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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: **NOV 14 2007**
WAC 05 145 51953

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:

[redacted]

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 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 dismissed.

The nature of the petitioner's business is a Chinese food restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty Chinese food. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated May 31, 2006, an 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 considering the petitioner's financial evidence submitted and the petitioner's personal expenses.

Beyond the decision of the director, a second issue in this case is whether or not the petitioner has represented to the Department of Labor (DOL) the true conditions of employment namely that it has employed the beneficiary from November 2000 (which fact was not disclosed to DOL in the Form ETA 750, Application for Alien Employment Certification).

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*, 229 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).

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.

Ability to Pay the Proffered Wage

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, 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).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$2,800.00 per month (\$33,600.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor with a letter of addendum dated April 7, 2003 in response to a letter from the State of California Employment Development Department; the petitioner's U.S. Internal Revenue Service Form 1040 returns for tax years 2001, 2002, 2003 and 2004; letters from the petitioner dated March 25, 2005 and September 8, 2005; a cover letter from prior counsel dated September 14, 2005; a photocopy of a webpage dated March 21, 2005 without Internet access information, or source information entitled "611 DDA/SAV Balance/Credit Inquiry" for the petitioner; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all the petitioner's four or five employees for three calendar quarters (April 30, 2004, August 2, 2004 and January 31, 2005) that were accepted by the State of California;² the petitioner's business and alcoholic beverage license (expiration dates October 31, 2005 and December 31, 2005); and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1983 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, substitute counsel asserts that the employer demonstrated the ability to pay the proffered wage and the petitioner will introduce additional evidence.

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

² The AAO notes that the beneficiary is not stated as an employee on the petitioner; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports although the beneficiary has stated in documents in the record of proceeding that she had been an employee of the petitioner from November 2000 to at least March 25, 2005.

Accompanying the appeal, substitute counsel submits additional evidence: exhibits of unaudited financial statements entitled "Comparative Average Monthly Cash Balance" and "Statements of Cash Flow" prepared by Theresa Granados, Esquire, and approximately 192 pages of the petitioner's basic business checking statements for years 2001, 2002, 2003, 2003, 2004, 2005 and 2006.

Substitute counsel submits a legal brief. Counsel contends that the petitioner's basic business checking average monthly balance of \$6,780.00, presumably for the period 2001 to 2006, as well as the unaudited financial statements (specifically the petitioner's cash flow for the years 2001, 2002, 2003, 2004 and 2005 submitted) are evidence of the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 Application for Alien Employment Certification 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, Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. 612 (BIA 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner did not submit the beneficiary's wage and tax statements requested by the director on July 2, 2005 although the beneficiary had been employed by the petitioner from November 2000. A petitioner must provide reasonably obtainable documentation when requested. *See Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*).

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 (or adjusted gross income for sole proprietorships) reflected on the petitioner's federal income tax return, without consideration of depreciation. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. [REDACTED] 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 [REDACTED] 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). The sole proprietors' yearly personal expenses total \$27,785.00 according to the evidence submitted.

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 is single. The tax returns reflect the following information:

	<u>1</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$ 22,773.00	\$ 16,920.00
Petitioner's gross receipts or sales (Schedule C)	\$268,631.00	\$236,552.00
Petitioner's wages paid (Schedule C)	\$ 39,905.00	\$ 48,510.00
Petitioner's net profit from business (Schedule C)	\$ 24,504.00	\$ 18,206.00
	<u>3</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040)	\$ 14,070.00	\$ 16,935.00
Petitioner's gross receipts or sales (Schedule C)	\$231,202.00	\$225,200.00
Petitioner's wages paid (Schedule C)	\$ 54,800.00	\$ 43,050.00
Petitioner's net profit from business (Schedule C)	\$ 12,868.00	\$ 18,223.00

In 1, 2002, 2003 and 2004, the sole proprietorship's adjusted gross incomes above stated do not cover the proffered wage of \$33,600.00 per year not including the payment of the petitioner's yearly personal expenses of \$22,758.00.

No credit for wages can be given for wages paid to the beneficiary since none were submitted. We note that the director specifically requested the Wage and Tax statements (W-2) in the request for evidence. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

³ 8 C.F.R. § 204.5(g)(2).

Counsel contends that the petitioner's basic business checking average monthly balance of \$6,780.00, presumably for the period 2001 to 2006 since how counsel reached that figure was not stated, is evidence of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank checking account for the years stated is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions).

Counsel has submitted unaudited financial statements (specifically unaudited financial statements entitled "Comparative Average Monthly Cash Balance" and "Statements of Cash Flow") as evidence of the petitioner's ability to pay the proffered wage. In an audit, in a generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. Also, in a cash flow statement the general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement in an audit present an analysis of the financial health of a business. No balance sheet or income statement was submitted. With important data withheld by petitioner or not disclosed by the accountant/attorney (the topical headings found in the statements are insufficient) and the accountant/attorney curtailed to produce only an unaudited report, the statements submitted can have little probative value in the determination of the ability to pay the proffered wage.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, the financials were prepared by [REDACTED] without the introduction of a curriculum vitae in the record. Therefore, the AAO has no means to determine if [REDACTED] is qualified to act as a financial analyst in these proceedings. Counsel has not qualified [REDACTED] as an expert. The attorney's qualifications to prepare and opine to the petitioner's financial condition were not presented by counsel. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The Beneficiary's Employment History and the Application for Alien Employment Certification

⁴ The AAO also notes that [REDACTED] e-mail transmitting the "Cash Flow Spreadsheet" was submitted into evidence substantially redacted.

On the Form ETA 750, signed by the beneficiary on March 28, 2001, the beneficiary did not claim to have worked for the petitioner. However, on the Form G-325 prepared and signed by the beneficiary found in the record of proceeding, the beneficiary stated she was employed by the petitioner from November 2000 to present time (i.e. March 25, 2005). The employment histories stated by the beneficiary in the labor certification and in the CIS Form G-325 are inconsistent. The alien by signing the "Declaration of Alien" under penalty according to 28 U.S. Code 1746 is liable for false statements in the Form ETA 750 B portion of the labor certification.

The beneficiary last entered the United States on November 12, 2000 according to the CIS Form I-94 Departure Record and the I-140 petition found in the record of proceeding. According to the beneficiary's letter of addendum to the labor certification dated April 7, 2003 submitted in response to a letter from the State of California Employment Development Department, the beneficiary stated that she was on vacation in the United States from November 2000 to April 2001. However as noted in the beneficiary's CIS Form G-325, the beneficiary has stated that she was actually employed by the petitioner commencing in November 2000 upon her arrival. We find the beneficiary's statements to be fraudulent and a misrepresentation of her employment experience. It is difficult to believe that, had the petitioner disclosed the above facts to the Department of Labor,⁵ that its adjudication would not have been affected.

There is evidence thus that the labor certification may have been secured by fraud or willful misrepresentation.⁶ However future proceedings must address this issue.

Further we find that the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

ORDER: The appeal will be dismissed.

⁵ The petitioner did not make the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process that she was in the petitioner's employ commencing November 2000 or to CIS that she was employed by the petitioner without authorization to work, since there is no such inclusion in the purportedly complete copy of the alien labor certification filing submitted to DOL or that the petitioner submitted to CIS with the petition. According to DOL precedent and regulations, 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). Here the petitioner has demonstrated by the evidence submitted that it already employed the beneficiary approximately six months before acceptance of the Form ETA 750, Application for Alien Employment Certification for processing.

⁶ The regulation at 20 C.F.R. § 656.30 (d) entitled "Validity and invalidation of labor certifications" states in pertinent part:

After issuance labor certifications are subject to invalidation by the INS [now CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application