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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: WAC-05-144-53708 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2007

In re: Petitioner: [redacted]
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:

[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 Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is in the business of training thoroughbred race horses, and seeks to employ the beneficiary permanently in the United States as a barn boss ("Foreperson"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's denial, the case was denied on November 30, 2005 based on the petitioner's failure to demonstrate that the beneficiary met the requirements of the certified ETA 750.

The AAO takes a *de novo* look at issues raised in the revocation 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.[1]

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on February 9, 1996.[2] The proffered wage as stated on the Form ETA 750 is $370 per week, which is

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[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).

[2] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The Kooritzky decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

equivalent to $19,240 per year based on a 40-hour work week. The Form ETA 750 was certified on June 14, 2000,[3] and the petitioner filed the I-140 on the beneficiary's behalf on April 25, 2005. The petitioner represented the following information on the I-140 Petition related to the petitioning entity: date established: 1997; gross annual income: "please see attached;" net annual income: "documents;" and current number of employees: 5-6.

The director issued a Request for Evidence ("RFE") on July 29, 2005 requesting that the petitioner provide: evidence that the beneficiary met the requirements of the certified ETA 750, and to submit evidence of the petitioner's ability to pay in the form of federal tax returns, annual reports, or audited financial statements. The petitioner responded. The director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary had the required three years of experience in the related occupation as set forth in the certified Form ETA 750, and further that the beneficiary did not have the license required. The petitioner appealed and the matter is now before the AAO.

First, we will examine the evidence submitted to document the beneficiary's qualifications, and then address counsel's additional arguments. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). 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 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).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a Foreperson, or three years in the related occupation as a Thoroughbred Race Horse Groom, or Ex-Rider with job duties including:

> Accompanies horses to race track or other places as needed. Responsible for the safety of the horses and nearby workers. **Supervises all employees when trainer not at barn. Has responsibility of teaching new employees' job duties.** Generally supervises barn area. Opportunity to earn winnings bonus in addition to the guaranteed wage. Housing available.

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[3] Based on 8 C.F.R. § 204.5(l)(3) a petitioner is required to file with "an individual labor certification from the Department of Labor" by submitting an original certified Form ETA 750. Counsel in the present case indicated that the original labor certification was contained in a prior filing on behalf of a different beneficiary, and that the prior petition was denied. Counsel filed the instant petition with a copy of Form ETA 750.

> May groom one or two of the best horses; administers medicine; directs grooms in job duties, i.e. cleaning and maintaining track, general care of horses, accompanies horses to track.

The petitioner listed no educational requirements beyond grade school, and listed special requirements for the position in Section 15 as: "split shift required because of training and racing schedules" and "C.H.R.B. will require license as a foreman."

On the Form ETA 750B, the beneficiary listed his prior experience as: (1) [redacted] from April 2005 to present (signed on February 18, 2005), [redacted] (2) [redacted] from March 2005 to April 2005, [redacted] Groom; and (3) [redacted] March 2004 to March 2005, Laborer; (4) [redacted] Bonsall, CA, March 2000 to February 2004, [redacted] (5) [redacted] January 1999 to February 1999, [redacted] (7) [redacted] January 1993 to December 1994, [redacted] July 1990 to November 1992, [redacted] and (9) [redacted], Michoacan, Mexico, May 1987 to June 1990, [redacted]

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (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.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letters:

> 1. Letter from [redacted] Bonsall, CA, dated April 2, 2005,
> Dates of employment: July 1990 to November 1992, forty hours per week at San Luis Rey Downs Race Track
> Title: Thoroughbred Racehorse Groom
> Job duties: responsible for maintenance of stalls and tack; responsible for disinfecting stalls and bedding; cleaned, brushed, and trimmed the horses and administered medicine as needed; responsible for the inspection and observation of horse's physical condition.

In the director's decision, he noted that the letter provided does not demonstrate that the beneficiary had the required three years of experience in the related occupation as a Thoroughbred Racehorse Groom. Further,

the petitioner failed to demonstrate that the beneficiary had a California State Horse Racing Board license as a Foreman as required by the certified Form ETA 750.

On appeal, counsel contends that the Form ETA 750B documents that the beneficiary has been working with horses since 1990.

The regulation at 8 C.F.R. § 204.5(l)(3) requires that the experience be verified. Stating the beneficiary's experience on Form ETA 750B alone is insufficient. 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. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

On appeal, the petitioner provided an additional letter to document the beneficiary's experience:

> 2. Letter from [redacted], Rancho Santa Fe, CA, dated December 14, 2005,
> Dates of employment: "the [beneficiary] worked for my stables . . . at San Luis Rey Downs Race Track in Bonsall, CA from December 1994 to December 1995," forty hours per week
> Title: Thoroughbred Racehorse Groom
> Job duties: responsible for maintenance of stalls and tack; responsible for disinfecting stalls and bedding; cleaned, brushed, and trimmed the horses and administered medicine as needed; responsible for the inspection and observation of horse's physical condition.

The petitioner additionally submitted a letter regarding the beneficiary's licensing:

> 3. Letter from [redacted], Licensing Supervisor, California Horse Racing Board, Arcadia, California.
> The letter provided: "[The beneficiary] is currently licensed with the California Horse Racing Board in the capacity of a Thoroughbred Groom. [The beneficiary] has had a Groom license with the California Horse Racing Board since August 21, 1992. His license . . . is in good standing."

While the letter from [redacted], in combination with the letter from [redacted] would provide that the beneficiary had the required three years of experience as a Thoroughbred Racehorse Groom, we note that the dates verified in the letter from [redacted] do not match the dates listed for the beneficiary's employment with [redacted] on the beneficiary's Form ETA 750B. On the Form ETA 750B, the beneficiary lists that he was employed with [redacted], from March 1989[4] to February 2000, as a Thoroughbred Racehorse Groom. The letter submitted in contrast provides that he only worked for [redacted] for a one year time period, December 1994 to December 1995, and the dates listed are significantly different than those listed on Form ETA 750B. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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[4] It is unclear whether 1989 would be a typo, or whether the beneficiary worked for Neil French Racing Stables continuously, and worked for additional employers as well during this time period.

Next, regarding the license, the certified Form ETA 750 states that, "C.H.R.B. will require license as a foreman." Counsel contends that the license is a "future requirement," that the license will be required once the beneficiary receives the job. Further, counsel provided a letter from the California Horse Race Board ("C.H.R.B.") that the beneficiary has been licensed as a groom.

As the requirement stated is for a license as a foreman, the beneficiary needs to have a foreman's license for the position. The letter submitted, which evidences that the beneficiary is licensed as a groom, would be insufficient for this requirement. Even if the license was a future requirement, the petitioner has not shown that the beneficiary is eligible to obtain a license, what the requirements are for a foreman's license, or that the beneficiary would be able to obtain the foreman's license for the position. Based on the C.H.R.B. website, (http://www.chrb.ca.gov/query rules and regulations database.asp, accessed on April 20, 2007), a Stable Foreman's license is separate than that of a Groom or Stable Employee.[5]

Based on the evidence provided on appeal, we would not conclude that the petitioner has demonstrated that the beneficiary meets the requirements of the certified ETA 750. Accordingly, the petitioner has failed to overcome this basis for denial.

Additionally, although not raised in the director's denial, we find that the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 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).

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[5] A review of the website demonstrates that the beneficiary continues to be licensed as a Groom, Stable Employee through May 2007. http://chrb.ca.gov/search licenses by number.asp.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on April 22, 2005, the beneficiary listed that he has been employed with the petitioner from April 2005 to the present (date of signature). The petitioner provided wage print outs to evidence payments to the beneficiary for the following dates and amounts: April 16, 2005 to April 30, 2005, in the amount of $540; May 1, 2005 to May 15, 2005, in the amount of $720; June 1, 2005 to June 15, 2005, in the amount of $600; July 16, 2005 to July 31, 2005 in the amount of $660; and August 1, 2005 to August 15, 2005, in the amount of $600. The petitioner additionally submitted a wage print out to show that the beneficiary was paid $3,140 for the overall time period of January 1, 2005 to June 30, 2005.

While the foregoing would demonstrate partial wages paid to the beneficiary in the year 2005, the petitioner must demonstrate that it can pay the beneficiary $19,240 from February 9, 1996 to the present. Based on the foregoing, the petitioner cannot establish its ability to pay the proffered wage on wages paid to the beneficiary alone. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and the proffered wage in 2005, and that it can pay the full proffered wage in the years 1996 to 2004.

We note that in the petitioner's response to the RFE, the petitioner submitted evidence of wage payment and counsel cited to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary. Counsel contends that the petitioner is now employing the beneficiary and, therefore, can demonstrate its ability to pay. Although the petitioner may now be employing and paying the beneficiary the proffered wage, the May 4 Yates Memo does not negate the petitioner's regulatory requirement to show that it can pay the beneficiary the proffered wage from the priority date of February 1996 to the time that the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The record of proceeding does not reflect that the petitioner has demonstrated this.

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. 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 appears to be formed as a sole proprietor, 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 for the years 2000, 2001, 2002, and 2003 supported himself, and resided in Bonsall, CA. For the year 1999, he supported himself, a spouse and three children. In the years, 1996, 1997 and 1998, he supported himself, a spouse and four children. The tax returns reflect the following information for the following years:

Petitioner	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2003[6]	$82,998			
2002	$17,173			
2001	$732			
2000	$49,004	$321,825	$54,033	$52,903
1999	$66,946	$363,514	$39,648	$72,594
1998	$60,394	$312,350	$42,055	$71,710
1997	$77,352			
1996	$44,831			

If we reduced the sole proprietor's adjusted gross income (AGI) by $19,240, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with an adjusted gross income of: 2003: $63,758; 2002: -$2,067; 2001: -$18,508; 2000: $29,764; 1999: $47,706; 1998: $41,154; 1997: $58,112; 1996: $25,591.

Based on the foregoing, the sole proprietor would be left with negative income in 2001 and 2002 to support himself. In the other years, we have no information regarding the sole proprietor's personal expenses and cannot determine whether he could support himself and his family on the remaining wages. Additionally, we note that the petitioner sponsored a second beneficiary with a priority date of January 14, 1998, so that in the year 1998, until the second beneficiary obtained permanent residence, the petitioner would need to demonstrate its ability to pay both beneficiaries. Based on the evidence above, it is unlikely that the petitioner could demonstrate its ability to pay one beneficiary, and most likely not two beneficiaries. The petition should have been denied on this basis as well.

Based on the foregoing, the petitioner has failed to demonstrate that the beneficiary met the requirements as listed on the certified Form ETA 750. Further, the petitioner failed to demonstrate its ability to pay the proffered wage. Accordingly, the petition will be denied for the above stated reasons, with each considered as

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[6] The sole proprietor provided tax transcripts rather than individual filed Forms 1040 with accompanying Schedule Cs. The tax transcripts did not contain Schedule C print outs for all of the above years.

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.