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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

WAC-03-119-00770

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a spa. It seeks to employ the beneficiary permanently in the United States as a massage therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established demonstrated its continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 at 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$24.00 per hour for 40 hours per week during the hours 9:00 a.m. to 6:00 p.m., which equates to \$49,920 per year. The petitioner represented on its form that it employs six employees, was established in 1999, and had a gross annual income of \$55,610.

The petitioner is structured as a sole proprietorship. The beneficiary indicated that she worked for the petitioner since November 1999 as a massage therapist. The ETA and visa petition were both signed by [REDACTED]. A letter signed by [REDACTED] as the petitioner's owner stated that the business was started in 1999, and discussed the beneficiary's credentials and the petitioner's desire to hire her as a permanent massage therapist employee. An additional letter confirming the beneficiary's past and present employment with the petitioner is in the record of proceeding and is signed [REDACTED].

With the petition, the petitioner submitted the beneficiary's Form 1040, U.S. Individual Income Tax Return, with accompanying Schedules C, Profit or Loss from Business statements for European Spa, with the same address as the petitioner, for the year 2001¹. The tax return reflects the following information:

¹ The beneficiary ticked a box "Yes" to question G on Schedule C inquiring whether she "materially

2001

Beneficiary's adjusted gross income (Form 1040)	-\$400
Europian Spa's gross receipts or sales (Schedule C)	\$55,610
Europian Spa's wages paid (Schedule C)	\$0
Europian Spa's cost of labor (Schedule C)	\$0
Europian Spa's net profit or loss from business (Schedule C)	-\$447

The petitioner submitted various other documents pertaining to the business, such as a license and permit for tanning and massage services. The petitioner also submitted unaudited internally generated payroll records reflecting compensation paid to the beneficiary and checks made out to the beneficiary from Europian Spa at the petitioner's address signed [REDACTED]

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 7, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of the petitioner's federal tax returns, and gave examples of the forms required for different types of business structures. The director also requested copies of any W-2 forms issued to the beneficiary and the petitioner's quarterly wage reports.

In response, counsel submitted a letter explaining that the beneficiary was a full-time massage therapist for the petitioner while she had employment authorization (EAD) but then she was removed from the petitioner's payroll records and her compensation was reported on Form 1099, Miscellaneous Income statements when the EAD lapsed. The petitioner submitted a notarized and sworn affidavit reiterating the same. Two 1099 forms are in the record of proceeding issued from the petitioner to the beneficiary for wages paid in the amount of \$70,075 in 2002 and \$55,610 in 2001. One other 1099 form is also in the record of proceeding issued by the petitioner [REDACTED] Meshcheryakova. The petitioner also provided unaudited income statements showing total income from massage therapy as the amount of wages paid to the beneficiary in each year.

Because the evidence submitted was still deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 22, 2003, the director issued a notice of intent to deny pertinent to that ability. The director noted that unaudited financial statements fail to comply with the requirements at 8 C.F.R. § 204.5(g)(2) and again requested the petitioner's tax returns.

In response, counsel submitted a letter explaining that the petitioner is submitting "a copy of its sole-proprietor's completed and signed" individual income tax returns. Counsel concedes that the adjusted gross income is less than the proffered wage, but cites to an unpublished AAO decision, and an uncited reference to "Matter of [REDACTED]" to support his assertion that actual payment of wages to a beneficiary in the amount of the proffered wage can evidence a petitioning entity's continuing ability to pay the proffered wage beginning on the

participate[d] in the operation of the business" during that year. She signed the return with the occupation of "Massage Therapist."

priority date. Counsel also stated that the "beneficiary holds a very crucial position in the company. For years, she has greatly contributed to its progress. . . . Discontinuance of the beneficiary's employment shall create a void in the company that is extremely difficult to fill."

The petitioner submitted [REDACTED] Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements for the petitioner, with the same address as the petitioner, for the years 2001 and 2002². The tax return reflects the following information:

	<u>2001</u>	<u>2002</u>
[REDACTED] adjusted gross income (Form 1040)	\$9,479	\$8,922
The petitioner's gross receipts or sales (Schedule C)	\$65,810	\$79,675
The petitioner's wages paid (Schedule C)	\$0	\$0
The petitioner's cost of labor (Schedule C)	\$0	\$0
The petitioner's net profit or loss from business (Schedule C)	\$10,200	\$9,600

The director denied the petition because the sole proprietor's reported adjusted gross income was less than the proffered wage and the petitioner's gross receipts or income was used in full to compensate the beneficiary as an independent contractor in 2001 and 2002.

On appeal, counsel reiterates past arguments and submits additional evidence such as photographs and a map of the petitioner's premises; a certificate of occupancy application; membership forms of the petitioner's clientele; a copy of a Russian American phone directory with the petitioner's advertisement; a copy of its list of clients and gift certificate samples; and copies of the petitioner's credit card lines, monthly bank statements, utility bills, and processed checks made payable to creditors.

The petitioner's phone bill is with Qwest Communications. Processed checks from the "[beneficiary] dba [the petitioner]" made payable to Qwest are in the record of proceeding. The petitioner's gas bill is with Southwest Gas Corporation. Processed checks from the "[beneficiary] dba [the petitioner]" made payable to Southwest Gas Corporation are in the record of proceeding. The petitioner's bill for electricity services is with APS and is issued to the "[beneficiary] dba [the petitioner]." The petitioner uses ADT Security Services for its security. Processed checks from the "[beneficiary] dba [the petitioner]" made payable to ADT are in the record of proceeding. The petitioner uses Cox Communications for its cable service. Processed checks from the "[beneficiary] dba [the petitioner]" made payable to Cox or Cox Communications are in the record of proceeding. Additional processed checks are also issued from the "[beneficiary] dba [the petitioner]" and made payable to various business services, such as a linen cleaning services, radiation services, and local utilities.

The petitioner's bank statements are in the name of the "[beneficiary] dba [the petitioner]." Copies of credit cards are in the name of the "[beneficiary] dba [the petitioner]." The occupancy certificate lists the beneficiary as the

[REDACTED] ticked a box "Yes" to question G on Schedule C inquiring whether she "materially participate[d] in the operation of the business" during that year. She signed the return with the occupation "Spa Owner."

petitioner's owner. The photograph of the petitioner's premises shows its hours of operation on its front door as 11 am – 10 pm on weekdays.

At the outset, counsel refers to a decision issued by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The other decision referenced by counsel does not provide a citation for the AAO to review.

Additionally, as noted by the director, the unaudited financial statements that counsel submitted in response to the director's request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Traditionally, in determining the petitioner's ability to pay the proffered wage during a given period, CIS 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.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 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.

Although the record of proceeding contains 1099 forms issued by the petitioner to the beneficiary in amounts greater than the proffered wage, the AAO concurs with the director's determination that the petitioner has failed to establish its continuing ability to pay the proffered wage beginning on the priority date. The AAO agrees with the director that the petitioner's gross receipts are all paid to the beneficiary and does not reflect a viable business entity. However, the AAO will make additional determinations in its decision that go beyond the decision of the director. 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).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The problem that arises in this case is the inconsistencies in information provided by the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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 591-592 also states: "It is incumbent on 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."

The AAO is concerned about representations made that [REDACTED] the petitioner's owner, and that the beneficiary is merely a massage therapist, omitting the fact that she is the actual owner of the petitioner. A cursory inquiry to the Arizona's Secretary of State clearly shows that the beneficiary registered the petitioner's trade Name, "European [sic] Spa," on July 14, 1999 as the owner of the company. She later renewed the registration on June 10, 2004, again claiming to be the owner.

Although never representing herself as the owner, on appeal, documentation illustrates that the beneficiary acted in her capacity as the petitioner's owner to receive and pay bills and obtain a certificate of occupancy. The tax returns from Ms. Roman and the beneficiary further add to the suspicions raised concerning the petitioner's

ownership³. Additionally, the hours of the petitioner's business operations do not coincide with the stated hours of the proffered position on the ETA 750A.

Fraud results in inadmissibility and permits the director to invalidate a labor certificate. *See* 8 U.S.C. § 1182(a)(6)(C) and 20 C.F.R. §§ 656.30(d) and 656.31(d). The director is entitled to invalidate the labor certificate based upon a finding of fraud.

The AAO determines that fraud has been committed in this case and the director should reexamine the instant petition and consider invalidating the labor certificate. Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence necessary to make an additional determination.

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 petition is remanded to the director for entry of a new decision.

³ It is noted that the petitioner's stated gross revenues on the visa petition on Form I-140 matches the Schedule C to the beneficiary's individual tax return submitted as supporting documentation by the beneficiary with the initial petition.