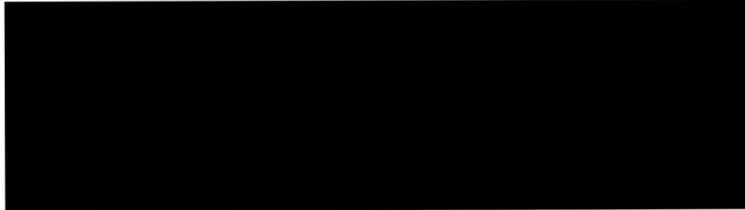




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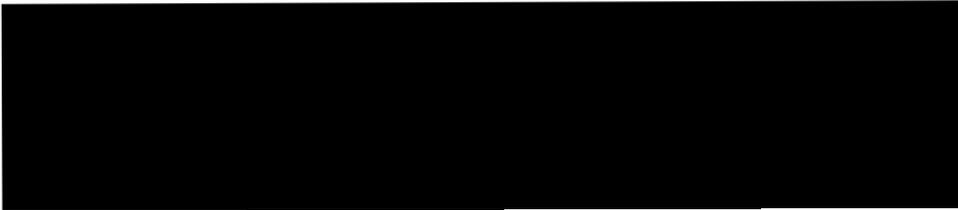
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FILE: WAC-02-229-50175 Office: CALIFORNIA SERVICE CENTER Date: JUL 13 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. Based on the result of a permanent residence interview at the United States Embassy in Ankara, Turkey, the director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain revoked.

The petitioner is an alteration and tailor shop. It seeks to employ the beneficiary permanently in the United States as a tailor (alteration tailor). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted sufficient evidence in rebuttal to the NOIR and had not overcome the grounds for revocation. The director revoked the approval of the petition accordingly.

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

As set forth in the director's February 1, 2006 NOR, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience as an alteration tailor prior to the priority date and thus was qualified to perform the duties of the proffered position.

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 petitioner must 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 26, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief without any additional evidence. Other relevant evidence in the record includes an experience letter dated February 14, 1999 from [REDACTED] Production Manager of As

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[REDACTED] submitted with the initial filing. The petitioner also submitted the following as evidence to rebut the grounds of revocation in response to the NOIR: a statement dated November 10, 2005 from the beneficiary, a report issued on November 7, 2005 by the Social Security Office of Izmir City, Turkey, pertinent to the beneficiary's employment records, a certificate from [REDACTED] Head Office dated October 28, 2005 regarding the status of [REDACTED], a statement from [REDACTED] of EM & FA, an experience letter dated November 8, 2005 from [REDACTED] verifying the beneficiary's four years of experience as a tailor and designer, a letter dated September 15, 2005 from [REDACTED] Chamber of Tailors and Ready-Made Clothing to the beneficia regarding mastership certificate, and statements from [REDACTED] and [REDACTED]. The record does not contain any other evidence relevant to the beneficiary's qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of alteration tailor. Item 14 describes the requirements of the proffered position as follows: 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 as "Will alter and sew various men & women's clothing according to customer specifications." Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he was self-employed with [REDACTED] located at [REDACTED], Izmir, Turneky as a "Business owner" from February 1991 to the present (i.e. April 23, 2001, the date the form was signed) working more than 45 hours per week performing duties of tailoring, production of clothing, pattern making and designing of clothing. He did not provide any additional information concerning his employment background on that form.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The regulation at 8 C.F.R. § 204.5(1)(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) also 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) of 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.

The record of proceeding contains a memorandum dated June 25, 2004 from the Embassy of the United States of America in Ankara, Turkey concluding that the beneficiary is not qualified for the proffered position, and recommending that his employment-based petition be revoked. The embassy's conclusion is based on its investigation report that "a phone call to EMFA revealed that [the beneficiary] primarily delivers orders for EMFA and occasionally cuts cloth for them, but never does any sewing or tailoring for the company." Therefore, the consular officer determined that the beneficiary submitted false employment documents and did not currently work as a tailor. The embassy also noted that the beneficiary did not know the name and number of employees of the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(1) requires the petitioner to submit an experience letter from current or former employer with all required contents. The embassy report states that a letter from the beneficiary's current employer was provided at the interview stating that the beneficiary has worked there as a tailor since 2001. The report also shows that the US Embassy in Ankara conducted the investigation by phone. The investigation report does not indicate whether the investigator talked to the representative of the company who is authorized to speak on behalf of the company, who is familiar with or able to access the company's personnel records or who provided the experience letter. In addition, the fact that the beneficiary is not currently working for his former employer, EMFA, cannot lead the consul to the conclusion that the beneficiary did not possess the requisite two years of experience as a tailor. Moreover, the experience investigated by the embassy is not the one claimed by the beneficiary on the Form ETA 750B and evidenced by a letter from [REDACTED]. Therefore, the AAO will discuss the beneficiary's qualifying experience without considering the embassy investigation report.

With the initial petition, the petitioner submitted an experience letter dated February 14, 1999 from [REDACTED] the production manager of [REDACTED] (February 14, 1999 letter) to corroborate the beneficiary's employment experience. The letter states in pertinent part that:

The purpose of this letter is to confirm and certify that [the beneficiary] has been employed by our company from January 1, 1993 to the present date as the owner and director of our apparel production & design business. His position is permanent and full-time.

[The beneficiary]'s duties consist of hands-on participation in the tailoring, production of clothing, pattern making and the design of the clothing we manufacture.

This letter is on [REDACTED] letterhead, was dated February 14, 1999 when the company operated its business², includes the name and title of the writer and the address of the company, verifies that the position is permanent and full-time and also includes a specific description of the duties performed by the beneficiary. However, the letter certifies that the beneficiary was the owner and director of the company's apparel production & design business. The letter does not indicate how many hours per week the beneficiary spent to perform the duties as an alteration tailor and how many hours he spent to perform his owner and director's duties. Therefore, this letter cannot be considered as primary evidence to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered, i.e. as an alteration tailor, prior to the priority date. The petitioner failed to establish the beneficiary's qualifications for the proffered position with [REDACTED] February 14, 1999 letter. Without requesting additional evidence for the beneficiary's qualifications, the petition was approved in error. The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The AAO finds that the director had good and sufficient cause to issue a NOIR for the approval of the instant petition, even without the information provided in the embassy investigation report.

The director issued a NOIR on October 19, 2005 giving the petitioner 30 days to submit evidence in opposition to the proposed revocation. The petitioner responded to the director's NOIR with supporting evidence for which the director received on November 17, 2005. The director revoked the approval of the petition on February 1, 2006 determining that the petitioner had not submitted sufficient evidence in rebuttal to the NOIR and had not overcome the grounds for revocation. On appeal, counsel asserts that the petitioner brought forth plentiful evidence clearly demonstrating that the beneficiary possesses much more than the required 2 years of experience in this position. Now the issue the AAO will discuss is whether the petitioner submitted sufficient evidence in response to the director's NOIR and has overcome the grounds of revocation.

In response to the NOIR, counsel alleged to submit nine pieces of evidence with certified and notarized English language translation. The regulation at 8 C.F.R. § 103.2(b)(3) provides that: "*Translations*. Any

² A certificate from [REDACTED] Head Office dated October 28, 2005 in the record shows that AS DORUK was established on January 1, 1991 and doing its business in ready-made clothing manufacturer (trouser, skirt, outdoor wear) from September 12, 1991 to January 29, 2002.

document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The translations of the nine documents submitted by counsel in response to the NOIR did not comply with the terms of 8 C.F.R. § 103.2(b)(3) because the certifying and/or notarizing sections for each of the documents were not translated into English, and therefore, the AAO cannot determine whether these documents were submitted with a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. Furthermore, since it is not clear whether these documents are certified and notarized, the declarations that have been provided on appeal are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of an appeal are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore, the petitioner failed to submit sufficient and proper evidence to rebut the grounds for revocation.

In response to the NOIR, counsel submitted a statement dated November 10, 2005 from the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(1) requires the petitioner to submit an experience letter from current or former employer(s) of trainer(s) to demonstrate the beneficiary's requisite experience. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidence standard. A statement from the beneficiary himself, without additional documentation, cannot be considered as a acceptable evidence to establish the beneficiary's qualifications.

Counsel submitted a report issued on November 7, 2005 by the Social Security Office of Izmir City, Turkey, pertinent to the beneficiary's employment records. This report can be considered as a acceptable form of objective evidence in case the experience letter from an employer is not available. However, the report verifies the beneficiary worked for [REDACTED] from December 21, 1987 to January 15, 1990 and from January 15, 1990³ to December 31, 1991. The report itself does not and cannot verify the beneficiary's full time employment, his position and his duties in the position. While this report from the Social Security Office of Izmir City, Turkey verifies the beneficiary's employment for the certain period, it does not demonstrate that the beneficiary worked as a tailor for at least two full-time years prior to the priority date.

³ It is noted that there is translation error here. The translator translated January 15, 1990 into 15.01.1990 while all other dates in the order of month day year, such as December 21, 1987 into 12.21.1987.

Counsel submitted a certificate from [redacted] Head Office dated October 28, 2005 regarding the status of [redacted]. This certificate can be considered as an acceptable form of objective evidence since the beneficiary claimed that he was self-employed with [redacted] and thus an experience letter from this employer is not available. This certificate shows that [redacted] was established on January 1, 1991 and doing its business in ready-made clothing manufacturer (trouser, skirt, outdoor wear) from September 12, 1991 to January 29, 2002. However, the certificate does not provide any information on the ownership, shareholders or corporation officers, and therefore does not verify that the beneficiary was the owner of the company, nor does it confirm that the beneficiary worked for this company as a tailor for at least two full-time years during its operation period.

Counsel's response to the NOIR also included an undated letter from M [redacted]. Counsel alleged that she is the owner of EM & FA. The letter is on letterhead of EM & FA, however, the letter does not include [redacted] position and/or title in the company. It is not clear whether or not the letter is from the beneficiary's current or former employer. [redacted] letter states in pertinent to the beneficiary's employment experience with her company that:

I am acquainted with [the beneficiary] from the time he was the owner of Asdoruk Company. I had heard that his company would be closed and offered him work. I told him that my workplace was suitable and you could to your work in there, and we reached an agreement. He began to work in May 5, 2001.

I was utilizing [the beneficiary] at the work of cutting, design and modeling

Based on the description of the beneficiary's duties performed, counsel argues on appeal that the duties qualify under DOL's Occupational Outlook Handbook (OOH) as a tailor. The AAO notes that duties described in [redacted] letter are part of duties normally performed by a tailor under OOH. However, the letter appears to indicate that [redacted] offered a workplace in her company for the beneficiary to do his own work there rather than offering employment. More importantly, [redacted] verifies that the beneficiary began to work in May 5, 2001. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 26, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Therefore, the beneficiary's work experience cannot be counted to qualify him for the proffered position in the instant case. The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a tailor prior to the priority date.

Counsel's response to the NOIR also included another experience letter from a former employer. This experience letter dated November 8, 2005 is from [redacted] ([redacted] November 8, 2005 letter). [redacted] states in his letter that:

I am a ready-made clothing manufacturer. [The beneficiary] had worked for 4 years between 12.21.1987 and 21[sic].31.1991 nearby me as a tailor and designer. Security Record of that period is enclosed.

As previously discussed, the report issued on November 7, 2005 by the Social Security Office of Izmir City, Turkey verifies the beneficiary worked for [REDACTED] from December 21, 1987 to December 31, 1991. However, the report does not verify the beneficiary's full time employment, his position and his duties in the position. [REDACTED]'s November 8, 2005 letter indicates that the beneficiary worked for him as a tailor and designer for four years, however, this letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary as a tailor and designer. The petitioner failed to demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750.

Counsel's response to the NOIR also included another document, which can be considered as an acceptable form of objective evidence if an experience letter from a former employer is not available. This document is a letter dated September 15, 2005 from [REDACTED] Chamber of Tailors and Ready-Made Clothing to the beneficiary regarding mastership certificate [REDACTED] Chamber's September 15, 2005 letter). On appeal counsel asserts that this letter confirms that the beneficiary qualifies for the Mastership Examination based on his training and experience. However, the director dismissed this letter because it did not bring proof that he actually took the exam. Counsel continues to contend that the director missed the point because this document is an independent, objective and competent proof that the beneficiary has the training and experience necessary to take the exam. [REDACTED] Chamber's September 15, 2005 letter states in pertinent part that:

Based on this Law, as [the beneficiary] applied to have the Compensation Training Exams available for profession members not taking Mastership Certificate and he documented through Tax Office that he was a Ready-Made Clothing Manufacturer between 09/12/1991 and 29/01/2002.

This letter confirms that the beneficiary is qualified to take the exam based on his ten years of experience as a ready-made clothing manufacturer. However, qualifying for Mastership Exam by the chamber does not necessarily qualify the beneficiary to perform the duties of the proffered position set forth on the Form ETA 750. [REDACTED] Chamber's September 15, 2005 letter indicates that the beneficiary documented his experience through the Tax Office, however, the letter itself does not document the beneficiary's experience, nor does it verify the beneficiary's employment, such as the employer's name, the beneficiary's title and/or position, the beneficiary's duration of employment. The letter does not include a specific description of the duties the beneficiary performed in those ten years as a ready-made clothing manufacturer so that the AAO can determine whether or not the duties performed qualify the beneficiary for the proffered position of alteration tailor with the petitioner. The beneficiary did not submit the documentation he documented his experience through Tax Office to Izmir Chamber of Tailor and Ready-Made Clothing. Therefore, the AAO does not concur with counsel's assertion that this letter demonstrates the beneficiary's qualifications.

Counsel also submitted statements from [REDACTED] and [REDACTED] in response to the NOIR. These statements show that [REDACTED] was a delivery-man, [REDACTED] was an accountant and [REDACTED] was a wholesaler. All three of them state that they saw the beneficiary was sewing when they visited his workplace. Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former

employer is unavailable, it still requires other documentation meet certain evidentiary standards. Letters from people who have interacted with the beneficiary while he worked for or operated another company cannot be used in lieu of a letter from the actual company for which the beneficiary worked, without solid objective evidence. These letters did not come with any documentary evidence to support their contents. 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)).

The petitioner did not submit independent objective evidence, such as tax returns, payroll records, and personnel records to support the beneficiary's self-employment experience or his employment with EMFA. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. 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). The AAO is not convinced with these documents that the petitioner submitted sufficient evidence to demonstrate that the beneficiary worked for at least two years prior to the priority date of April 26, 2001 as a full-time alteration tailor.

Counsel's assertions on appeal cannot overcome grounds of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the insufficient evidence in factual assertions presented by the beneficiary concerning his qualifications for the proffered position.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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).

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 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 Application for Alien Employment Certification, was accepted

for processing by any office within the employment system of the U.S. Department of Labor. *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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As previously noted, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120 per year). On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of \$120,977, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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, 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. In the instant case, the beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any W-2 forms, 1099 forms or other documentary evidence showing that the petitioner employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present.

The evidence indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001. The tax return demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage:

In 2001, the Form 1040 stated adjusted gross income of \$37,997.

In 2001 the sole proprietor's adjusted gross income on Form 1040 was \$37,997, which was sufficient to pay the beneficiary the proffered wage of \$29,120 and leaves the balance of \$8,877 for the sole proprietor to sustain her family's living expenses that year. The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietor established her ability to pay the proffered wage as well as to sustain her family's living expenses. However, it is not likely that the petitioner could support herself and her mother with \$8,877.

In addition, the schedule A of the 1040 tax return shows that the sole proprietor paid medical and dental expenses of \$1,428, paid taxes of \$3,251, paid home mortgage interest and points of \$13,418, and gifted \$654 to charity, totaling \$18,751 in the year of 2001. It is noted that the actual living expenses would be more than this amount. However, even taking the figures shown on Schedule A as the living expenses for the sole proprietor's family, after deducting these expenses from the adjusted gross income, the sole proprietor did not have sufficient funds to pay the beneficiary the proffered wage in 2001.

CIS will consider the sole proprietor's income and her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as 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 personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of each year 2001 onwards.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through the present.

⁴ The line for adjusted gross income on Form 1040 is Line 33 for 2001.

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. The director's decision on February 1, 2006 is affirmed. The approval of the petition remains revoked.