

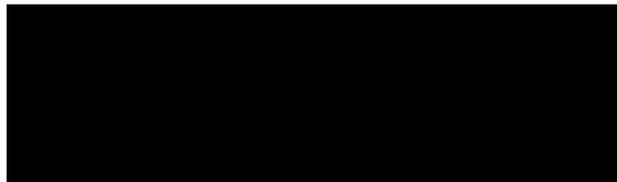
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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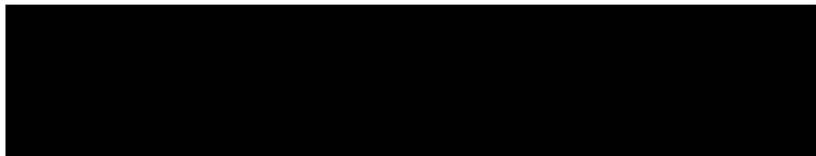
FILE: [Redacted]
SRC 06 218 51427

Office: TEXAS SERVICE CENTER Date: **APR 17 2008**

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

Kevin S. Poulos for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a fitness club. It seeks to employ the beneficiary permanently in the United States as a physical instructor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the United States Department of Labor (DOL), accompanied the petition. 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 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 29, 2007 denial, the primary issue in this case is whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition.

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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19,000 annually.

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 submitted on appeal includes counsel's brief, a report, dated November 1, 2006, from [REDACTED] CPA, a copy of a letter, dated September 12, 2006, from [REDACTED], Owner, of Train Like A Pro, LLC, a copy of a service agreement, dated September 6, 2001, between Washington Square Limited Partnership and [REDACTED], an individual, copies of letters from the beneficiary's clients, photographs of the Washington Square Fitness Club, and printed materials from the Train Like A Pro website and list of services. Other relevant evidence includes a copy of [REDACTED]'s 2001 and 2002 Forms 1040 including Schedule C, Profit or Loss from Business, copies of the Train Like A Pro's bank statements for 2003 through 2005, copies of the beneficiary's 2001 through 2005 Forms 1040, and copies of the beneficiary's 2001 through 2005 Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by an employer other than the petitioner. The record does not contain any other evidence relevant to the petitioner's 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that it employed the beneficiary in any relevant year. Therefore, the petitioner must establish its continuing ability to pay the entire proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns,

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).

rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner in the instant case is Washington Square Fitness Club. There is no regulatory-prescribed evidence in the record of proceeding to establish the petitioner's ability to pay the proffered wage of \$19,000.² Therefore, the petitioner has not established its continuing ability to pay the proffered wage from the priority date of April 30, 2001.

While the Form I-140, Immigrant Petition for Alien Worker, and the Form ETA 750 list the petitioner/employer as Washington Square Fitness Club, a letter in the record dated January 18, 2005 and addressed to DOL states:

With respect to the Corrections List, [REDACTED] has provided clarification regarding the employer's existence. Mr. [REDACTED] is the founder and CEO of "Train Like A Pro, LLC," located at 6103 Western Run Drive, Baltimore, MD 21209. Mr. [REDACTED] founded this organization in order to have the ability to manage a number of clubs, including Washington Square Fitness Club. This club is located at the address provided on form ETA 750A, 1050 Connecticut Avenue NW, Washington, DC 20031.

Enclosed please find the following documentation to confirm the existence of the employer:

- District of Columbia Certificate of Organization for Train Like A Pro, LLC;
- Articles of Organization for Train Like A Pro, LLC;
- Written consent to the District of Columbia for [REDACTED] to act as registered agent for Train Like A Pro, LLC;

² The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in a request for evidence dated August 10, 2006, the petitioner declined to provide copies of its tax returns for 2001 through 2005. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the Internal Revenue Service (IRS) and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

- Two year report for Foreign and Domestic Limited Liability Companies, listing Mr. [REDACTED] as Manager of the Washington Square Fitness Club, 1050 Connecticut Avenue, NW, Concourse Level, Washington, DC 20031.

The Form ETA 750 was approved and certified by DOL on July 19, 2005, after the date of the above letter. There were no visible corrections made by or certified by DOL on the Form ETA 750 and the Form I-140 petition names Washington Square Fitness Club as the petitioner. Therefore, we reject counsel's assertion that Train Like a Pro, LLC is the petitioner in the instant case simply because it manages the petitioner's business. However, for illustrative purposes, the AAO will review the continuing ability of Train Like A Pro, LLC³ to pay the proffered wage from the priority date of April 30, 2001.⁴

In determining the ability of Train Like A Pro, LLC to pay the proffered wage, CIS will first examine whether Train Like A Pro, LLC employed the beneficiary at the time the priority date was established. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary does not claim Train Like A Pro, LLC as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by Train Like A Pro, LLC on behalf of the beneficiary to show that it employed the beneficiary in any relevant year. Therefore, Train Like A Pro must establish its continuing ability to pay the entire proffered wage.

In 2001 and 2002, Train Like A Pro was organized as a sole proprietorship and in 2003, Train Like A Pro was organized as a limited liability company.⁵ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed in 2003 under the District of Columbia law, is considered to be a sole proprietorship for federal tax purposes.

A sole proprietorship is 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

³ There is no evidence in the record that Train Like A Pro uses the fictitious name of Washington Square Fitness Club. Therefore, the record does not demonstrate that Train Like A Pro, LLC and Washington Square Fitness Club are the same entity. Further, the petitioner has not established that Train Like A Pro, LLC is a successor-in-interest to the petitioner. This status requires documentary evidence that Train Like A Pro, LLC has assumed all of the rights, duties, and obligations of the petitioner. The fact that Train Like A Pro, LLC is doing business at the same location as the petitioner does not establish that Train Like A Pro is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁴ The lease agreement between Washington Square Limited Partnership and [REDACTED] lists the owner of the building at 1050 Connecticut Avenue, N.W., Washington, D.C. 20036 as the Lerner Corporation. The Washington Square Fitness Club is located in that building with Roger W. Brown listed only as "licensee."

⁵ The District of Columbia Certificate of Organization of Train Like A Pro, LLC indicates that the entity was not organized as a LLC until February 28, 2003, nearly two years after the priority date of April 30, 2001.

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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of one in 2001 and 2002. The sole proprietor's adjusted gross incomes in 2001 and 2002 were -\$1,621 and -\$1,686, respectively. The sole proprietor failed to list his monthly personal recurring expenses.⁶ The sole proprietor could not have paid the proffered wage of \$19,000 and his monthly recurring expenses from negative adjusted gross incomes in 2001 and 2002. In addition, Train Like A Pro failed to submit any tax returns for the years 2003, 2004, or 2005. Therefore, Train Like A Pro has not established its ability to pay the proffered wage of \$19,000 for any of the pertinent years, 2001 through 2005.⁷

The CPA's letter, dated November 1, 2006, claims that the petitioner is organized as an LLC in Washington, DC with [REDACTED] as the only member of the LLC. As such, the CPA asserts that the petitioner is classified as a Disregarded Entity that is taxed as a sole proprietor for tax purposes. The CPA also states:

Since these trainers typically set their own hours, have their own client base, manage their work flow and have a high degree of independence, they are treated as independent contractors. As a result, there are no quarterly 941 forms or W-2s or W-3 forms to be filed. A 1099-MISC form is required to be filed to report payments of \$600 or more to persons not treated as employees (e.g. independent contractors) for services performed in the trade or business.

I have looked at the bank statements of Train Like a Pro for the period of October 8, 2003 to January 9, 2006. Based on these statements, deposits of the business have increased from an average monthly deposit of \$3,704 in 2004 to an average monthly deposit of \$6,533 in 2005, or an increase of 76.4%.

Based on the projections in [REDACTED]'s September 12 letter and the significant increases in his business deposits from 2004 to 2005, it seems reasonable that [REDACTED] can pay the prevailing wage of \$19,000 to [the beneficiary]. Based on [REDACTED]'s very favorable service agreement with Washington Square Limited Partnership, the business has very few fixed expenses. As a

⁶ It is noted that the director also failed to request a list of the sole proprietor's personal monthly recurring expenses.

⁷ The record before the director closed on February 15, 2007 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. Therefore, Train Like A Pro's 2006 tax return would not have been available at that time.

result, the employment of [the beneficiary] could add very favorably to the revenues while adding proportionately less to the expenses.

The letter, dated September 12, 2006, from [REDACTED], states:

Prior to filing the labor certification application for [the beneficiary], I carefully considered the expenses associated with employing [the beneficiary] and the revenues that he could generate. I made these calculations based on [the beneficiary's] regular clientele base of 20+ clients at \$75.00 per hour, 3 times per week per client. [The beneficiary's] clients are extremely loyal as is confirmed by the attached letters from some of his clients. In the personal training industry, clients work out with their trainers at least twice a week and sometimes more frequently. Based upon these numbers, there is no doubt that I would have been able to pay [the beneficiary] \$19,000 per year from the outset. In fact, if only ten of [the beneficiary's] clients were to work out twice each week, he would bring in \$1,500 per week and more than \$60,000 per year. This far exceeds the prevailing wage that I am obligated to pay [the beneficiary].

On appeal, counsel claims that Train Like A Pro, LLC has established its ability to pay the proffered wage based on the loyalty of the beneficiary's past clients, based on Train Like A Pro's bank statements, based on Train Like A Pro's minimal expenses, and based on Train Like A Pro's continued operations. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (C.A. D.C. 1989), *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and *Matter of Ranchito Coletero*, 02-INA-105 (BALCA Jan. 8, 2004) (en banc) in support of her contentions.

It is noted that the checking account bank statements of Train Like a Pro are those for the business and not personal bank statements. Counsel's reliance on the balances in Train Like A Pro's checking accounts 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, a sole proprietor's business checking accounts are funds that are most likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis.⁸ Furthermore, Train Like a Pro has not submitted any bank statements for 2001 (the priority date) or 2002.

Counsel contends that the sole proprietor's minimal expenses should be considered when determining the petitioner's ability to pay the proffered wage of \$19,000. However, whether those expenses are minimal or not, they must still be considered, and negative adjusted gross incomes do not indicate that the petitioner had

⁸ It is noted that the bank statements provided by Train Like A Pro [REDACTED] do show a savings account for the period August 7, 2003 through May 6, 2004. While business checking account statements may only be utilized as part of a "totality of circumstances" analysis, a savings account may be considered when determining a sole proprietor's ability to pay the proffered wage. In the instant case, the savings account balances for the period August 7, 2003 through May 6, 2004 reflect balances ranging from a low of \$0 to a high of \$1,152.56 with an average monthly balance of \$139.26. These balances fall far short of the \$1,583.33 monthly balance needed to pay the proffered wage of \$19,000. In addition, these savings account balances represent only a ten-month period in part of 2003 and part of 2004. There is no evidence of a savings account for the years 2001, 2002, the remainder of 2003 and 2004, or 2005.

sufficient funds to pay the proffered wage and pay those expenses or the sole proprietor's own recurring monthly expenses.

Counsel asserts that the beneficiary's ability to generate income should be considered when determining the petitioner's ability to pay the proffered wage and cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2nd 898 (D.C. Cir. 1989), in support of her contention. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. This hypothesis cannot be concluded to outweigh the evidence presented in Train Like A Pro's tax returns.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the proposition that when the petitioner is a sole proprietorship, the sole proprietor's assets can be considered toward the ability to pay the proffered wage. However, counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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, BALCA 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). In addition, while CIS will consider the sole proprietor's assets in determining the petitioner's ability to pay the proffered wage, those assets must also be offset by the sole proprietor's expenses or liabilities. In the instant case, the petitioner has not provided any evidence of the sole proprietor's assets or expenses.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner, Washington Square Fitness Club, has provided no evidence relevant to its financial ability to pay the proffered wage. Train Like A Pro has provided tax returns for the years 2001 and 2002, neither of which establishes the sole proprietor's ability to pay the proffered wage and to support himself. In addition, these two tax returns are not enough evidence to

establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. Furthermore, the record of proceeding does not contain any evidence of how Train Like A Pro earns its income, for example, through management fees paid by the petitioner.⁹

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date of April 30, 2001.¹⁰

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the beneficiary will be employed as an independent contractor. 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 at 20 C.F.R. § 656.3 states in pertinent part:

Employer means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

Employment means permanent, full-time work by an employee for an employer other than oneself. . . In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

Both the letter from the CPA, dated November 1, 2006, and counsel's brief state that "most of the trainers have an independent client base and are in fact treated as independent contractors. As such, the petitioner has

⁹ While [REDACTED] claims that Train Like A Pro, LLC was established to manage several fitness clubs, there is no evidence in the record of proceeding that corroborates this claim. 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)).

¹⁰ It is noted that a review of public records at <http://mblr.dc.gov/corp/lookup/status.asp?id=210424>, accessed on April 10, 2008, reveals that the limited liability company status of Train Like A Pro, LLC was revoked in the District of Columbia on November 8, 2004. Therefore, Train Like a Pro, LLC was not an active limited liability company at the time the petition was filed in 2006. The petitioner has provided no evidence of its current entity status.

few direct expenses related to them.” Therefore, it does not appear that under the present circumstances, the petitioner would be the actual employer of the beneficiary as defined in the regulation at 20 C.F.R. § 656.3, but would more accurately have an independent contractor relationship with the beneficiary.

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.