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U.S. Citizenship
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FILE:

WAC 06 800 04785

Office: TEXAS SERVICE CENTER

Date:

JUL 01 2008

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a board and care manager (residence supervisor) of the facility. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. In her October 5, 2006 decision, the director described the analysis of how to determine whether a corporation has the ability to pay a proffered wage based on its net income and net current assets. The director then identified the petitioner as a sole proprietor and noted that the petitioner's household expenses must be considered in determining a sole proprietor's ability to pay a proffered wage. The director then determined that the petitioner did not have the ability to pay the proffered wage, and denied 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 October 5, 2006 decision, the primary issue in this case is whether or not the petitioner, as a sole proprietorship, has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$1,422.72 per month (\$17,312.64 per year). The Form ETA 750 states that the position requires no college degree, no training, and either two years of work experience in the proffered position or two years of

work experience as a manager in any field. Section 14, of the ETA Form 750, Part A, noted that the work schedule is 2:00 PM to 11:00 PM with Mondays and Tuesdays off.¹

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.² On appeal counsel submits a brief and the following additional documentation:

The petitioner's loan statements from World Savings, and Countrywide Home Loans for the months January to December 2004, 2005, and 2006;³

A document entitled "Declaration of New Construction Newly Constructed or Major Remodel of Single Family Dwelling" for the petitioner's Dawson Drive property dated November 11, 2005 that indicated the total cost of planned improvements to the property totaled \$181,280;

The petitioner's mortgage account statements from GMAC Mortgage, dated August 2002 to May 2003; and

Deeds of Trust between the petitioner and Accubanc Mortgage Corporation, filed February 11, 1997 with the San Diego County Recorder's Office with regard to the petitioner's property at [REDACTED], San Diego; and

Documents of Titles and/or loan applications on the petitioner's two properties.

Other relevant evidence in the record includes the sole proprietor's IRS Forms 1040 for tax years 1998 to 2005, with accompanying Schedules C; a list of the petitioner's monthly and yearly household expenses for tax years 1998 to 2004;⁴ a statement of estimated monthly Household Family Expenses for tax year 2005 that totaled \$89,580; and a document entitled Personal Balance Sheet that examines the petitioner's assets for tax years 1998 to 2005. In this document the petitioner itemized cash in bank from the Great American Credit Union for checking and savings accounts, as well as personal furniture, fixtures, personal computers, and

¹ The occupational code and title identified by the U.S. Department of Labor on the ETA Form 750, Part A are 187.167-186, Residence Supervisor.

² 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).

³ The World Savings loan pertains to the sole proprietor's property at [REDACTED], Chula Vista, California, while the World Savings loan pertains to the sole proprietor's property at 4224 Emet Court, San Diego, California.

⁴ The petitioner's yearly household expenses for these tax years are identified as \$18,840 in 1998; \$36,120 in 1999; \$37,800 in 2000; \$38,760 in 2001; \$80,640 in 2002; \$81,840 in 2003; and \$84,360 in 2004.

vehicles. The record also contains a document that lists the petitioner's adjusted gross income and assets for the same tax years, the petitioner's equity from real estate and the petitioner's expenses for tax years 1998 to 2005. Finally the record contains a copy of the beneficiary's W-2 Form Wage and Tax Statement for tax year 2005 that indicates the petitioner paid the beneficiary \$3,920 in tax year 2005.⁵ The record also contains a Form DE-7 for the final quarter of tax year 2005 that indicated total wages paid by the petitioner for the 2005 tax year were \$3,920. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the I-290B appeal form, counsel states that the director committed a reversible error in disregarding or omitting discussion of the petitioner's assets, namely the petitioner's equity in two properties, which could be easily converted to cash within twelve months. Counsel further asserts that the director failed to analyze the petitioner's personal balance sheet in her decision as to whether the petitioner had the ability to pay the proffered wage. In his brief, counsel states that as a sole proprietorship, the petitioner's assets should have been considered in determining whether the petitioner had the ability to pay the proffered wage. Counsel cites *Matter of Ranchito Coletero*, 02-INA-105 (Board of Alien Labor Certification Appeals (BALCA) Jan. 8, 2004).

Counsel then examines the petitioner's adjusted gross income, household expenses, and the petitioner's personal assets for each relevant tax year in question, namely 1998 to 2005. Counsel notes that for each year the director did not mention or discuss the petitioner's personal assets in her analysis of the sole proprietor's ability to pay the proffered wage. Counsel notes that in each relevant year, the sole proprietor's personal assets exceeded the proffered wage, and yet the director did not examine or mention the sole proprietor's personal assets. Counsel also notes that the petitioner's household yearly expenses were erroneously stated initially by the petitioner. Counsel states that the petitioner's \$500 monthly payment for the home equity line of credit was already included in the petitioner's housing expenses/mortgages, and that the petitioner's expenses should be \$83,580 for tax year 2005. Counsel finally notes that the director did not mention or discuss why the petitioner's two real estate properties, purchased in February 1997 and July 2002, were excluded as a factor in determining the sole proprietor's ability to pay the proffered wage.

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 on April 1, 1997; and to currently employ one employee. On the Form ETA 750B, signed by the beneficiary on January 9, 1998, 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.

⁵ In an earlier I-140 petition filed by the petitioner for the beneficiary (WAC 03-164-53044), in response to the Texas Service Center director's request for further evidence dated November 3, 2005, current counsel stated that the beneficiary was not paid by the petitioner until October 2005, and that from 1997 to October 2005, the beneficiary did volunteer work for the petitioner. The record contains a Form G-325A submitted with the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status, signed by the beneficiary on February 23, 2006. In the document, the beneficiary indicates that she worked as a caregiver for the petitioner at [REDACTED], San Diego, California, from June 1997 until the time she signed the G-325A.

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 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 a W-2 Wage and Tax Statement for tax year 2005 that established the petitioner paid the beneficiary \$3,920, in tax year 2005. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 1998 priority date onwards. The petitioner has to establish its ability to pay the entire proffered wage of \$17,312.64 in tax years 1998 to 2004, and the its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2005.

The director in her decision explained the analysis used to examine a corporate petitioner's net income and net current assets in determining whether a petitioner had the ability to pay the proffered wage, although she did not explain whether the instant petitioner actually met the analysis provided in her decision. The AAO notes that the petitioner is a sole proprietor, and thus only its adjusted gross income will be examined in these proceedings.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of four individuals in tax years 1998 to 2000, and then a family of five individuals from 2001 to 2005. The tax returns reflect the following information for the following years:

	1998	1999	2000
Proprietor's adjusted gross income (Form 1040)	\$ 10,475	\$ 27,423	\$ 30,602
Petitioner's gross receipts or sales (Schedule C)	\$ 42,669	\$ 85,445	\$ 95,748
Petitioner's wages paid (Schedule C)	\$ 0	\$ 10,695	\$ 20,400
Petitioner's net profit from business (Schedule C)	\$ -3,425	\$ 1,381	\$ -12,328

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	\$ 11,018	\$ 62,316	\$ 65,843
Petitioner's gross receipts or sales (Schedule C)	\$ 97,146	\$ 132,765	\$ 151,750
Petitioner's wages paid (Schedule C)	\$ 14,420	\$ 12,000	\$ 12,000
Petitioner's net profit from business (Schedule C)	\$ -20,327	\$ 20,085	\$ 30,366

	2004	2005
Proprietor's adjusted gross income (Form 1040)	\$ 21,932	\$ 14,025
Petitioner's gross receipts or sales (Schedule C)	\$ 109,250	\$ 135,376
Petitioner's wages paid (Schedule C)	\$ 0	\$ 3,920
Petitioner's net profit from business (Schedule C)	\$ 11,146	\$ 15,527

In the priority year of 1998 and 2001, the petitioner did not have sufficient adjusted gross income to pay the proffered wage. In tax years 1999, 2000, and 2002 to 2005, the petitioner did have sufficient adjusted gross income to either pay the entire proffered wage or the difference between the beneficiary's wages of \$3,920 in tax year 2005 and the proffered wage. However, the sole proprietor also has to establish that he or she can both pay the proffered wage and pay his or her yearly household expenses as of the 1998 priority year and through tax year 2005.

As stated previously, the petitioner submitted estimated yearly expenses for the priority year 1998 and for tax years 1999 to 2005. As previously stated, the petitioner's yearly household expenses for these tax years are identified as \$18,840 in 1998; \$36,120 in 1999; \$37,800 in 2000; \$38,760 in 2001; \$80,640 in 2002; \$81,840 in 2003; and \$84,360 in 2004. For tax year 2005, the petitioner has total yearly expenses of \$89,580.⁶

⁶ Although counsel on appeal states that the petitioner's yearly expenses for 2005 are \$83,580, rather than \$89,580, based on the double reporting of a \$500 home equity loan payment, the AAO notes that based on the loan statements from Countrywide Loans and World Savings, as of January 2005, the petitioner paid a monthly combined amount of \$4,535.58 for these two loans which appear to be the financing of the two real estate properties. The AAO is not clear as to what documentation counsel refers with regard to the additional \$500 home equity loan payment. However, the loan documentation submitted to the record on appeal suggests an underreporting of actual mortgage expenses by a factor of \$936. For purposes of these proceedings, the AAO will use the original estimated figures submitted in response to the director's request for further evidence.

With regard to the 1998 priority year, if the petitioner's yearly household expenses are considered prior to paying the proffered wage, the sole proprietor would have negative adjusted gross income of -\$8,365 available to pay the proffered wage. With regard to the remaining relevant tax years of 1999 to 2005, the petitioner would have the following negative adjusted gross incomes after subtracting the petitioner's yearly household expenses: -\$8,697 in 1999; -\$7,298 in 2000; -\$27,652 in 2001; -\$18,324 in 2002; -\$15,997 in 2003, -\$62,428 in 2004, and -\$75,555 in 2005. Therefore the petitioner cannot establish its ability to pay the proffered wage and its household expenses based on its adjusted gross income.

On appeal, counsel asserts that the director should have considered the petitioner's assets as identified on the petitioner's Statement of Assets for years 1998 to 2005 in her analysis of the petitioner's ability to pay the proffered wage. While a sole proprietor's additional assets should be considered in the analysis of the ability to pay a proffered wage, such assets usually consist of savings accounts, money market accounts, certificates of deposits, or other similar accounts. Such assets should be considered to be immediately available for the sole proprietor to pay the proffered wage and/or personal expenses. Counsel's assertions that the sole proprietor's personal assets such as automobiles, computers, or household appliances should be considered as a source of additional financial resources with which to pay the sole proprietor's expenses as well as the proffered wage is not persuasive. Such assets are not viewed as additional assets that can easily be available to pay additional expenses.

Counsel further asserts that the equity that the petitioner has in its two real estate properties should be considered as additional financial resources to be utilized to pay the proffered wage because such properties could be sold within twelve months. Again, counsel's assertions are not persuasive. First, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). The record contains no evidence that the sole proprietor would be willing or able to sell off either real estate property to establish its ability to pay the proffered wage. Second, the AAO does not view petitioner's real estate holdings as easily liquifiable assets, such as money market funds, investment accounts, and similar financial instruments. The AAO notes that the record contains no current appraisals of the two properties. Thus, there is no evidence in the record that the current value of the properties exceed the petitioner's mortgages. Further, one of the petitioner's properties serves as the location for the petitioner's residential care facility, and no evidence exists in the record that the petitioner would sell or encumber this business real estate. The AAO notes that the petitioner has refinanced its personal residence twice and has a home equity line of credit. The record contains no evidence that the petitioner would sell its personal residence (where the petitioner, spouse and three children live), or could further encumber the property to pay the proffered wage.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the sole proprietor's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset.

However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.

Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Therefore, from the date the Form ETA 750 was accepted by the Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income.

Beyond the decision of the director, in the denial of the first I-140 petition submitted by the petitioner for the beneficiary, the director stated that the beneficiary had not met the minimum requirements with regard to the proffered position at the time the Form ETA 750 was filed. In the current denial of the instant petition, the director does not comment on this issue. The AAO will further examine this issue in these proceedings.

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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School C
 - High School C
 - College 0
 - College Degree Required n/a
 - Major Field of Study n/a

The applicant must also have 2 years of experience in the job offered, or two years of work experience as a manager in any field. The duties of the position as delineated at Item 13 of the Form ETA 750A are as follows:

Assist the administrator of 24 hr a day board and care facility. Will supervise and coordinate the activities of personnel providing care to elderly residents. Hire, supervise, and train new personnel. Oversee services provided to residents such as social activities, scheduling of and transportation to medical appointments, administration of medication, personal hygiene and nutrition to ensure and residents' wellbeing. Coordinate and arrange of resident's medical needs and treatment according to physician's specifications. Provide information to family members regarding residents' condition and progress.. Responsible for security and hygienic conditions of facility, planning of menus, keeping inventory and requisition of supplies. Respond in emergencies as necessary.

Item 15 of Form ETA 750A reflects the following special requirements: "Work schedule: 2:00 P.M.- 11:00 P.M. Mon and Tuesday off." Part A of the Form ETA 750 also indicates that the beneficiary would supervise two other employees and report to the administrator.

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 Section 11, she indicated that she attended Mabini College, a high school in the Philippines from June 1961 to March 1965 and completed her studies. She also indicates that she attended Feati University, the Philippines, studying commerce from June 1965 to March 1969, and did not complete a degree. On Part 15, eliciting information of the beneficiary's work experience, she represented that she worked from September 1993 to August 1996 as a branch manager for Nutricare America of Philippines, a company distributing herbal products, with the following duties

Direct production, distribution and marketing operations for branch plant. Coordinate production, distribution and sales in accordance with policies, principles and procedures. Confer with customers and representatives of associated industries to evaluate and promote improved services. Review production costs and product quality. Plan and direct sales program, and field services. Recommend budgets to management.

The regulation at 8 C.F.R. § 204.5(l)(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 petitioner also submitted a letter of work verification from the Nutricare America of Philippines company dated August 30, 1996. In the letter, [REDACTED], President, stated that the beneficiary had worked with the company from August 16, 1994 to August 30, 1996. On November 3, 2005, the director of the California Service Center requested further evidence with regard to the beneficiary's work experience, requesting more details as to the beneficiary's title, duties, and dates of employment including the number of hours worked per week. In response, the petitioner submitted a second letter from Nutricare America of Philippines that stated the company is an official distributor of herbal products of Nutri-Care America. The letter signed by both [REDACTED] Chairman, and [REDACTED], President, stated that the beneficiary worked as a fulltime manager from September 1993 to August 1996, and she was responsible for directing production, distribution and marketing operations for a branch plant. The letter also noted that the beneficiary also coordinated her work in accordance with policies, principles, and procedures. The letter writers also note that the beneficiary's duties included conferring with customers and representatives of associated industries to evaluate and promote improved services, to review production costs and product quality, to plan and direct sales, sales program and field services, and finally to recommend budgets to management.

While the letter from the officers of Nutri-Care America establishes the beneficiary's two years of work experience as a manager in any field, the petitioner has not established that the beneficiary will be supervising two employees as set forth on the ETA 750. The initial I-140 petition submitted to the record in 2006 indicated that the petitioner had one employee. The sole proprietor's Schedule C for tax year 2005 indicates that wages of \$3,920 were paid, while the beneficiary's W-2 Form indicates that she received \$3,920 in wages during the same year. Thus the record indicates that as of tax year 2005, the beneficiary was the sole proprietor's only employee. Thus, the AAO does not find the job offer to be bona fide.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.