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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 11 2007**
WAC-02-138-50778

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, California Service Center. Based on a report of investigation conducted by the American Consulate General in Mumbai, India, the director subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain revoked.

The petitioner is an Indian sweets, snacks and catering establishment. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (Indian specialty cook). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not submitted sufficient evidence in rebuttal to the NOIR and had not overcome the grounds for revocation. The director revoked the approval of 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 2, 2005 NOR, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining the beneficiary's two years of employment experience in the proffered position prior to the priority date.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 13, 2001.

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 appeal¹.

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

On appeal, counsel submits a brief, a physical handicapped certificate for [REDACTED], a birth certificate of [REDACTED] an affidavit of [REDACTED] dated December 26, 2005 [REDACTED] December 26, 2005 letter) and copies of the statement from [REDACTED] with attachments submitted in response to the director's NOIR. Other relevant evidence in the record includes a certificate of employment dated January 12, 2001 from [REDACTED] January 12, 2001 letter), an experience letter dated July 28, 2002 from Ashvin Patel, the president of the petitioner (the petitioner's July 28, 2002 letter), a statement of the beneficiary dated July 19, 2005, affidavit of [REDACTED] a dated July 13, 2005 [REDACTED] July 13, 2005 letter), and a letter dated July 16, 2005 from the petitioner (the petitioner's July 16, 2005 letter) with paystubs for a period from July 1992 to March 1993. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director has erred in rendering his decision that the beneficiary does not have the required experience and that the petitioner has submitted credible evidence showing that the beneficiary was employed with [REDACTED].

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion 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 Indian specialty cook. Item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------------|---------|
| 14. | Experience | |
| | Job Offered | 2 years |
| | Related Occupation | Blank |

The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has been working 40 hours per week as a "Cook,

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).

Indian Specialty” for the petitioner from May 1992 to the present, i.e. March 6, 2001 when the form was signed. Her job duties were exactly same as the duties described at Item 13 of the Form ETA 750A for the proffered position. The beneficiary also represented that she worked 40 hours per week as a “Cook, Indian Specialty” for ██████████ in Dakor, India from March 1985 to December 1987 to cook Indian sweets, such as ██████████, etc. and supervise 5 to 6 employees. She did not provide any additional information concerning her employment background on that form.

The director’s NOIR stated that “[t]he petition was forwarded to the United States Consulate in Mumbai for an investigation of the experience gained at ██████████. The U.S. Consulate learned that the beneficiary never worked for the foreign company – ██████████. The foreign company is owned by Jayantikaben. The beneficiary is the owner’s aunt’s son’s wife (or the owner’s cousin’s brother’s wife).” The record of proceeding contains an investigation report from the United States Consulate General in Mumbai, India. The report shows that the US Consulate in Mumbai conducted the investigation by phone, and that the investigator called the telephone number provided as the business’ number and talked to the son of the owner of the business, ██████████. There is no evidence showing that the son of the owner is the representative of the company who is authorized to speak on behalf of the company, who is familiar with or able to access the company’s personnel records or who provided the experience letter. The investigation report quoted by the director in his NOIR is solely based on the telephone conversation between an investigating officer and the son of the owner, ██████████ who was born on April 20, 1986². It is most unlikely that any statement from this person about facts that occurred in the period from March 1985 to December 1987, before he was born or when he was one year old, is reliable. In addition, there is no solid evidence in the record or statements in the investigation report to support the director’s quotation that the foreign company is owned by ██████████.

The consulate investigation report also indicated that ██████████ helped the beneficiary to obtain lawful permanent residence because the beneficiary is the owner’s cousin’s wife. However, the beneficiary is not prohibited from using her experience to meet the requirements set forth on the Form ETA 750. Furthermore, as previously discussed, the investigator did not find any evidence to suspect that the experience letter provided by ██████████ for the beneficiary is fraudulent.

Therefore, the consulate investigation report cannot be given any evidentiary weight in the proceedings and thus, the AAO will not consider the consulate investigation report in determining whether the director had good and sufficient cause to revoke the approval of the instant petition.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval.

² The Birth Certificate issued by Government of Gujarat Public Health Department for ██████████ located in the record, indicates his birth date.

³ The evidence in the record shows that the father of ██████████ and the owner of ██████████ instead of ██████████

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988). The AAO finds that the director had good and sufficient cause to revoke the approval of this petition without considering the consulate investigation report.

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 [redacted] occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(1) also states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record of proceeding contains three letters from [redacted] pertinent to the beneficiary's alleged employment with [redacted] for the period from March 1985 to December 1987: the [redacted] January 12, 2001 letter, the [redacted] July 13, 2005 letter and the [redacted] December 26, 2005 letter. The [redacted] January 12, 2001 letter is on the business letterhead and signed by [redacted] as the owner. This letter can be properly accepted as an experience letter from a former employer as required by the above quoted regulation. The letter states in pertinent part that:

This letter is to certify that [the beneficiary] was employed at our business at Sukhadia Sweet Mart from 1st March 1985 to 29th December 1987.

... ..

She was working in our cooking area (kitchen) as a cook for India specialty sweets like [redacted], [redacted] etc. and spicy Snacks like [redacted], etc. Her position was Head cook and under her supervision 5 to 6 employees working in kitchen.

The letter verifies that the beneficiary worked as a head cook in Indian specialty sweets and snacks for

two years and ten months from March 1985 to December 1987 and includes a description of the duties performed by the beneficiary. However, the letter did not verify the beneficiary's full-time employment. In addition, it is not clear whether the duties the beneficiary performed at [REDACTED] qualify her to perform the duties described at Item 13 of the Form ETA 750A since she did not have experience to plan menus and to cook foreign-style dishes, dinners, desserts, and other foods other than sweets and snacks. Therefore, the [REDACTED] January 12, 2001 letter cannot be considered as primary evidence to establish the beneficiary's requisite two years of experience in the job offered even without considering the results of overseas investigation.

The [REDACTED] July 13, 2005 letter was submitted as part of the response to the director's NOIR in the form of a notarized affidavit. Concerning the beneficiary's employment with [REDACTED], the letter states that:

5. That [the beneficiary] was employed with us from March 1985 to December 1987.
... ..
7. That during her employment with us she was paid Rs 300/-per month. Her salary was paid in cash. At that time, we use to maintain a register wherein we obtained her signature at the time of payment. However, since it has been over 20 years, it is impossible for us to obtain the register at the present stage.
10. That [the beneficiary] was working as a cook preparing Indian specially[sic] sweets like [REDACTED] etc., and spicy Snacks like [REDACTED], etc. with us at [REDACTED]. Her position was head cook and had 5 to 6 employees working in kitchen under her supervision.

The [REDACTED] July 13, 2005 letter includes the exactly same description of the duties performed by the beneficiary as described in the [REDACTED] January 12, 2001 letter. Therefore, it did not establish that the beneficiary is qualified to perform the duties described at Item 13 of the Form ETA 750A. Again, in his second letter, [REDACTED] did not verify the beneficiary's full-time employment. Although this second letter states that the beneficiary was paid at the level of Rs 300 per month, the letter did not indicate whether the salary was for her full-time employment or part-time employment and nor there is any evidence showing the normal standard of monthly salary for a full-time head cook position. Therefore, with the [REDACTED] July 13, 2005 letter, the petitioner still cannot establish the beneficiary's requisite two years of experience as an Indian specialty cook prior to the priority date to qualify her to perform the duties on the Form ETA 750A.

The [REDACTED] December 26, 2005 letter was submitted as part of the additional evidence on appeal in the form of notarized affidavit. Concerning the beneficiary's employment with S [REDACTED] the letter states that:

9. That in the letter originally provided to verify [the beneficiary] I have stated that she worked as a Head Cook. Usually as a head cook it is normal and customary to "Plan menus and cook different dishes. Also, as a head cook you direct and portions and

garnish food.” Mu[sic]-understanding is that once you mention Head Cook you do not have to specifically mention all of her duties. I am now informed that USCIS is questioning [the beneficiary]’s ability as cook. This is not right.

10. That [the beneficiary] is an outstanding cook who has indepth knowledge and expertise in cooking and all facets of preparing Indian dishes.

amended his description of the beneficiary’s duties with by adding some duties such as planning menus, cooking different dishes, directing, portioning and garnishing food. He explained why his description in the first two letters did not include the duties of planning menus, cooking different dishes, directing, portioning and garnishing food because he meant that all of these duties were automatically included when he mentioned her position as a head cook. Even if the AAO accepts this explanation, similar with his first two letters, the December 26, 2005 letter did not verify the beneficiary’s full-time employment. Nor is there any evidence in the record establishing the beneficiary’s full-time employment with . Therefore, with the three letters from the petitioner failed to establish that the beneficiary possessed the requisite two years of experience as an Indian specialty cook prior to the priority date.

The record contains letters from the beneficiary, the petitioner and the beneficiary’s former co-workers concerning the beneficiary’s working experience at . The regulation at 8 C.F.R. § 204.5(g)(1) requires the petitioner to submit an experience letter from current or former employer(s) of trainer(s) to demonstrate the beneficiary’s requisite experience. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered. In this case, the record does not contain any evidence that an experience from the former employer is unavailable. Instead, the petitioner submitted experience letters from the owner of the former employer. A statement from the beneficiary himself, without additional documentation, cannot be considered as acceptable evidence to establish the beneficiary’s qualifications. The petitioner in the instant case is not in a position verifying the beneficiary’s past work experience with another business in a foreign country. Letters from people who have interacted with the beneficiary while she worked for or operated another company cannot be used in lieu of a letter from the actual company for which the beneficiary worked, without solid objective evidence. These letters did not come with any documentary evidence to support their contents. 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)). Therefore, CIS may not consider any other documentation relating to the beneficiary’s experience in the instant case and the petitioner failed to establish the beneficiary’s two years of experience as a full-time Indian specialty cook with with these letters.

The petitioner did not submit independent objective evidence, such as tax returns, payroll records, and personnel records to support the beneficiary’s full-time employment with . Although the owner explained that the register showing the beneficiary’s payments was not available any more, no other independent objective evidence was provided by the petitioner. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann*

Bakery Shop, Inc. v. Nelson, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The AAO is not convinced with these documents that the petitioner submitted sufficient evidence to demonstrate that the beneficiary worked for at least two years prior to the priority date as a full-time Indian specialty cook with Sukhadia Sweet Mart.

The record of proceeding also contains the petitioner's July 28, 2002 letter, the petitioner's July 16, 2005 letter and paystubs for a period from July 1992 to March 1993 submitted as evidence to establish the beneficiary's work experience as an Indian specialty cook with the petitioner from May 1992 to March 1993. The petitioner's July 28, 2002 letter is on the company letterhead and signed by Ashvin Patel as the president of the company. This letter can be properly accepted as an experience letter from a former employer as required by the regulation at 8 C.F.R. § 204.5(g)(1). The letter states in pertinent part that:

This is to certify that [the beneficiary] was employed with this company May of 1992 to March 1993 as an Indian specialty cook on a full time 40 hours work week.

The letter verifies that the beneficiary worked as a full-time Indian specialty cook for ten months from May 1992 to March 1993. With ten months of experience as a full-time Indian specialty cook, the beneficiary is not qualified for the proffered position because the labor certification in the instant case clearly requires two years of experience in the job offered. Further, the petitioner's July 28, 2002 letter did not include a description of the duties performed by the beneficiary as required by the regulation. Without a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the duties performed by the beneficiary at the petitioner's business qualify her to perform the duties described at Item 13 of the Form ETA 750A. In addition, as to be discussed below, the petitioner's verification of the beneficiary's full-time employment is not supported by evidence submitted. Therefore, the petitioner's July 28, 2002 letter cannot be considered as primary evidence to establish the beneficiary's requisite two years of experience in the job offered.

The petitioner's July 16, 2005 letter is also on the company letterhead in a different format from the one used for the petitioner's July 28, 2002 letter, and was signed by someone on behalf of the petitioner, but without printing the signor's name and title. This letter was submitted as part of the response to the director's NOIR. It appears to be a supporting letter for the instant petition rather than an experience letter. However, it also contains some statements regarding the beneficiary's qualifications as follows:

This letter is provided in support of [the beneficiary]'s Form I-140, Immigration Petition for Alien Worker, [f]iled by [the] petitioner, [REDACTED]. On or about 3/18/02 Form I-140, Immigration Petition for Alien Worker was filed for [the beneficiary]. At the said time, as the [p]etitioner, we were aware of [the beneficiary]'s knowledge and expertise as an Indian cook to perform the following:

Planning menus and cooking foreign-style dishes, dinners, desserts, and other foods, according to recipes, [f]or example, dishes like sweets, [REDACTED] and foods prior to cooking, seasoning and cooking food according to prescribed method portioning and gamishing[sic] food, estimating food consumption and

requisitioning or purchasing supplies.

We have personal knowledge about [the beneficiary]'s expertise and knowledge in preparation of India dishes as she has been cooking for us on regular basis, and on several occasions she has prepared certain specialty Indian dishes for us, such has [REDACTED]

The letter stated that at the time of filing the instant petition on or about March 18, 2002, the petitioner was aware of the beneficiary's knowledge and expertise to perform the duties if Indian cook. In this July 16, 2005 letter, the petitioner indicated that the beneficiary "has been cooking for us on regular basis, and on several occasions she has prepared certain specialty Indian dishes for us." The letter did not indicate when the beneficiary started to cook for the petitioner on regular basis, and the letter fails to verify her period of employment with the petitioner. The petitioner certified in his July 28, 2002 letter that the petitioner terminated the beneficiary's employment in March 1993 when it learned that the beneficiary was not a permanent resident. With the petitioner's July 16, 2005 letter, the petitioner failed to establish that the beneficiary worked for it as an Indian specialty cook for two years prior to the priority date.

It is also noted that the beneficiary indicated that she worked for the petitioner from May 1992 to the present on the Form ETA 750B and Form G-325A. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve this inconsistency.

The record contains copies of the beneficiary's paystubs for a period from July 1992 to March 1993 from the petitioner. These paystubs show that the petitioner paid the beneficiary at rate of \$210 per week for weeks from July 1, 1992 to March 14, 1993. Since they do not contain the hours the beneficiary worked weekly and her hourly pay rate, it is not clear whether the beneficiary worked and was paid on full-time basis during this eight and a half months period from July 1992 to March 1993. However, the paystubs do not support the petitioner's verification that the beneficiary worked for them for ten months from May 1992 to March 1993. Further, although the petitioner verified in his July 28, 2002 letter that the beneficiary worked "on a full time 40 hours work week" the amount of \$210 per week paid to the beneficiary as compensation for an Indian specialty cook does not support the petitioner's assertion because the amount paid was less than a half of the proffered wage (\$462 per week) for an Indian specialty cook in that area.

Counsel's assertions on appeal cannot overcome the grounds of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the insufficient evidence in factual assertions presented by the beneficiary concerning her qualifications for the proffered position, without considering the consulate investigation report.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful 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 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on March 13, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 per year). On the Form ETA 750B signed by the beneficiary on March 6, 2001, she claimed to have worked for the petitioner from May 1992 to the present. However, in the letter dated July 29, 2002 submitted as part of response to the director's RFE dated June 18, 2002, the beneficiary amended her employment history as follows: Unemployed 6/200 to Present; 3/2000-6/2000 Spherion Corporation as an assembler; 3/1993-1/2000 Cherokee International as an assembler; and 5/1992-3/1993 [REDACTED]. On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$621,176, to have a net annual income of \$141,864, and to currently employ 10 workers.

Relevant evidence in the record includes Ashvin Patel's Form 1040 U.S. Individual Income Tax Return for 2000 and 2001, and a letter dated September 26, 2002 from [REDACTED] the owner of the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage for the years from the priority date in 2001 to the present.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit W-2 forms, 1099 forms or any other documents showing that the petitioner paid the beneficiary any compensation during the relevant years, and thus, the petitioner has not established that it employed and paid the beneficiary the proffered wage from the priority date in 2001 onwards.

The evidence in the record indicates that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁴, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2000 and 2001. However, the petitioner's 2000 tax return is not necessarily dispositive in the instant case since the priority date is March 13, 2001. The AAO will review the 2001 tax return to determine whether the petitioner had the ability to pay the proffered wage in the year of the priority date. The sole proprietor's 2001 tax return demonstrated adjusted gross income of \$49,131, which is \$25,107 more than the proffered wage. The petitioner did not submit a statement of monthly expenses for the sole proprietor.⁵ However, the tax return Schedule A – Itemized Deductions showed that the sole proprietor paid health

⁴ The line for adjusted gross income on Form 1040 varies every year, however, it is Line 33 for 2001.

⁵ We note that the sole proprietor is single without dependents.

insurance of \$1,200, state and local income taxes and real estate and land taxes of \$15,047, home mortgage interest and points of \$19,324 and gifts to charity of \$1,995, totaling \$37,566⁶. Therefore, in 2001 the sole proprietor's adjusted gross income on Form 1040 was insufficient to pay the beneficiary the proffered wage and the sole proprietor's living expenses. Therefore, the petitioner failed to establish that it had sufficient income to pay the proffered wage to the beneficiary for 2001, the year of the priority date.

In response to the director's RFE dated August 15, 2002, the petitioner submitted a letter dated September 26, 2002 from the owner of the petitioner as evidence to establish the petitioner's ability to pay the proffered wage. The letter states that: "I estimate the gross and net earnings for the business at year 2001 \$800,000 gross, year 2001 \$200,000 net, year 2002 \$650,000 gross currently and year 2002 \$100,000 net currently." The petitioner's reliance on the letter from the owner of the business is misplaced. First, a letter from the owner of the petitioner is 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. Second, while 8 C.F.R. § 204.5(g)(2) provides that the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage, it must be established that the employer employs 100 or more workers. In the instant case, the petitioner asserts that it employs 10 workers. Furthermore, the letter provides estimated figures, which cannot be relied upon to determine whether the petitioner had the ability to pay the proffered wage.

CIS will consider the sole proprietor's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had extra available funds sufficient to cover the proffered wage and the sole proprietor's living expenses in 2001 and onwards.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the instant petitioner had another immigrant petition⁷

⁶ The sole proprietor's actual living expenses should be much more than this amount because the figure does not include mortgage loan principal repayment, utilities, transportation, food, clothing, auto insurance, entertainment expenses and other living expenses.

⁷ The receipt number for the petition is WAC-99-169-51048.

approved on December 5, 2000. The beneficiary of the approved petition obtained lawful permanent residence on April 27, 2006. Therefore, the petitioner must establish its ability to pay the two proffered wages from 2001 to 2006. CIS records also show that the petitioner filed another immigrant petition on July 26, 2007⁸ which is pending with the Nebraska Service Center. The record does not show the petition's priority date, however, the petitioner is obligated to demonstrate that it had sufficient funds to pay both the instant beneficiary and the pending beneficiary their proffered wages at least in 2007. The record does not contain any evidence showing that the petitioner had established its ability to pay for a single beneficiary in each of the years from 2001 to 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The director's decision on December 2, 2005 is affirmed. The approval of the petition remains revoked.

⁸ The receipt number for the petition is LIN-07-248-52334.