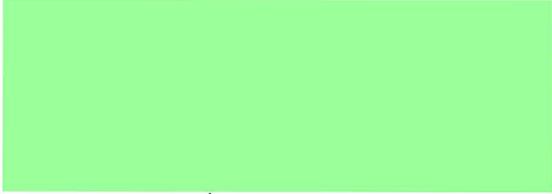


(b)(6)

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:

JAN 29 2013

Office: NEBRASKA SERVICE CENTER

FILE:



IN RE:

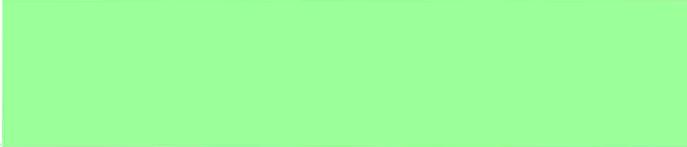
Petitioner:

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:



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, Nebraska Service Center (the director), 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 roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found to be qualified for classification as a skilled worker. The director denied the petition accordingly.

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

As set forth in the director's December 22, 2008 denial, an issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

Here, the Form I-140 was filed on July 24, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

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

On appeal, counsel submits a brief; a statement dated February 19, 2009, entitled "Declaration of [redacted] Employer/Petitioner/Appellant in Support of Appeal;" an employment letter dated April 15, 2002 from [redacted] an

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).

employment letter dated December 13, 2006 from [REDACTED], a recruitment report dated March 23, 2007 from [REDACTED] a Notice of Filing Application under DOL's Permanent Labor Certification Program dated March 27, 2007; a letter dated December 20, 2006 from [REDACTED] attesting to the petitioner's advertisement of the proffered position in three newspapers; three newspaper advertisements for the proffered position; two resumes submitted in response to the position advertisements; letters which the petitioner wrote to the two applicants; an excerpt from the DOL's Dictionary of Occupational Titles (DOT)(2003 online ed.); and an excerpt from O*Net Online.

On appeal, counsel and the petitioner assert that the director erred in concluding that the proffered position does not qualify as skilled work. Counsel asserts that the position of roofer is "a skilled position requiring at least two years of experience." Counsel asserts that, according to the DOL, in its DOT, the position of roofer carries a specific vocational preparation level (SVP) of 7 and "requires at least two years of experience, but no more than 4 years of experience." Counsel asserts that the petitioner knew that the position of roofer was skilled work and that it could have required two years of experience when filing Form ETA 750, however, because the labor market was experiencing a shortage of roofers, the petitioner did not want to limit the pool of applicants by implementing the more stringent requirement. Counsel also asserts that, if the AAO upholds the denial of the instant petition, "irreparable harm will occur" because the beneficiary would have to return to Colombia.

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

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

In this case, the key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. 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.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret

the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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 requirements:

Block 14:

Education:

Grade School: 6 years

High School: 6 years

College: None

Training: None

Experience: 1 year in the job offered

Block 15:

Special Requirements: None

As set forth above, the labor certification indicates that the proffered position requires the completion of grade school, high school and one year of experience in the job offered. There are no education or training requirements for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Part A of the Form ETA 750 indicates that the DOL assigned the occupational code of 47-2181 with the accompanying job title roofer, to the proffered position.² The DOL's occupational codes are

² Section 9 of Part A of Form ETA 750 also contains a DOT code for the proffered position which is 866.381-010 and the accompanying job title: roofer. The occupation of the offered position is

assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the SOC system, which is designed to cover all occupations in the United States.³

In the instant case, the DOL categorized the offered position under the SOC code 47-2181. The O*NET online database states that this occupation falls within Job Zone Two, requiring "some preparation" for the occupation which corresponds with the proffered position.

The DOL assigns an SVP of 4.0, but less than 6.0 (4.0 to < 6.0) to the occupation. According to the DOL, an SVP of 4.0 signifies that the position requires over three months of preparation and up to and including six months of preparation. An SVP of 6.0 signifies that the position requires over one year and up to and including two years of preparation.⁴

Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

Education: These occupations usually require a high school diploma.

determined by the DOL and its classification code is notated on the labor certification. The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. O*NET is the current occupational classification system in use by the DOL. O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. The SOC classifies workers at four levels of aggregation: major group; minor group; broad occupation; and detailed occupation. All SOC occupations are assigned a six-digit code. The first and second digits represent the major group; the third digit represents the minor group; the fourth and fifth digits represent the broad occupation; and the sixth digit represents the detailed occupation. In cases where the O*NET-SOC occupation is more detailed than the original SOC detailed occupation, it is assigned the six-digit SOC code from which it originated, along with a two-digit extension starting with .01, depending on the number of detailed O*NET-SOC occupations linked to the particular SOC detailed occupation. For older labor certifications that were assigned a DOT code instead of an O*NET-SOC code, O*NET contains a crosswalk that translates DOT codes into the current O*NET-SOC codes. In the instant case, the DOL categorized the offered position under 866.381-010 of the DOT. Using the DOT crosswalk at, this equates to the O*NET-SOC code of 47-2181.00, which falls under the SOC detailed occupation of roofer. The DOL applied the O*NET-SOC code in the lower right hand corner of Form ETA 750.

³See <http://www.bls.gov/soc/socguide.htm> (accessed December 11, 2012).

⁴See <http://www.onetonline.org/help/online/svp> (accessed December 11, 2012).

Related Experience: Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.

Job Training: Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.

According to Form ETA 750, the position requires one year of experience. According to the DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position is not considered skilled labor, in accordance with 8 C.F.R. § 204.5(1)(3) and (4), because the DOL sets the minimum vocational preparation for roofer occupations at SVP 4.0, indicating that the would require at least three months of preparation, but sets the higher limit at less than 6.0, indicating that the position would require less than two years of preparation. Based upon the requirements for the position, as stipulated on Form ETA 750 and based upon the code assigned by the DOL, the proffered position does not meet the regulatory definition of skilled labor.

On appeal, counsel asserts that the director erred in determining that the proffered position did not require skilled work. Counsel asserts that the proffered position is that of a roofer, which requires two years of experience and that, as such, corresponds with skilled work. Counsel further asserts that "the occupation of roofer carries an SVP of 7." In support of his assertion, counsel refers to an excerpt from the DOL's DOT, which he provided with the instant appeal.

Submitted as evidence on appeal, counsel included an excerpt from the DOT for Roofer (construction), which is assigned the DOT code 866.381-010.

Prior to O*NET, the DOL used the DOT occupational classification system. The O*NET website contains a crosswalk that translates DOT codes into SOC codes. See <http://online.onetcenter.org/crosswalk/DOT>. Using the O*NET crosswalk, DOT code 866.381-010 translates to SOC code 47-2181.00 and the occupation roofers, which is the code assigned to the proffered position by the DOL.

In the instant matter, when the petitioner initially filed Form ETA 750, the DOL was no longer relying upon the DOT. By 2001, the year of the priority date in this case, the DOL had already migrated to the O*NET.⁵ This fact is further reflected in that the DOL assigned an SOC number to the proffered position, as indicated in the endorsement portion of Part A of Form ETA 750.

On appeal, counsel asserts that the petitioner knew that the position of roofer was skilled work and that it could have required two years of experience when filing Form ETA 750, however, because the labor market was experiencing a shortage of roofers, the petitioner did not want to limit the pool of applicants by implementing the more stringent requirement.

⁵ The most recent edition of the DOT was published in 1991 and is now out of print. <http://www.onetcenter.org/questions/8.html> (accessed October 2, 2012).

However, the labor certification process was enacted specifically to mitigate just such labor shortages.

20 C.F.R. § 656.1 states:

a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

- (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

In order to perform an accurate analysis of the labor market, at the time Form ETA 750 was filed in this case, employers were directed through the recruitment process by the DOL, using the position requirements which the petitioner specified. As explained above, if an employer ascribes educational, training, or experiential requirements to the proffered position which exceed those requirements which are common to the industry, the DOL would direct the employer to alter the requirements. In this case, the petitioner indicated that the proffered position requires one year of experience in the job offered: roofer. These experiential requirements correspond with the requirements associated with the position of roofer, as certified by the DOL and as indicated by the SOC code which the DOL used to categorize the proffered position. According to the documentation provided on appeal, the petitioner advertised the proffered position with the experiential requirements identified on Form ETA 750, that is one year of experience, and all recruitment was conducted in conformity with these requirements. The DOL certified Form ETA 750, acknowledging that no workers could be located with the experiential requirements identified on Form ETA 750.

If the petitioner maintains that the proffered position actually requires two years of experience, it should have presented such requirements to the DOL during the labor certification process. However, given the SOC code for roofers assigned by the DOL, two years of experience exceeds the SVP associated with the proffered position and the associated SOC code. Nevertheless, if the proffered position entails specific and/or extraordinary requirements, such requirements could have been made known to the DOL for purposes of allowing the DOL to ascertain whether the two years of experience could have corresponded with the position and the SOC code assigned. However, the petitioner provided no documentary evidence demonstrating that it addressed a two-year requirement with the DOL or that it provided evidence demonstrating that the proffered position involved duties which are more complex than the roofer position which the DOL certified.

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)).

Counsel also asserts that if the AAO upholds the denial of the instant petition "irreparable harm will occur" because the beneficiary would have to return to Colombia.

However, under the circumstances, the AAO is required solely to determine whether the petitioner has demonstrated eligibility for the benefit sought, in this case, specifically whether the petitioner demonstrated that the proffered position qualifies as skilled work. The petitioner has not so demonstrated this to be the case. Determining whether the beneficiary is eligible for some other form of relief is not within the purview of the AAO in the matter which is currently before us.

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

Beyond the decision of the director,⁶ the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In the instant case, Form ETA 750 was initially filed by [REDACTED]. However, prior to the DOL's certifying Form ETA 750, ownership of [REDACTED] Inc. was transferred to [REDACTED] which is the petitioner in the instant case. It is not USCIS' purpose to evaluate whether or not the transfer of ownership constitutes a bona fide successor-in-interest relationship since the DOL found that such was the case prior to certifying the ETA 750. However, in an evaluation of the petitioner's ability to pay, USCIS considers the predecessor's ability to pay the beneficiary the proffered wage from the priority date until the date of the transfer of ownership to the successor and the successor's ability to pay the proffered wage from the date of the transfer of ownership onward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm. 1986).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁷ If the petitioner's net income or net current assets are

⁶ 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).

⁷ See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 the instant case, although the beneficiary claims to have worked for the predecessor, [REDACTED] since November 1997 and then for the successor since 2004, the petitioner provided copies of Internal Revenue Service (IRS) Forms W-2, which were issued to the beneficiary by the predecessor for 2002 and 2003 only. According to the W-2 Statements, the predecessor paid the beneficiary the proffered wage of \$28,392.00 in 2003, but not in 2002. The sole proprietor provided copies of his U.S. Individual Income Tax Returns (Form 1040) for 2004, 2005, and 2006 only. The petitioner provided no income tax returns for the predecessor. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

According to the tax returns, the sole proprietor supports a family of two. However, as a sole proprietor, the petitioner is obligated to demonstrate not only the ability to pay the beneficiary the proffered wage, but also the ability to support his household and both from his adjusted gross income. In order to make such a demonstration, the sole proprietor must enumerate and document his recurring, monthly, personal, household expenses. The petitioner provided no evidence of such expenses. Therefore, the sole proprietor has not demonstrated sufficient adjusted gross income both to support his own household and to pay the beneficiary the proffered wage from 2004, the date upon which he claims to have succeeded the predecessor, onwards. Further, without the predecessor's federal income tax returns, the petitioner has not demonstrated that the predecessor had the ability to pay the beneficiary the proffered wage from the priority date until the date upon which the ownership of the business was transferred to the petitioner, with the exception of 2003.

1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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USCIS would also consider the sole proprietor's personal, unencumbered, and liquefiable assets, which could reasonably be applied towards paying employee wages. However, the petitioner provided no evidence of his personal assets.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.