2006, 2007, 2008, 2009, and from January to June 2010; bank account statements for [REDACTED] from [REDACTED] bank for the period December 14, 2005 through July 14, 2010; copies of consolidated portfolio summaries from [REDACTED] as of December 31, 2008 and [REDACTED] as of December 31, 2006 showing two [REDACTED] accounts "for the benefit of" [REDACTED] as well as a Roth IRA in the name of [REDACTED] and a simple IRA and an IRA account both in the name of [REDACTED] an asset allocation, performance, and portfolio summary from [REDACTED] as of December 31, 2007; and Forms 1099 issued to the beneficiary in 2008 and 2009.

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 Sonogawa*, 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

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

petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary for 2008, 2009, and 2010 through the submission of the beneficiary's Forms 1099 for those years issued by the petitioner's sole proprietor.<sup>3</sup> The beneficiary's Forms 1099 demonstrate the wages paid for 2008, 2009, and 2010 as shown in the table below.

- In 2008, the Form 1099 showed wages paid to the beneficiary of \$6,713.00
- In 2009, the Form 1099 showed wages paid to the beneficiary of \$22,371.00
- In 2010, the Form 1099 showed wages paid to the beneficiary of \$135,025.00<sup>4</sup>

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<sup>3</sup> The AAO notes that the beneficiary's social security number could not be verified. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at [http://www.ssa.gov/OP\\_Home/ssact/title02/0208.htm](http://www.ssa.gov/OP_Home/ssact/title02/0208.htm) (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

<sup>4</sup> The AAO notes that this figure is more than twenty times the wages paid to the beneficiary in 2008 and more than six times the wages paid in 2009.

In 2008 and 2009, the petitioner paid the beneficiary less than the proffered wage of \$31,200. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage for the years 2008 and 2009. The following table shows the difference between wages actually paid to the beneficiary and the proffered wages for the relevant years.

- 2008: \$24,487.00
- 2009: \$8,829.00

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); *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 (7<sup>th</sup> 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.

The record of proceeding includes U.S. individual tax returns Forms 1040 for 2003 through 2008 of [REDACTED] Schedule C of the Forms 1040 list [REDACTED] as the proprietor of [REDACTED] with Employer Identification Number (EIN) [REDACTED] Schedule C lists the principal business as "waterproofing." The AAO notes that although the EIN

listed on the instant petition matches the EIN on Schedule C and on Forms 1099, the company name and type of business listed on both the petition and on Form ETA 750 does not match Schedule C. Both the petition and the ETA 750 list the company name as [REDACTED]. The type of business on the petition is "construction" and on the ETA 750 is "contracting." No explanation for these discrepancies is provided. This must be addressed with any further filings.

In the instant case, the sole proprietor has supported himself since 2006. From 2003 to 2006, the sole proprietor supported himself and his wife. The proprietor's tax returns reflect the following information for the following years:

Proprietor's adjusted gross income (Form 1040):

	<u>2003</u>	<u>2004</u>	<u>2005</u>
Petitioner's adjusted gross income (Form 1040):	\$45,318.00 <sup>5</sup>	\$177,678.00 <sup>6</sup>	\$71,549.00 <sup>7</sup>
Petitioner's gross receipts or sales (Schedule C):	\$481,961.00	\$643,302.00	\$431,106.00
Petitioner's wages paid (Schedule C):	\$0	\$0	\$0
Petitioner's net profit from business (Schedule C):	\$54,113.00	\$120,402.00	\$27,731.00
	<u>2006</u>	<u>2007</u>	<u>2008</u>
Petitioner's adjusted gross income (Form 1040):	\$15,221.00	\$77,036.00	-\$35,906.00
Petitioner's gross receipts or sales (Schedule C):	\$359,976.00	\$276,952.00	\$195,687.00
Petitioner's wages paid (Schedule C):	\$0	\$0	\$0
Petitioner's net profit from business (Schedule C):	-\$20,160.00	\$1,413	-\$45,088.00
	<u>2009</u>		
Petitioner's adjusted gross income (Form 1040):	Not submitted		
Petitioner's gross receipts or sales (Schedule C):	Not submitted		
Petitioner's wages paid (Schedule C):	Not submitted		
Petitioner's net profit from business (Schedule C):	Not submitted		

For 2003, the difference between the sole proprietor's adjusted gross income (AGI) and the full proffered wage is \$14,118. It is unlikely that the petitioner and his wife would be able to support themselves on \$14,118 in 2003, given that the expenses listed for the petitioner as a single person from 2006 to 2010 total between \$17,136 per year to \$21,468 per year. In 2006, the sole proprietor's AGI fails to cover the proffered wage of \$31,200, and in 2008, the AGI fails to cover the difference between the wages paid and the proffered wage of \$24,487.00. The petitioner failed to submit tax returns for 2009, thus it cannot be determined from the evidence presented whether the petitioner had the ability to pay the difference between the wages paid and the proffered wage for that year. Additionally, it is improbable that the sole proprietor could support himself on a deficit, which is

<sup>5</sup> The proprietor's adjusted gross income for 2003 is found on line 34 of the Form 1040.

<sup>6</sup> The proprietor's adjusted gross income for 2004 is found on line 36 of the Form 1040.

<sup>7</sup> The proprietor's adjusted gross income for 2005-2010 is found on line 37 of the Form 1040.

what remains after reducing the AGI in 2006 and 2008 by the amount required to pay the proffered wage. Therefore, the petitioner has not demonstrated sufficient AGI for the years 2003, 2006, 2008, and 2009.

The record of proceeding contains a summary from the sole proprietor's investment account for the period ending December 31, 2007, which has an ending balance of \$284,142.40. No other statements are submitted for this account for any other years. As the petitioner has already established the ability to pay the proffered wage in 2007, and an investment account summary is only submitted for 2007, it is unnecessary to analyze the investment account.

The record of proceeding also includes evidence of college accounts. The college accounts are set up "for the benefit of" [REDACTED]. These accounts will not be considered as they are "for the benefit of" other individuals.

The record of proceeding contains year-end monthly statements from the sole proprietor's Roth individual retirement account (IRA) for 2006 and 2008.<sup>8</sup> Counsel contends that the value of the petitioner's Roth IRA should be taken into account when determining the petitioner's ability to pay the proffered wage. Counsel states that the value of the petitioner's Roth IRA in 2006 is \$62,092.22 and in 2008 is \$56,076.44. However, the statements reflect that the value of the Roth IRA as of December 31, 2006 was \$19,820 and as of December 31, 2008 was \$13,454.04. Adding these amounts to the proprietor's AGI, the result is \$35,041 for 2006 and -\$22,451.96 for 2008. The petitioner's stated expenses in 2006 are \$1,789 per month, or \$21,468 per year. Subtracting the proffered wage of \$31,200 from \$35,041 results in \$3,841.00, which is not enough to cover \$21,468 in expenses for the year. The result for 2008 remained negative even when accounting for the value of the Roth IRA. Therefore, the petitioner has not established the ability to pay the proffered wage through the 2006 and 2008 statements for his Roth IRA account.

Counsel asserts that the petitioner has the ability to pay the proffered wage for 2009 even in the absence of evidence as required by statute such as annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2). Counsel states that the Request for Evidence (RFE) issued by the director only requested evidence pertaining to 2010 and not to 2009. Therefore, counsel contends, the petitioner thought that the director was satisfied with the evidence submitted for 2009. In his decision, the director found that the petitioner had not submitted sufficient evidence to show that it had the ability to pay the proffered wage in 2009. The petitioner, however, still has not submitted its 2009 taxes on appeal, nor does it offer any explanation as to why the tax returns have not been submitted. Counsel states that the bank account statements from the petitioner's business account for 2009 are sufficient proof of its ability to pay the proffered wage for 2009. However, the funds in the WSFS bank account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax

<sup>8</sup> The AAO notes that the simple IRA account and the IRA account are in the name of [REDACTED] while the Roth IRA account is in the name of [REDACTED]. It therefore is unclear whether the simple and the traditional IRA accounts belong to the same individual. There is no explanation in the record regarding these discrepancies.

returns as gross receipts and expenses. The funds in the [REDACTED] bank account appear to be for a different business and also contain another name on the account. The account is labeled, [REDACTED]. Even if it is accepted that this is the petitioner's business, it will likewise be shown on Schedule C as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel argues that the petitioner had a "down period" in 2006 and 2008. The petitioner's sole proprietor, in an affidavit, states that he was diagnosed with terminal illness in 2004 and that his wife died in 2006. Counsel claims that the economic downturn hurt the petitioner's business in 2008. However, in 2004, the petitioner's gross receipts as reflected on the Schedule C, were \$643,302, and the petitioner was found to have the ability to pay the proffered wage for that year. The petitioner's gross receipts as reflected on the Schedule C for 2004, 2005, 2006, 2007, and 2008 were \$643,302, \$431,106, \$359,976, \$276,952, and \$195,687, respectively. These figures reflect a general downturn in the petitioner's business over a five-year period, and not a one-time occurrence as counsel contends.

Counsel argues that the petitioner has a historical track record of profitability and therefore, should be found to have the ability to pay the proffered wage. However, as discussed above, the petitioner's business saw a steady decline in revenue from 2004 to 2008. And, the petitioner's profitability has

been sporadic. From 2005 to 2008, the business showed two years of negative income, and in 2007, the business' income was only \$1,413. The petitioner has not shown historical growth such as that in *Sonegawa*.

Counsel also argues that the petitioner's "cash on hand" should be considered in evaluating the totality of the circumstances when determining the petitioner's ability to pay the proffered wage. However, as discussed above, based on the evidence in the record, the funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage.

Counsel further asserts that the beneficiary's expertise will increase the petitioner's future profits. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The AAO also notes that the beneficiary has been working for the petitioner since at least 2008 as evidenced by the beneficiary's Forms 1099 for 2008, 2009, and 2010. Nothing has been submitted to explain how the beneficiary's employment already has or will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence in the record of proceeding.

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.

Beyond the decision of the director,<sup>9</sup> 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'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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

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<sup>9</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

of the labor certification, nor may it impose additional requirements. *See 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires four years experience in the job offered. No other education or training is required. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a stone carver with [REDACTED] from April 1996 until May 2000.

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 includes a letter signed by [REDACTED] which is not in English. The record also contains a document titled, "Translation From Polish to English." Nothing in the record indicates who translated the letter or that he or she is fluent in Polish and English.

In the instant case, the translation of the experience letter does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

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 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.