

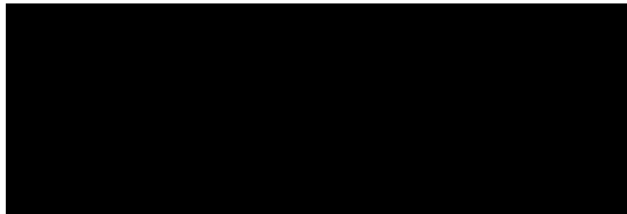
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: [REDACTED]
SRC-07-218-51855

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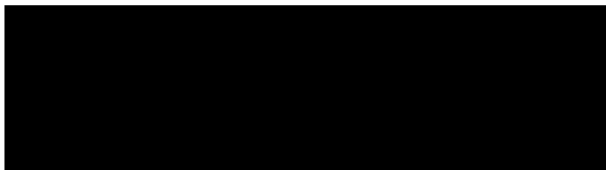
Date: FEB 20 2010

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 landscaping and irrigation system company. It seeks to employ the beneficiary permanently in the United States as a landscape architect (landscape designer). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage. 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 January 25, 2008 denial, the single 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.

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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted on April 30, 2001 and certified on April 16, 2007 initially on behalf of the original beneficiary. The proffered wage as stated on the Form ETA 750 is \$22.50 per

hour (\$46,800.00 per year¹). The Form ETA 750 states that the position requires two years of experience in the job offered and that the beneficiary would supervise two employees in the proffered position. The Form I-140 immigrant petition on behalf of the instant beneficiary was submitted on July 10, 2007. The instant petition is for a substituted beneficiary.² On the petition, the petitioner claimed to have been established in 1986 and to currently employ seven workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on June 15, 2007, the beneficiary states that she worked for [REDACTED] in Lahore, Pakistan as a landscape designer from August 1994 to September 1999. She did not provide any information about her employment since September 1999.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d

¹ The petitioner offered the beneficiary \$950.00 per week (\$23.75 per hour) on the Form I-140 and \$23.85 per hour in the letter dated May 5, 2007. However, the AAO calculates the annual proffered wage based on the proffered wage of \$22.50 per hour set forth on the Form ETA 750.

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

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. 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).

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 petitioner has not claimed and established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 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). 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. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to

³ 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).

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 the instant case, the sole proprietor supports a family of six. Counsel submitted a statement of the proprietor's household living expenses for the relevant years. The record also contains the proprietor's tax returns for 2000 through 2007. However, the proprietor's tax return for 2000 is not necessarily dispositive since the priority date in this case is April 30, 2001. The tax returns and living expense statement reflect the following information for the following years:

Tax Year	Adjusted gross income	Living Expenses	Proffered Wage	Surplus or deficit
2001	\$62,970	\$50,188	\$46,800	(\$34,018)
2002	\$70,219	\$51,858	\$46,800	(\$28,439)
2003	\$62,840	\$53,690	\$46,800	(\$37,650)
2004	\$52,123	\$53,424	\$46,800	(\$48,101)
2005	\$58,466	\$49,035	\$46,800	(\$37,369)
2006	\$58,130	\$50,903	\$46,800	(\$39,573)
2007	\$59,726	\$52,498	\$46,800	(\$39,572)

In 2001 through 2007, the sole proprietor's adjusted gross incomes were not sufficient to pay the proffered wage of \$46,800 as well as to cover the proprietor's household living expenses. Thus, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as well as support his family with the sole proprietor's adjusted gross income. The petition is obligated to demonstrate that the sole proprietor had additional funds of \$34,018 in 2001, \$28,439 in 2002, \$37,650 in 2003, \$48,101 in 2004, \$37,369 in 2005, \$39,573 in 2006, and \$39,572 in 2007 respectively to establish his ability to pay in this case.

USCIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. The sole proprietor's liquid assets includes cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or family's living expenses. In the instant case, counsel submitted the bank statements covering the period from 2003 to 2007 as evidence of the petitioner's extra available funds to pay the proffered wage as well as the proprietor's family living expenses in response to the director's notice of intent to deny dated

December 14, 2007. The director considered the year-ending balances of the bank account as additional funds for the petitioner to pay the proffered wage and accordingly concluded that the petitioner established its ability to pay the proffered wage for 2003 through 2006. On appeal, counsel claims that the year-ending balances of \$13,557.40 and \$33,683.00 in the petitioner's bank account establish the ability to pay the proffered wage for 2001 and 2002.

However, if the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. This office notes that the balances counsel claimed and the director considered as the sole proprietor's extra available funds are the balances of the sole proprietor's business checking account. Therefore, these funds cannot be considered as additional funds in determining the sole proprietor's ability to pay the proffered wage. It is noted that bank statements show that the sole proprietor had a business high yield savings account with JPMorgan Chase Bank during the period from October 2003 to September 2006.⁴ The balances of the sole proprietor's saving account were \$500.82 at the end of year 2003, \$505.62 at the end of 2004, and \$5,551.15 in 2005. Unlike the annually re-creatable income, such as adjusted gross income reflected on annual tax return, the balance in an account is an amount accumulated as of a given date, and therefore, the bank account balance cannot be used to pay the proffered wage every year repeatedly. If the sole proprietor had used the balance of the saving account in a year, the available balance for next year would not be the same amount or the balance reflected at the end of the next year. In this case, the available amount in 2003 would be \$500.82; in 2004 it would be \$4.80; and in 2005 it would be \$5,045.53.

Counsel also submitted bank statements for August and November 2007 as evidence that the sole proprietor had additional funds to be used to pay the proffered wage and his family living expenses. The bank statements show that the sole proprietor has business line of credit up to \$100,000 with Chase Bank. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the sole proprietor has not established that the unused funds from the line of credit were available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁴ The business savings/money market account opened earlier than that, however, the account started to have a balance of \$500.07 from October 2003 and the balance became zero in September 2006.

On appeal counsel also submits documents concerning the sole proprietor's investment accounts which show that the sole proprietor had account value of \$17,137.71 in 2001, \$11,346.91 in 2002, \$14,377.82 in 2003, \$25,802.24 in 2004, \$27,646.66 in 2005, \$28,225.19 in 2006 and \$32,705.34 in 2007. However, counsel did not document that the sole proprietor was willing to liquidate his investment funds to pay the beneficiary the proffered wage and that the amount in the investment accounts were available to be used to pay the beneficiary the proffered wage in 2001 with or without penalty. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, if even the sole proprietor is willing to use these funds, the investment funds listed above at the end of each year cannot be used to pay the proffered wage every single year. Instead, while the available amount in 2001 might be \$17,137.71, there would not be any amounts to be available for the years of 2002 and 2003.⁵ The available funds from the investment accounts in 2004 would be around \$8,664.53, and \$1,844.42 for 2005, \$578.43 for 2006 and \$4,480.15 for 2007.

Contrary to counsel's assertion, the AAO does not generally accept a claim that the sole proprietor relies on the value of his/her residential and/or business real property to show their ability to pay because it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, counsel's reliance on the sole proprietor's business real properties to demonstrate the petitioner's ability to pay is misplaced.

Counsel claims and provides evidence that the sole proprietor has funds in addition to his adjusted gross income: investment funds of \$17,137.71 in 2001, saving account balance of \$500.82 in 2003, \$8,669.33 (\$8,664.53 from investment funds and \$4.80 from savings account) in 2004, \$7,395.57 (\$1,844.42 from the investment funds and \$5,551.15 from the saving account) in 2005, and \$578.43 of investment funds in 2006 and \$4,480.15 of investment funds in 2007. However, these additional funds are not sufficient to demonstrate that he had additional funds of \$34,018 in 2001, \$28,439 in 2002, \$37,650 in 2003, \$48,101 in 2004, \$37,369 in 2005, \$39,573 in 2006, and \$39,572 in 2007 respectively to establish his ability to pay in this case.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay the instant beneficiary the proffered wage as well as to cover his family living expenses as of the priority date through an examination of wages paid to the beneficiary, his adjusted gross income and other assets.

⁵ The balances in 2002 and 2003 are less than the one in 2001. If all of the balance had been used to pay the proffered wage in 2001, there would not have had any amount left for 2002 and 2003.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for another worker for which the petitioner is obligated to demonstrate its ability to pay the proffered wage during the period from 2001 through 2007.⁶ Therefore, the petitioner would need to demonstrate its ability to pay at least two proffered wages in 2001 through 2007.

On appeal counsel asserts that the petitioner has already paid the proffered wage to the beneficiary of the approved petition, and therefore, established its ability to pay the proffered wage in that case. The W-2 form in the record shows that the petitioner paid the beneficiary of the approved petition in the amount of \$44,750 in 2006. The record does not contain any other evidence showing that the petitioner paid the beneficiary of the approved petition any amounts in any other relevant years. The petitioner has established that it paid the beneficiary of the approved petition the full proffered wage in 2001 through 2005 and 2007.⁷ The petitioner is still obligated to demonstrate that it had sufficient adjusted gross income and other assets to pay one proffered wage in 2006 and two proffered wages in 2001 through 2005 and 2007. However, as previously discussed, the sole proprietor's adjusted gross income and other assets available are insufficient to pay the instant beneficiary the proffered wage. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2001 through 2007.

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 (BIA 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

⁶ USCIS records show that the petitioner filed a Form I-140 immigrant petition (SRC-07-131-51307) on March 22, 2007 with the priority date of April 26, 2001, and the petition was approved on April 10, 2007.

⁷ Counsel confirms that the proffered wage for the petition LIN-07-182-51312 is identical to the one for the proffered position in the instant case.

been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, although the petitioner has been in business since 1986 and its gross receipts have grown from \$700,000 to \$1,800,000, the business's profits were never sufficient to cover the sole proprietor's family living expenses and to pay a single proffered wage. The petitioner claims that it currently employs seven workers, however, its tax returns show that the petitioner paid salaries at maximum of \$65,341 in 2006 and \$48,536 in 2007, in many years its total salaries paid were under \$20,000, and in 2005 the petition's tax return reflects no salaries and wages paid at all. In addition to the instant pending petition and the approved petition discussed above, the petitioner filed several Form I-140 immigrant petitions and Form I-129 nonimmigrant petitions. The petitioner is also obligated to pay the prevailing wage to each of its H-1B employees. See 20 C.F.R. § 655.731. Given the record as a whole, the petitioner's history of filing petitions, the number of immigrant petitions and nonimmigrant petitions, and 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 wages.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether the petitioner has provided regulatory-prescribed evidence to demonstrate that the beneficiary possessed the required experience for the proffered position prior to the priority date. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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. 1986). See also, *Mandany 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 Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of landscape designer. The applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not reflect any special requirements.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains an experience letter in English from [REDACTED] in Pakistan verifying the beneficiary's experience with this company as a landscape designer [REDACTED] letter). This letter stated in pertinent part that:

This is to certify that [the beneficiary] worked as a Landscape Designer for our company from August 1994 to September 1999. She was responsible for residential and commercial landscape designs.

[REDACTED] letter is on a computer-created letterhead, was not dated but with an original signature of the writer. The company is located in Lahore, Pakistan and the letter does not appear to

be mailed from aboard. The letter is written in English. It is not clear whether the writer is familiar with English language, nor is it clear whether this letter was written in Pakistan. This letter does not include a specific description of the duties performed by the beneficiary while she worked for [REDACTED] as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's experience with [REDACTED] qualifies her to perform the duties set forth in Item 13 of the Form ETA 750A. The record does not contain any documents or information to support the contents of the letter. The beneficiary did not provide any information about her employments before and after this employment with [REDACTED] on the Form ETA 750 when she signed the form on June 15, 2007 despite the form clearly requires to "list all jobs held during the last three (3) years."

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The petitioner did not submit any documentary evidence, such as the corporate registration, personnel records, the beneficiary's taxation documents or income statements from the former employer, etc. to support the contents of the experience letters. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 582. Because of these defects, the [REDACTED] letter will be given little weight in these proceedings. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence.

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.