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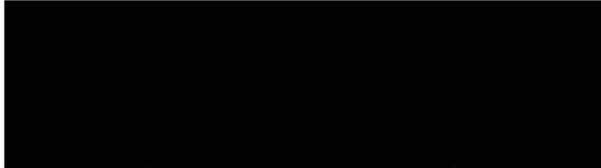
U.S. Department of Homeland Security
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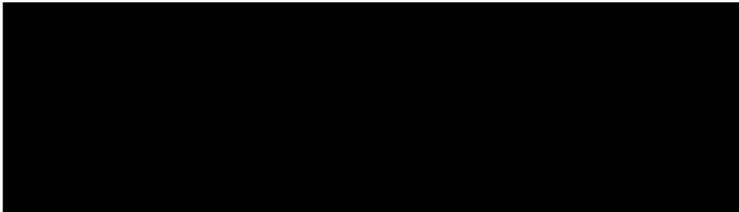
FILE: [REDACTED]
SRC-06-230-50940

Office: TEXAS SERVICE CENTER Date: APR 07 2008

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 Director, Texas Service Center (“director”), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a business related to photography, and photo development, and seeks to employ the beneficiary permanently in the United States as a photographer (“Digital Photographer”). As required by statute, the petition filed was submitted with Form ETA 9089,¹ Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s October 17, 2007 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

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).²

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 professional, or as a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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).

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 9089 Application for Permanent 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 9089 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).

In the case at hand, the petitioner filed Form ETA 9089 with DOL on February 8, 2006. The proffered wage as stated on Form ETA 9089 is \$21.93 per hour, which is equivalent to an annual salary of \$45,614.40 per year, based on a 40 hour work week. The labor certification was approved on March 30, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on July 26, 2006. On the I-140, the petitioner listed the following information: date established: August 1, 1991; gross annual income: \$120,000.00; net annual income: \$25,000; current number of employees: 3.

On January 9, 2007, the director issued a Request for Evidence ("RFE") for the petitioner to submit evidence that the beneficiary had complied with Special Registration requirements and the National Security Entry-Exit Registration System ("NSEERS"), as the beneficiary was born in Iran.³ The petitioner responded, but the information was insufficient. On July 7, 2007, the director issued a Notice of Intent to Deny ("NOID") for the petitioner to establish that the beneficiary had properly registered under NSEERS as the petitioner's response to the January 9, 2007 RFE did not clearly establish registration. The provided that the beneficiary was required to appear at an interview at the Bureau of Immigration and Customs Enforcement at the Los Angeles Office. The petitioner responded.

On September 11, 2007, the director issued a NOID the petition as the petitioner had failed to establish its ability to pay the beneficiary the proffered wage. The Notice provided the petitioner 30 days to provide the

³ NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregistration/index.htm>, accessed April 5, 2007.

petitioner's 2006 federal tax return, or other evidence, as well as the beneficiary's W-2 Form, if the petitioner employed the beneficiary. The petitioner responded.

On October 17, 2007, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. 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 9089, signed by the beneficiary on April 21, 2006, the beneficiary listed that he has been employed with the petitioner since August 19, 2001. The petitioner submitted the following evidence of wage payment.

<u>Year</u>	<u>W-2 Wages Paid</u>
2006	\$20,030.96
2005 ⁴	\$6,288.33

The petitioner additionally submitted copies of the beneficiary's pay statements for August 1, 2007 to September 30, 2007 in 2007. The 2007 pay statements reflect that the beneficiary was paid \$19,475 as of September 30, 2007, and that the beneficiary was paid \$14 per hour.^{5,6}

While the wages paid to the beneficiary would demonstrate the petitioner's partial ability to pay the proffered wage, as the amounts paid are less than the proffered wage, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary alone. The petitioner must establish that it can pay the difference between the wages paid and the proffered wage in 2006.

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.*

⁴ As the petition's priority date is February 8, 2006, the beneficiary's 2005 wages would not demonstrate the petitioner's ability to pay the proffered wage from the 2006 priority date onward, but will be considered generally.

⁵ The petitioner provided an offer letter on appeal dated September 17, 2007, which stated the petitioner has employed the beneficiary since August 2001. The letter further stated that the petitioner would increase the beneficiary's pay from \$14 per hour to the proffered wage upon granting the beneficiary's permanent residence.

⁶ We further note that the paystubs exhibit that the beneficiary has worked a varying number of hours per week ranging from 26.40 (for the week of September 3, 2007 to September 9, 2007) to a maximum high of 36.53 hours (for the pay period of September 24, 2007 to September 30, 2007). 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself." The petitioner must employ the beneficiary on a full-time basis when he obtains permanent residence.

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 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 supports himself⁷ and resides in Sunland, California. The tax returns reflect the following information:

Tax Year	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)
2006	-\$76,405	\$75,384	\$0 (costs of labor \$0)	-\$26,725
2005 ⁸	Not provided	\$80,160	\$9,836	-\$41,511
2004	Not provided	\$83,640	\$0	-\$4,813

If we reduced the sole proprietor's Adjusted Gross Income (AGI) by the proffered wage that the petitioner must demonstrate that it can pay the beneficiary (\$45,614.40), the owner would be left with the following amounts through which to support himself: 2006: -\$100,718.44 (including wages already paid). The sole proprietor would not be able to pay the proffered wage and support himself on negative income.

Further, the sole proprietor failed to submit an estimate of his personal/family expenses so that we cannot ascertain the total amount beyond -\$100,718.44 that he would require to support himself and pay the proffered wage.

The petitioner additionally provided unaudited financial statements, including a statement regarding net income for the time periods January through December 2003, 2004, and 2005,⁹ and a profit and loss report for

⁷ The sole proprietor's tax return indicates that he is married, but that his wife filed her tax return separately.

⁸ As the priority date is February 2006, the petitioner's 2004 and 2005 federal tax returns would not be required and would not show the petitioner's ability to pay from 2006 onward, but will be considered generally.

⁹ These statements would not be relevant to the petitioner's ability to pay from 2006 onward, but will be considered generally.

the time period January through October 2007. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence as they would represent the compiled unsupported representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also provided copies of bank statements for the time period January to August 31, 2007. If we examined the bank statements specifically, the statements vary in the amount that the petitioner had in its account from a low balance of -\$50.29 (as of February 28, 2007) to a high balance of \$1,138.31 (as of July 31, 2007). As noted above, the petitioner is 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. The business bank account records, as well as individual savings would be considered. However, the petitioner did not provide evidence that the funds from the business bank account were not already considered or accounted for on Schedule C of the sole proprietor's Form 1040. Further, the petitioner has not provided bank statements for the entire relevant time period of 2006, and 2007. The bank statements would represent only the amount that the petitioner had in its account in a few months of 2007, and would, therefore, be insufficient to demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date, February 2006, until the beneficiary obtains permanent residence, or to show sufficient sustained assets through which the sole proprietor could support himself and his family and pay the proffered wage. *See Ubeda v. Palmer*, 539 F. Supp. at 647.

On appeal, counsel¹⁰ provides that CIS erred in its determination that the petitioner could not pay the proffered wage, and that the sole proprietor's 2006 tax return, and asset summary, submitted on appeal would demonstrate its ability to pay.

Counsel provides that the sole proprietor's business was "thriving" as exhibited by the sole proprietor's \$76,000 in gross receipts and "gross profit of over \$47,100." Counsel provides that the gross profit would be more than the proffered wage, which should be considered, as the petitioner would have utilized tax planning to reduce tax liability.

We note that the sole proprietor's net profit was -\$26,725 in 2006, and the sole proprietor's AGI was insufficient to demonstrate his ability to pay the beneficiary the proffered wage and support himself. *See Ubeda v. Palmer*, 539 F. Supp. at 647.

Counsel claims that a Board of Alien Labor Certification Appeals ("BALCA" or "Board") case, *The Matter of Oriental Pearl Restaurant*, 92 INA 59 (BALCA 1993), supports the petitioner's case. Specifically, counsel provides that even though the restaurant showed a loss of \$29,406 for its first year, the employer could still show its ability to pay based on a "substantial, bona fide business doing a high volume of business;" that the restaurant was owned and operated "by an effective restaurateur who has met his payroll in the past;" that the

¹⁰ A different lawyer filed the appeal on behalf of the petitioner.

evidence showed “substantial assets tied up in the business,” and that the restaurant had “minimal debt and high equity investment.”

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). BALCA’s decision in *Oriental Pearl* is, therefore, not binding on CIS. Moreover the evidence in the instant petition is less persuasive than the evidence relied upon by the Board of Alien Labor Certification Appeals in that case. In *Oriental Pearl*, the Board cited evidence which included a listing of all of the employer’s employees, with the monthly salary and job title for each employee, as well as supporting statements from a bank officer and from the president of the employer’s accounting firm. The Board also cited a very favorable review of the employer in a guide to restaurants in the City of Atlanta, where the employer was located. In addition to the foregoing evidence, the Board cited information from the employer’s federal tax return for 1990, which was its initial return. According to the Board, that return showed gross receipts of \$756,501.03, a loss of \$29,406.08, \$122,432.57 in salaries paid, and “minimal” current liabilities. *The Matter of Oriental Pearl Restaurant*, 92 INA 59.

In the present matter, while counsel references the petitioner’s \$75,000 in gross receipts, we note that the petitioner’s gross receipts have declined, the petitioner has shown negative net profits in three years where Schedule C’s were provided, and only paid just over \$9,000 in wages in one year, and no wages in two other years.¹¹

Counsel further cites to *Far East International, Inc.*, 93 INA 22 (Dec. 21, 1993) and provides that the BALCA decision found that considering only the assets of the business operation to be unduly strict and that the owner’s additional assets should be considered.

Again we note that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Similarly, the BALCA decision in *Far East* would not be binding. However, unlike the employer in *Far East*, and as noted above, the petitioner is 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.

Counsel asserts that the petitioner’s assets must be considered, and has provided an asset summary listing \$165,000 in assets. In support, counsel cites 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, and that the petitioner’s assets would exhibit is ability to pay the proffered wage.

Counsel in support has provided an asset summary listing equipment and inventory, which includes: printer processor, and film processor, estimated at \$60,000; a digital system estimated at \$40,000; spare parts for the printer and film processor: \$5,000; digital retouching and imaging center: \$20,000; digital imaging kiosk:

¹¹ While the petitioner issued a W-2 Form for the beneficiary in 2006, the wages paid to the beneficiary do not appear to be listed on the Form 1040, Schedule C provided. The reason for this discrepancy is unclear.

\$2,000; as well as studio equipment, backdrops, lighting, and props: \$6,000; camera equipment: \$10,000; retail inventory: \$9,000; store fixtures: \$10,000; and photo lab inventory: \$3,000.

Counsel provided the asset summary as a list, but did not provide any official documentation in the form of estimates, documentation of property ownership, receipts for purchase, or other evidence to verify that the petitioner owned such assets, and what such assets are worth. 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)).

Further, we note that the majority of the items listed on the asset summary would be required for the petitioner to operate its business. If the sole proprietor sold the photo equipment to pay the proffered wage, he would have no equipment to operate his business. Even if we were to consider all the sole proprietor's inventory, and "spare parts," the amount potentially from the sale of such items would be insufficient to pay the proffered wage and support the sole proprietor. *See Ubeda v. Palmer*, 539 F. Supp. at 647. Additionally current assets must be measured against current liabilities. The petitioner has not provided any documentation regarding its current liabilities. *See Matter of Soffici*, 22 I&N Dec. at 165.

Counsel further contends that the director's decision is misleading when it provides that the petitioner only pays the beneficiary \$14 per hour. Counsel provides that the petitioner has stated and knows that it must pay the beneficiary \$21.93 per hour when the beneficiary obtains permanent residence. Additionally, counsel asserts that the petitioner has shown this ability and that for 2007 the petitioner's income statement from January to October 2007 shows that it earned \$55,000 in gross receipts, which would be more than the proffered wage.

Counsel is mistaken in her belief that the gross receipts would exhibit the petitioner's ability to pay the proffered wage, as the sole proprietor must show that he can support himself and pay the proffered wage, a calculation which would consider the sole proprietor's AGI, which was not provided for 2007, personal living expenses, which were not provided for any year, as well as the proffered wage.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the proffered wage.

Further, although not raised in the director's decision, the petition should also be denied as the petitioner has failed to establish that it has a realistic job offer for the beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial 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.

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).

CIS must look to the job offer portion of the labor certification to determine the required terms of, and 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), (2). *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). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. *See* 20 C.F.R. § 656.30(c)(2).

20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

Based on the pay statements provided listing the hours that the beneficiary worked,¹² it does not appear that the petitioner employs the beneficiary on a full-time basis. Further, as the sole proprietor's Schedule C does not list any wages paid to employees in two years, and only lists payment of wages of \$9,836 in the third year, it does not appear that the petitioner requires the services of any employee on a full-time basis. Therefore, the petitioner has not demonstrated that its job offer is realistic.

Accordingly, 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.

¹² The paystubs exhibit that the beneficiary has worked a varying number of hours per week ranging from 26.40 (for the week of September 3, 2007 to September 9, 2007) to a maximum high of 36.53 hours (for the pay period of September 24, 2007 to September 30, 2007). Other statements list that he worked 33.5 hours, 35.45 hours, 31.55 hours, and 34.2 hours.