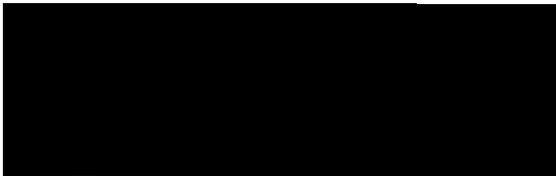




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Office: CALIFORNIA SERVICE CENTER

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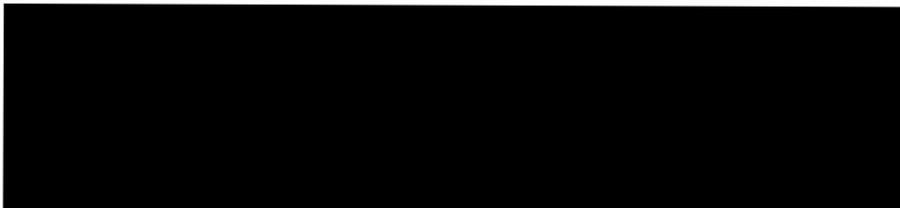
Petitioner:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, California Service Center. In connection with results of the beneficiary's application to adjust status to lawful permanent resident (Form I-485), 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's approval will remain revoked.

The petitioner is a board and care home. It seeks to employ the beneficiary permanently in the United States as a residence supervisor (board and care manager). 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 established that the beneficiary qualifies for the classification sought. The director revoked the approval of 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 September 6, 2005 revocation, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is eligible for the classification sought. The director noted that a letter dated January 15, 1998 from ██████████ regarding the beneficiary's employment inconsistently states that the beneficiary worked on a part-time basis (40 hours per week); a letter dated April 4, 2005 from ██████████ submitted in response to the NOIR asserted the beneficiary worked 40 hours per week - a full time employee, however, the record does not contain substantial evidence to resolve the inconsistency.

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.

A petitioner must establish the elements for the approval of the petition at the time of filing. 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. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate

the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 13, 1998.

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 appeal<sup>1</sup>. On appeal counsel submits a brief and resubmits the letter from [REDACTED]. The relevant evidence in the record includes an experience letter from [REDACTED] dated January 15, 1998 and an affidavit of [REDACTED] dated August 10, 2005 regarding the beneficiary's previous employment experience. The record does not contain any other evidence relevant to the beneficiary's qualifying experience for the proffered position.

On appeal, counsel asserts that the affidavit of [REDACTED] is credible and worthy of considerable weight and therefore sufficient to establish the beneficiary's qualifying experience without the any substantial evidence such as W-2/W-3 or Form 1099.

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 AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

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.

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

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<sup>1</sup> 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).

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 residence supervisor. Item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	C
	High School	C
	College	Blank
	College Degree Required	None
	Major Field of Study	N/A

The applicant must also have two years of experience in the job offered (the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision) or two years of experience in the related occupation of care provider. Item 15 of Form ETA 750A requires that the applicant “must be available for on-call 24 hrs/day. Employer will compensate as per CA state law/regulations. Work Schedule: Sun & Wed off” as other special requirements. Item 17 indicates the applicant will supervise 2 employees.

The beneficiary set forth her credentials on Form ETA-750B and signed her 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 her work experience, the beneficiary represented that she has been working as a full-time (40 hours per week) “Accountant” for the petitioner since October 1994 to the present (the form was signed on October 9, 1998). Prior to that, she represented that she worked as a full-time “Bookkeeper/Computer Operator” from April 1987 to June 1990 and as an “Accountant” from June 1990 to October 1994 for Metro Drug Distribution Inc., and that she also worked as a full-time “Care Provider” for [REDACTED] in Philippines from November 1980 to July 1983.

The record of proceeding contains an experience letter for the beneficiary from [REDACTED] Provido (letter) in corroboration of the above quoted regulations. Judith’s letter states in pertinent parts that:

This is to certify that [the beneficiary] was employed as a care provider for my mother from November 15, 1980 to July 15, 1983. On a part time basis (40 hours per week).

The director issued a NOID to resolve the inconsistency of a part-time basis and working 40 hours per week in the letter. In response to the NOID, counsel submitted an affidavit of [REDACTED] (letter). The [REDACTED] letter dated August 10, 2005 stated in pertinent parts that:

[The beneficiary] worked during the period between November 15, 1980 and July 15, 1983.

[The beneficiary] was a full-time employee. She worked 8 hours a day on Tuesday and Thursday, and 12 hours a day on Saturdays and Sundays. Therefore, she was working 40 hours a week, a full time job.

The previous letter dated January 15, 1998 submitted by my sister, [REDACTED] regarding experience verification of [the beneficiary] with our family, contains one error.

[REDACTED] inadvertently stated that [the beneficiary was employed ‘... on a part time basis (40 hours per week) ...’

I don’t know why my sister [REDACTED] mistakenly stated that [the beneficiary] was employed on a part time basis.

[The beneficiary] worked 40 hours per week. Therefore, she was a full time employee.

Counsel asserts that [REDACTED]’s letter resolved the inconsistency occurred in [REDACTED] letter. However, both sisters confirmed that the beneficiary was employed as a care provider for their mother, but none of them indicated who was the employer (who decided hiring and firing, and paid the beneficiary or the head of the family at the time of employment). Therefore, it is not clear whether either of the letters is from the previous employer. Instead, the beneficiary verified on the Form ETA 750B that the employer was [REDACTED]

Assuming that [REDACTED] is the mother of [REDACTED] and [REDACTED] and the statement of the beneficiary on the Form ETA 750 is true, neither [REDACTED] letter nor [REDACTED]’s letter comes from a former employer. The regulation at 8 C.F.R. § 204.5(g)(1) allows other documentation relating to the alien’s experience or training will be considered only if a letter from an employer or trainer is unavailable. [REDACTED] letter was dated January 15, 1998 when her mother was alive. However, [REDACTED] letter did not explain that she wrote the letter as an employer or on behalf of her mother, the employer, and if she was not an employer, did not explain why the letter from the employer was not available. Therefore, [REDACTED] letter cannot be considered as primary regulatory-prescribed evidence to establish the beneficiary’s qualifying experience even without the inconsistency. Although [REDACTED]’s letter explained why the letter from her mother or sister was unavailable, it still cannot be considered to meet the requirements set forth by regulation at 8 C.F.R. § 204.5(g)(1) because it did not include a specific description of the duties the beneficiary performed, therefore, the AAO cannot determine whether the beneficiary’s duties performed for [REDACTED] qualify her for the proffered position. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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.” Accordingly, [REDACTED]’s letter is not sufficient to resolve the inconsistency because the record does not contain any independent objective evidence to support [REDACTED]’s assertion in her letter. Instead, the record contains inconsistent information provided by the beneficiary which would support that the beneficiary might have worked for [REDACTED] on a part-time basis. The beneficiary set forth her educational background on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting names and addresses of schools, colleges and universities attended, the beneficiary represented that she attended Central Philippine University in Jaro, Iloilo, Philippines in the field of accounting from April 1979 to May 1983. However, the beneficiary did not

explain how she could manage studies and a care providing job both on full-time basis. The record does not contain any substantial evidence to support the assertions of the [REDACTED] and the beneficiary that the beneficiary worked as a care provider on a full-time basis.

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 petitioner concerning the beneficiary's qualifying experience for the proffered position prior to the filing of the labor certification application.

Beyond the director's decision and counsel's assertions on appeal, the AAO notes other ineligibility issues. 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$1,865.67 per month (\$22,388.04 per year).

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1982, to have a gross annual income of \$136,440, to have a net annual loss of \$42,920, and to currently employ 3 workers. On the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary claimed to have worked as an accountant for the petitioner since October 1994.

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 petitioner submitted its Form DE-6 Quarterly Wage Reports for all quarters of 1998 through 2001 and 2004 and the beneficiary's W-2 form for 2001, 2002, 2003, 2004 and seven pay stubs for 2005. These forms show that the petitioner paid the beneficiary the following amounts for the following years: \$21,600 in each of 1998 and 1999, which is \$788.04 less than the proffered wage respectively; \$19,929.60 in 2000, which is \$2,458.44 less than the proffered wage that year; \$23,988.95 in 2001, \$23,098.70 in 2002, \$22,880 in 2003, \$23,320 in 2004 and \$13.00 per hour or \$1,040.00 biweekly in 2005. These figures are more than the proffered wage per year in 2001, 2002, 2003, 2004 and 2005. Therefore, the petitioner established its ability to pay the full proffered wage through examination of wages paid in 2001 through 2005 but failed for 1998 through 2000. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage in each relevant year.

As previously noted, 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 (7<sup>th</sup> 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 33<sup>2</sup>, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 1998 through 2001. Since the petitioner established its ability to pay the proffered wage in 2001 to the present through wages actually paid to the beneficiary, the AAO will review the tax returns for 1998 through 2000 only. The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage from 1998, the year of the priority date, to 2000:

In 1998, the Form 1040 stated adjusted gross income of \$(58,703).

In 1999, the Form 1040 stated adjusted gross income of \$(5,459).

In 2000, the Form 1040 stated adjusted gross income of \$(6,662).

The record does not contain any statements of monthly expenses for the sole proprietor's household. The petitioner must address this issue in any future proceedings. However, the above information indicates that for the years 1998 through 2000 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the difference between wages actually paid and the proffered wage in each of these years even not taking into account the sole proprietor's household living expenses. Therefore, the petitioner failed to establish that it had sufficient income to pay the proffered wage to the beneficiary for years 1998, 1999 and 2000.

CIS will consider the sole proprietor's income and his 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 1998, 1999 and 2000. The petitioner should address this issue in any subsequent proceedings.

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 1998 through 2000.

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 petition's approval remains revoked.

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<sup>2</sup> The line for adjusted gross income on Form 1040 is Line 33 for 1998 through 2000.