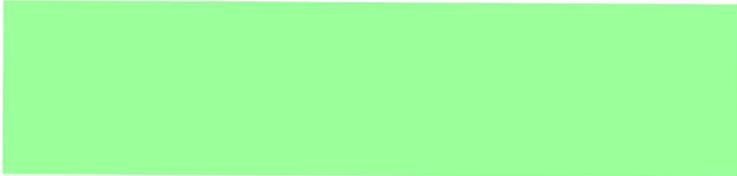


(b)(6)

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



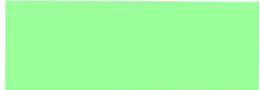
U.S. Citizenship
and Immigration
Services



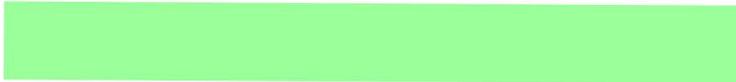
DATE: JUL 30 2013

OFFICE: TEXAS 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as an assistant store manager. The petition is accompanied by a recreation of a Form ETA 750,¹ Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).² 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 May 25, 2010 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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.

¹ The record reflects that the petitioner could not locate the original labor certification and requested USCIS obtain a duplicate from the DOL on May 4, 2005. As the DOL was unable able to furnish a copy of the original labor certification, the petitioner submitted a newly created labor certification to USCIS stating that it contained the same information as the original labor certification.

² This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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).

According to a letter dated November 6, 2002, from the Massachusetts Division of Employment and Training, the Form ETA 750 was accepted by that office on April 30, 2001.³ The proffered wage as stated on the recreated Form ETA 750 is \$24,000 per year. The Form ETA 750 states that the position requires eight years of grade school, and two years in the job offered as an assistant store manager or two years 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 is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on March 25, 2005, the beneficiary did not claim to work 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).

³ This letter and the June 23, 2003 Final Determination letter both confirm a priority date of April 30, 2001. The AAO will utilize an April 30, 2001 priority date absent evidence to establish that a different priority date is accurate.

⁴ The petitioner failed to indicate a specific related occupation on the recreated ETA 750.

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).

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 contains the beneficiary's Form 1099 issued by the petitioner indicating that he was paid \$25,440 in non-employee compensation in 2005. The record fails to contain the beneficiary's Forms W-2, Forms 1099, or other evidence of wages paid to the beneficiary in any other year. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the purported priority date in 2001 through 2004, and from 2006 onwards.

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.

The record before the director closed on May 7, 2010 with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE). As of that date,

the petitioner's 2009 federal income tax return was the most recent return available. In the instant case, the sole proprietor supports a family of five. The proprietor's tax returns reflect the following information for the following years:

<u>Tax Year</u>	<u>Tax Return</u>
2001	The petitioner did not submit any evidence pursuant to 8 C.F.R. § 204.5(g)(2).
2002	Form 1040 (Line 35) stated an adjusted gross income of \$83,560.
2003	Form 1040 (Line 34) stated an adjusted gross income of \$82,818.
2004	The petitioner did not submit any evidence pursuant to 8 C.F.R. § 204.5(g)(2).
2005	Form 1040 (Line 37) stated an adjusted gross income of \$155,024.
2006	The petitioner did not submit any evidence pursuant to 8 C.F.R. § 204.5(g)(2). ⁶
2007	Form 1040 (Line 37) stated an adjusted gross income of \$101,289.
2008	Form 1040 (Line 37) stated an adjusted gross income of \$188,656.
2009	The petitioner did not submit any evidence pursuant to 8 C.F.R. § 204.5(g)(2). ⁷

Therefore, for the years 2001, 2004, 2006 and 2009, the petitioner did not establish that the sole proprietor's adjusted gross income was sufficient to pay the proffered wage.

Further, the record also does not establish the petitioner's ability to pay the proffered wage in 2002, 2003, 2005, 2007, and 2008. As previously noted above, 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). The record fails to contain a statement of the sole proprietor's monthly expenses. Accordingly, the petitioner's ability to pay cannot be properly analyzed for any of the years from the priority date onwards. Regardless, even without the statement of monthly expenses, the petitioner still fails to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the instant beneficiary, net income, or net current assets. In any future filings, the petitioner must establish the sole proprietor's expenses for each year from the priority date onwards.

⁶ Although requested in the director's April 19, 2010 Request for Evidence (RFE), the petitioner failed to submit the sole proprietor's 2006 federal tax returns or other regulatory required evidence of its ability to pay. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). On appeal, the petitioner submits its 2006 state tax returns, which is not one of the regulatory required forms of evidence acceptable to establish its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). The AAO notes the petitioner provided tax transcripts for year 2005, but did not provide a transcript for any previous or subsequent year.

⁷ On appeal, filed on June 28, 2010, counsel asserts that the petitioner's 2009 tax returns "have not been prepared and therefore cannot be submitted." The petitioner does not indicate or provide evidence that an extension was filed for 2009. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

On appeal, counsel requests that “the AAO analyze the totality of the circumstances and considers the large adjusted gross income for the years 2005 through 2008.”

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, the petitioner claims to have been doing business since 1998. The petitioner failed to submit the sole proprietor’s federal tax returns for 2001, 2004, 2006 and 2009. Of the remaining years, the sole proprietor’s adjusted gross income has been inconsistent since 2003, with a substantial decrease in 2007. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Further, the record fails to contain a statement of the sole proprietor’s monthly expenses, which precludes the AAO from making a determination as to whether the petitioner has the ability to pay the proffered wage. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company’s accomplishments. Nor has it included any evidence or detailed explanation of the business’ milestone achievements. 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.

Based on the above, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary from the priority date onwards.

On appeal, counsel also asserts that the “beneficiary should be allowed to port to Petitioner’s new business – ‘7-eleven franchise.’” Counsel asserts that the beneficiary would be working on the same occupational classification as the job for which the original petition was filed. Counsel submits a copy of a USCIS Interoffice Memo, dated December 27, 2005.

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

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

On the instant petition, the petitioner describes itself as a convenience store. On appeal, counsel states that the petitioner no longer conducts business as [REDACTED] but has been doing business as “7-eleven franchise.” Based on the record, it appears that the type of business, position offered, job duties and general work location are substantially similar. However, in any future filings, the petitioner must provide documentation to establish that the beneficiary will be working on the same occupational classification as the job for which the original petition was filed.

Beyond the decision of the director,⁸ 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 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 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires eight years of grade school, and two years in the job offered as an assistant store manager or two years in a related occupation. The record contains a copy of the beneficiary’s [REDACTED] transcripts from March to April 1973.

On the labor certification, regarding the experience requirements, the beneficiary claims to qualify for the offered position based on experience as a managing director with [REDACTED] from June 2001 to June 2004; as a managing director with [REDACTED] in

⁸ 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).

Uganda, East Africa in April 2000; and as a general manager with (Mangalam) in Indore, India from April 1992 to June 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 contains copies of two undated letters from the same affiant (signatures illegible) on letterhead. In one letter, the affiant states that the beneficiary was employed as a general manager from April 10, 1992 to June 11, 2000. In the other letter, the affiant states that the beneficiary worked for the company for more than three years, but no dates of employment are specified. As the letters do not list any duties performed by the beneficiary, the letters do not meet the regulatory requirements. *Id.* Further, the letters do not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. Additionally, these dates of employment conflict with the beneficiary's purported employment in April 2000 with another company. 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).

The record contains copies of two letters dated July 12, 2004 (signatures illegible) on letterhead. In one letter, the affiant states that the beneficiary was employed from July 25, 2002 to June 15, 2004. In the other letter, the affiant states that the beneficiary worked for the company for more than two years, but no dates of employment are specified. As the letters do not list any duties performed by the beneficiary or the beneficiary's position, the letters do not meet the regulatory requirements. 8 C.F.R. § 204.5(l)(3)(ii)(A). Also, the letters do not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. In addition, the first letter is inconsistent with the beneficiary's experience listed on the labor certification. On Form ETA 750B, the beneficiary stated that he worked at from June 2001 to June 2004. This inconsistency casts doubt on the credibility of the beneficiary's claimed experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record fails to contain any independent, objective evidence to reconcile the inconsistency. Further, the beneficiary's claimed experience with was gained after the April 30, 2001 priority date. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

The petitioner has not provided sufficient evidence of the beneficiary's claimed experience pursuant

to 8 C.F.R. § 204.5(l)(3)(ii)(A). 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.

Also, beyond the decision of the director, it is also concluded that the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, the labor certification states that the position offered is for an assistant store manager, and includes the supervision and direction of other employees. However, in the Form I-140, the petitioner claims that it employs only two workers. The labor certification indicates that the position offered is for a night shift, from 9pm to 5am; based on this information, it does not appear that the beneficiary would have any supervisory duties as the petitioner employs too few workers for there to be another employee on site during the night shift. It is unclear whether the job opportunity is the same as the position offered on the labor certification. 20 C.F.R. § 656.30(C)(2). The petitioner must provide competent evidence that a supervisory position exists in any future filings. Considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity. Accordingly, the petition must also be denied for this reason.

Further, the AAO notes that even if the petitioner had overcome the above issues, the petition would be unapprovable. The record fails to 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. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [USCIS].

(emphasis added).

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). Counsel has not provided any authority permitting USCIS to accept a photocopy of the ETA 750. 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.⁹ The AAO recognizes that the record reflects that the petitioner requested

⁹ 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

USCIS obtain a duplicate copy from the DOL; however, the record fails to contain an official duplicate labor certification. Therefore, even if the petitioner's evidence had established the petitioner's ability to pay the proffered wage during the relevant period, the beneficiary's qualifications for the offered position, and a *bona fide* job offer, the evidence would not support an approval of the Form I-140 petition unless an original or a duplicate original of the Form ETA 750 labor certification had first been obtained. Without an original or duplicate original of the Form ETA 750, the petitioner fails to meet the regulatory requirements, preventing USCIS from approving the instant petition.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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.