

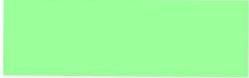
(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: JUN 04 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,

A handwritten signature in cursive script, appearing to read "Ronald Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). A new party filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner was an electric engineering firm. It sought to employ the beneficiary permanently in the United States as an electrical engineer. 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).

At the outset, the petitioner is no longer in business and claims to have a successor-in-interest, [REDACTED] filed the motion in this matter. The AAO finds that [REDACTED] has not established that it is the successor-in-interest to the petitioner. Thus, the motion was not filed by an affected party. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). The party affected in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979). A motion that does not meet applicable requirements must be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(3), and 103.5(a)(4). Nevertheless, as the successor-in-interest issue must be resolved to determine whether the motion was properly filed, the AAO will approve the motion. The AAO will refer to [REDACTED] as the movant or by name in this decision.

On motion, the movant submitted copies of business licenses, website information, and letters of explanation from the business president, organizational charts, corporate annual reports, tax returns, and other business related documentation. These materials constitute new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted.

Upon reviewing the petition, the director determined that the petitioner had failed to establish its ability to pay the proffered wage, and that the petitioner had failed to provide sufficient evidence to demonstrate the beneficiary's qualifications to perform the required job duties. The director also found that the petitioner had not established a successor-in-interest relationship with [REDACTED]. The director denied the petition accordingly. On appeal, the AAO agreed with the director's determination and also determined that the petitioner had failed to demonstrate its ability to pay the proffered wage beginning on the priority date of the visa petition.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issues. Therefore, on motion the issues are whether the petitioner has established a successor-in-interest relationship with the movant; its ability to pay the proffered wage beginning on the priority date of the visa petition; and whether the petitioner provided evidence to establish that the beneficiary is qualified to perform the duties of the proffered position with one year of qualifying employment experience.

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 evidence in the record of proceeding shows that the petitioner was structured as an S corporation. On the petition, the petitioner indicates that it employed three workers. On the Form ETA 750B, signed by the beneficiary on February 21, 2006, the beneficiary does not claim to have been employed by the petitioner. The proffered wage as stated on the Form ETA 750 is \$23.47 per hour based upon a 40 hour work week (\$48,817.60 per year). The Form ETA 750 states that the position requires one year of experience in the job offered and a bachelor's degree in electrical engineering. The priority date in this matter is July 21, 2003.

As noted in the previous decision, the petitioner must establish that it has the ability to pay the proffered wage to the beneficiary from the priority date until he obtains permanent residence. 8 C.F.R. § 204.5(a)(2).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On motion, counsel asserts that [REDACTED] (with FEIN [REDACTED] and [REDACTED] (with FEIN [REDACTED] are the successor-in-interest companies of [REDACTED] and [REDACTED] and that USCIS erred in its analysis of the relationship of the companies. The labor certification and the I-140 petition were filed by [REDACTED] with Federal Employer Identification Number (FEIN) [REDACTED] and contrary to counsel's claim, there is no evidence to demonstrate a successor relationship.

Counsel submits as evidence on motion copies of [REDACTED]'s licenses to operate as an electric contractor in 2006 through 2012, website information establishing its business and contact information, organizational chart, and corporate file report. Counsel also submits copies of [REDACTED] corporation file report, organizational chart, Articles of Incorporation, approval of incorporation from the Office of the Secretary of State of Illinois, and corporate annual report. Copies of [REDACTED] corporation file report show its incorporation date and date of dissolution and its organizational chart. Counsel further submits as evidence copies of [REDACTED] (with FEIN [REDACTED] corporation file report showing its incorporation date and date of dissolution, its Form BCA 5.10 showing its application for change of registered agent and/or office and the Secretary of the State of Illinois' approval letter for such change, and its 2004 corporate annual report. The evidence of record demonstrates the existence of four separate and

distinct business entities, and is insufficient to demonstrate that, as claimed by the petitioner, only a name change took place and that other factors of the business such as ownership, business address, and type of business remained the same.

The movant submitted two letters dated May 30, 2012 from the president of [REDACTED] and [REDACTED] who stated that in the year 2006 he had an idea to change the names of [REDACTED] and [REDACTED] and that his then CPA suggested that he open two new companies rather than change the companies' names or to add DBA, and that he followed his CPA's advice. The movant's president further stated that both [REDACTED] and [REDACTED] perform all of the remaining executor/executory obligations of [REDACTED] and [REDACTED] under the same contracts without modification, that they continue to operate the same type of business, and that the way the business is structured, controlled and carried on remain substantially the same as it was before. The declarant stated that he was attaching copies of checks/invoices for a few projects that were started by [REDACTED] and [REDACTED] and continued and finished by [REDACTED] and [REDACTED]. The record contains copies of checks and invoices; however, this documentation does not demonstrate the initiation and/or transfer of obligation from [REDACTED].

The record of proceeding shows that [REDACTED] was incorporated on March 22, 2005 and involuntarily dissolved on August 10, 2007 and that [REDACTED] was incorporated on April 24, 2003 and involuntarily dissolved on September 14, 2007. The record also shows that [REDACTED] was incorporated on July 20, 2006 and that [REDACTED] was incorporated on October 15, 2007.

Although the petitioner infers that the two business entities, [REDACTED] (FEIN [REDACTED] and [REDACTED] (FEIN [REDACTED] are affiliated, there is no evidence in the record to substantiate that claim. Counsel claims that both [REDACTED] (FEIN [REDACTED] and [REDACTED] (FEIN [REDACTED] are the successor-in-interest companies of [REDACTED] however there is no evidence in the record to establish an affiliate relationship, parent-subsidiary relationship or any other type of business relationship evidencing the affiliation of such entities. It is further noted that neither [REDACTED] nor [REDACTED] submitted consolidated tax returns demonstrating any type of tax affiliation between the two business entities. All four business entities have separate and distinct Federal Employer Identification Numbers and are not reported on any consolidated return.

As previously noted, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry

on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

The record contains no evidence to establish a valid successor relationship. The evidence does not establish that [REDACTED] acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer. It is further noted that even if the AAO were to consider a successor relationship, there is no evidence in the record to show which business entity would employ the beneficiary.

The fact that [REDACTED] and [REDACTED] are owned and operated by the same shareholder is not sufficient alone to establish a successor-in-interest relationship.¹ Therefore, the evidence in the record is not sufficient to establish that either [REDACTED] or both, are successors-in-interest to the petitioner. As noted in the Notice of Intent to Dismiss, the current status of [REDACTED] is inactive; therefore, the petition and the appeal to the AAO have become moot. It is further noted that the petitioner, [REDACTED] was not incorporated until March 22, 2005, nearly one and one half years subsequent to the priority date of July 21, 2003. Thus, the petition is not accompanied by a valid labor certification. 20 C.F.R. § 656.30 (c)(2); 8 C.F.R. § 204.5(l)(3).

On motion, counsel cites to Memo, Neufeld, Acting Assoc. InfoNet at D09090362. The memo states in part "business entities do not always wholly assume the assets and liabilities of entities they acquire or merge with and that businesses may choose not to assume certain assets or liabilities in connection with a perfectly legitimate transaction." Counsel infers that a successor does not have to demonstrate that it assumed certain liabilities in order to establish a successor relationship. Counsel asserts that a new petition is not necessary, as in the instant matter, where: "(1) the case involves portability; (2) the company has merely changed its legal name; or (3) the company has changed its location but remains within the same area of intended employment (same metropolitan statistical area)." *See AFM at 22.2(b)(5)(C), (F).* However, in the instant case the movant has failed to demonstrate that its actions comply with AFM at 22.2(b)(5)(C),

¹ The record of proceeding shows that [REDACTED] and [REDACTED] were owned by two shareholders whereas [REDACTED] are owned by a single shareholder.

(F). There is no evidence in the record to demonstrate that the case involves portability; that the petitioner merely changed its legal name; or that the petitioner has changed its location but remains within the same area of intended employment.

For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. The petitioner has failed to detail the nature of the transfer of rights, obligations, and ownership of the prior entity. The president and sole shareholder stated in the letters submitted on motion that he decided to change the name of the petitioner in 2006, but fails to specify the date or to provide evidence such as a corporate name change request or a contract of sale documenting such transaction. Nor has the petitioner submitted such documents as: a contract of sale for the acquisition of the predecessor; mortgage closing statements or audited financial statements of the predecessor and successor for the year documenting the transfer and assumption of the ownership of the predecessor by the successor. *See AFM at 22.2(b)(5)(B)*. While the evidence submitted on motion demonstrates the operating authority of the individual business entities, it is insufficient to demonstrate the transfer and assumption of the ownership of the predecessor by the successor.

Another issue addressed by the AAO was whether the petitioner had provided sufficient evidence to establish its ability to pay the proffered wage. The AAO determined that the petitioner had failed to establish its ability to pay the proffered wage. On motion, counsel asserts that the AAO's decision was in error and that the total net income of all companies was and is sufficient to establish the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage.

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. The record of proceeding does not contain any evidence of wages paid to the beneficiary by the petitioner.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir.

2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The movant submitted a Form 1040 tax return for 2003 listing [REDACTED] as the sole proprietor.² A sole proprietorship is characterized as a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay.

Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

In order to determine the sole proprietor's ability to pay the proffered wage, his monthly expenses must be subtracted from the adjusted gross income amounts. The proffered wage is \$48,817.00. The priority date is July 21, 2003. In the instant matter, the movant did not submit a list of the sole proprietor's average monthly household expenses. [REDACTED] adjusted gross income is listed as \$27,416.00 which is insufficient to pay the proffered wage and any personal expenses in 2003. Therefore, the petitioner has failed to establish its ability to pay the proffered wage in 2003.

² The petitioner has not established any affiliation to or successor relationship with [REDACTED]. Therefore, [REDACTED] tax return has not been established as relevant although the AAO will review the evidence.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The movant submitted 1120S³ tax returns of [REDACTED] to demonstrate the combined ability of the companies to pay the proffered wage. The proffered wage is \$48,817.00. Although the movant has not established the binding obligation of any of these companies other than the petitioner to pay the proffered wage, and thus the tax

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

returns of [REDACTED] may not be considered, for purposes of this decision only, the AAO will review the tax returns of all four companies. The tax returns demonstrate net income from the Forms 1120S as shown in the table below:

- In 2003, [REDACTED] Form 1120S stated net income of \$48,283.00.⁴
- In 2004, [REDACTED] Form 1120S stated net income of \$28,930.00.
- In 2005, [REDACTED] Form 1120S stated net income of \$26,062.00.

- In 2006, [REDACTED] Form 1120S stated net income of -\$17,448.00.⁵

- In 2006, [REDACTED] Form 1120S stated net income of \$21,356.00.⁶
- In 2007, [REDACTED] Form 1120S stated net income of \$7,843.00.
- In 2008, [REDACTED] Form 1120S stated net income of \$21,028.00.
- In 2009, [REDACTED] Form 1120S stated net income of \$1,474.00.
- In 2010, [REDACTED] Form 1120S stated net income of \$1,503.00.
- In 2011, [REDACTED] Form 1120S stated net income of \$57,851.00.

- In 2008, [REDACTED] Form 1120S stated net income of \$42,248.00.
- In 2009, [REDACTED] Form 1120S stated net income of \$43,532.00.
- In 2010, [REDACTED] Form 1120S stated net income of \$78,155.00.
- In 2011, [REDACTED] Form 1120S stated net income of \$20,435.00.

Therefore, even if the AAO were to take into consideration the combined net income amounts from [REDACTED] as evidence of the petitioner's ability to pay the proffered wage, the evidence demonstrates that the petitioner has not established its ability to pay the proffered wage in 2003, 2004, 2005, 2006, 2007, 2008, and 2009. In 2010 the net income for [REDACTED] was \$78,155.00, and in 2011 the net income for [REDACTED] was \$57,851.00 and would be sufficient to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets in an S corporation are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-

⁴ The petitioner has not demonstrated an affiliation or parent-subsidary relationship with [REDACTED]

⁵ The petitioner's business was dissolved on August 10, 2007, and there is no evidence in the record of proceeding to show its ability to pay the proffered wage from January 2007 through August 2007.

⁶ The petitioner has not demonstrated a successor-in-interest relationship with [REDACTED]

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses

end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. None of the business entities' Schedules L demonstrate net current assets for 2004, 2005, 2006, 2007, 2008, and 2009, and none of the business entities submitted a Schedule L for 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the movant has not established that four companies combined had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner submitted a letter dated June 11, 2012 from [REDACTED] CPA who states that in his opinion, the financial situation of [REDACTED] is stable and that the year-end cash flows are positive. The declarant further states that the companies have the resources to increase its payroll expenses up to an additional \$50,000.00, which stems from the companies' net profit and/or decreasing contract labor. Reliance on the petitioner's future receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Furthermore, the petitioner must show that as of the date of filing, not just in the future, that it has the ability to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The movant has failed to demonstrate the petitioner's ability to pay the proffered wage.

Another issue raised by the AAO is whether the petitioner had established that the beneficiary had one year of experience in the job offered, electrical engineer as required in the labor certification. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is July 21, 2003, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).⁸ The Immigrant Petition for Alien Worker (Form I-140) was filed on July 30, 2007.

(such as taxes and salaries). *Id.* at 118.

⁸ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

According to the plain terms of the labor certification in the instant matter, the applicant must have one year of experience in the job offered. The AAO determined that the petitioner failed to demonstrate that the beneficiary meets the qualifications set forth on the Form ETA 750. The petitioner had submitted a letter from [REDACTED] in which the declarant stated that the beneficiary was employed by the company from 1997 to 2001 as director for electrical installations. The AAO determined that the beneficiary had not listed [REDACTED] as a former employer on the Form ETA 750B, and that the declarant failed to provide specifics with respect to a description of the beneficiary's job duties and the specific dates of his employment.

On motion, the petitioner submitted a letter from [REDACTED] that specifies the beneficiary's dates of employment and describes his specific job duties as a director for electrical installations and electrician. The petitioner also submitted independent objective evidence in the form of a translated Certificate from [REDACTED] and a Certificate of [REDACTED] which supports the information contained in the [REDACTED] letter of employment. Therefore, with respect to this issue, the petitioner has submitted sufficient evidence to show that it is more likely than not that the beneficiary had all the education, training, and experience specified on the Form ETA 750 as of the priority date, July 21, 2003.

However, the appeal will be dismissed for the reasons stated above.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO's prior decision, dated May 22, 2012, is affirmed. The petition remains denied.