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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC 01 251 50731

Office: VERMONT SERVICE CENTER

Date: **FEB 13 2008**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The AAO concurred with the director's decision on appeal.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's July 16, 2003 dismissal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization **which establishes the prospective employer's ability to pay the proffered wage.** In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is October 7, 1996. The proffered wage as stated on the Form ETA 750 is \$25.60 per hour or \$53,248 annually.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted. Relevant evidence submitted on motion includes counsel's brief, copies of the petitioner's individual Form 1099-MISC, Miscellaneous Income for 2002, a copy of a homeowner's insurance policy for the period December 15, 1999 through December 15, 2000 for property at [REDACTED] Dunellen, N.J. 08812-1302, a mortgage statement for the petitioner's owner from Sovereign Bank due on September 1, 2003 (property is not listed on the statement), a copy of the petitioner's bank statement from Valley National Bank for the period June 30, 2003 through July 31, 2003, a billing statement for the petitioner's owner from EMC Mortgage Corporation for property at [REDACTED], North Plainfield, N.J. 07060 due on September 1, 2003, a copy of an apparent savings account at United Trust for the petitioner's owner with a balance of \$15,849.65 as of May 21, 2003, appraisals for properties located at [REDACTED], North Plainfield, N.J. 07060-4801 and at [REDACTED] Dunellen, N.J. 08812-1302, a copy of a deed for the property at [REDACTED] North Plainfield, N.J., copies of the beneficiary's 1995 and 1997 through 2006 Forms 1040, an address change for the petitioner, copies of the 1995, the previously submitted 1998, and the 2001 through 2006 Forms W-2 issued by the petitioner on behalf of the beneficiary, and a copy of an affidavit from the petitioner's owner, dated May 10, 2002. Other relevant evidence in the record includes a copy of the 1996 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, for the petitioner's owner, copies of the petitioner's 1996 Forms 941, Quarterly Federal Tax Returns, a copy of the petitioner's Schedule C for 1999, and copies of the 1996 through 2000 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The copies of the petitioner's 2002 individual Forms 1099-Misc reflect wages paid to the petitioner in 2002 of \$78,288.91 from Center Valley Pool, \$283,872.85 from Inca Gunite, \$7,890 from Inca Pool, \$14,855 from B&B, \$62,221 from Eastern, \$28,000 from Rem Pools (no date given), \$10,000 from Monmouth Pools (no date given), and \$18,000 from Leuco Pools (no date given).

The homeowner's insurance policy for the period December 15, 1999 through December 15, 2000 reflects coverage of the dwelling at \$144,300 with the dwelling extension covered up to \$14,430 for the property at [REDACTED] Dunellen, N.J. 08812-1302.

The mortgage statement with a due date of September 1, 2003 from Sovereign Bank reflects a mortgage payment of \$1,157.49.

The petitioner's bank statement from Valley National Bank for the period June 30, 2002 through July 31, 2003 reflects a beginning balance of \$90,484.42 and a closing balance of \$97,331.89.

The billing statement from EMC Mortgage Corporation for the property at [REDACTED] North Plainfield, N.J. 07060 due on September 1, 2003 reflects a mortgage payment of \$1,270.48.

The appraisal for the property at [REDACTED] reflects a value of \$235,000, and the appraisal for the property at [REDACTED] reflects a value of \$270,000.

The deed for the property at [REDACTED] shows that the petitioner's owner purchased the property in 2002 for \$139,000.

The affidavit, dated May 10, 2002, from the petitioner's owner states:

I have been in this business since 1986. I have steady business since then and my business is growing and is expected to remain indefinitely. The business does construction, repairs, and restoration of interior and exterior in ground pools in homes, hotels, resorts, and health clubs and also demolish pools, decks, patios and sidewalks. Our business is a year round business, of course with normal slow periods at certain times like in any other business.

In 1996, I paid a total of \$133,950 as wages. The Schedule C for 1996 was submitted to the I&NS and is once again submitted where at line 26, such wages are shown. Similarly, in 1997, I paid a total of \$116,799 in wages and enclose Schedule C for 1997 referring to line 26; in 1998, I paid \$148,363 (Schedule C enclosed); in 1999, I paid \$137,733 in wages (enclosed Schedule C).¹ In 2000 and 2001, I received two 1099 forms from one major client, Inca Pool Corporation of [REDACTED] North Plainfield, N.J. 07060 which is enclosed in original with the 2000 and 2001 1099 forms. Please note that in such letter it is stated that we are doing 300 to 350 swimming pools, indoor and outdoor and that we have been working for them for over 10 years. The 2000 and 2001, 1099 forms show incomes of \$324,000 and \$366,700, respectively.

Furthermore, as a sole proprietor, I am able **and willing** to deposit funds equal to or higher than the proffered wage of \$53,248 to [REDACTED], my employee, and furthermore, **guarantee** that his employment with my firm will be of indefinite length. I own property at [REDACTED], Dunellen, NJ 08817 and also at [REDACTED] North Plainfield, NJ **and these properties at the current market value are in excess of \$400,000 and am enclosing** deed and other records showing ownership interest in same. I am willing to pledge these assets if the Immigration Service is not satisfied that I will not pay the proffered wage to my employees.

The petitioner's 1996 Form 1040 reflects an adjusted gross income of \$25,675, and Schedule C reflects gross receipts of \$219,771, wages paid of \$133,950, and a net profit of \$5,096.

The petitioner's 1999 Schedule C reflects gross receipts of \$327,673, wages paid of \$137,733 and a net profit of \$17,911.

The 1995 through 2006 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of \$18,460 in 1995, \$15,840 in 1996, \$20,130.30 in 1997, \$26,400 in 1998, \$24,900 in 1999, \$30,360 in 2000, \$27,480 in 2001, \$23,760 in 2002, \$26,780 in 2003, \$33,865 in 2004, \$32,797.50 in 2005, and \$25,520 in 2006.

On motion, counsel states:

The Petitioner herein submitted Schedule C from ".....petitioner's owner's 1996 tax return." is admitted in Exhibit 'A' (copy enclosed). However, the Appeals Unit fails to reiterate that Schedule C's for the years 1997, 1998, 1999 were provided to the Appeals Unit under sworn affidavit executed by Romberto Baires, the sole proprietorship of Baires Pool Plastering Co., (copy of the affidavit enclosed).²

¹ In spite of the declaration of the petitioner's owner stating that the Schedule Cs are enclosed, the only Schedule Cs in the record are those for 1996 and 1999.

² See footnote 1.

A sole proprietorship is the owner himself. There is no separate and distinct definition of 'sole proprietorship.' The Exhibit 'A's' discussion on page 4, pagrapgraph [sic] 5, very clearly concedes such a description, "...petitioner's owner's income and assets may very correctly be included in the calculation of the petitioner's ability to pay the proffered wage." This paragraph 5, in its entirety, is what the petitioner and his counsel have been reiterating throughout the saga of this case.

Paragraphs 2 & 3, page 4, of the discussion (Exhibit 'A') talks about "adjusted gross income" on a Form 1099. There is no accounting basis in any standard acceptable accounting practice that inserts "adjusted gross income" on a Form 1099. A Form 1099, for the sake of clarification is simply a document that states the total compensation paid to an independent contractor, such as this sole proprietor employer-petitioner! To ask for something that is not part of a standard, government accepted document is to exercise draconian abuse of discretion and to set a double standard in view of the fact that a sole proprietor can pledge his/her own assets and income "...very correctly.." be ".....included in the calculation of the petitioner's ability to pay the proffered wage." (See paragraph 5 of the enclosed Exhibit 'A')

The Appeals Unit is [sic] misapplied the *KCP Food Co., Inc. vs. Sava* argument as it pertains to gross income.

The ability of the petitioner to pay is not determinative of the actual amount of wages paid on a W-2, since the petitioner is not obligated to pay the beneficiary the full wage until the beneficiary would have adjusted status or admitted as an immigrant under the employment based preference category.

Enclosed are proven assets and income of the 'sole proprietor' petitioner:

- (a) Appraisals of 2 properties at (i) N. Plainfield, NJ 07060 and (ii) [redacted] Dunellen, NJ 08812, showing from a Certified Appraisers report as the values: \$235,000 and \$270,000 totaling more than half a million dollars.

The Miscellaneous Income for the year 2002, as per attached 1099 for the year 2002 shows:

	\$ 78,288.91
	\$283,872.85
	\$ 7,890.00
	\$ 14,855.00
	\$ 62,221.00
	\$ 56,000.00
<u>TOTAL</u>	<u>\$503,127.76</u>

This income is more than sufficient to meet the annual wage of at least \$60,000 for a key employee, on whose behalf an alien employment certification has been approved.

The Appeals Unit and the Center Director are wasting valuable Service resources by repeatedly denying a 245(i) eligible alien and his petitioning employer the clear opportunity by law to have this petition approved by dilatory and officious review of this prima facie approvable case.

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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on October 1, 1996, the beneficiary claims to have been employed by the petitioner from March 1992 until the present. In addition, counsel has submitted Forms W-2 issued by the petitioner for the beneficiary for the years 1995 through 2006. Therefore, the petitioner has established that it employed the beneficiary from 1995 through 2006.

The petitioner is obligated to show that it had sufficient income to pay the difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary in 1996 through 2006³. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$15,840 in 1996 is \$37,408. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$20,130.30 in 1997 is \$33,117.70. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$26,400 in 1998 is \$26,848. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$24,900 in 1999 is \$28,348. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$30,360 in 2000 is \$22,888. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$27,480 in 2001 is \$25,768. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$23,760 in 2002 is \$29,488. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$26,780 in 2003 is \$26,468. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$33,865 in 2004 is \$19,383. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$32,797.50 in 2005 is \$20,450.50. The difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$25,520 in 2006 is \$27,728.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v.*

³ Please note that the Form W-2 issued by the petitioner on behalf of the beneficiary for 1995 reflects wages earned the year before the priority date of October 7, 1996, and, therefore has little evidentiary value when determining the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The AAO will not consider the wages paid to the beneficiary in 1995 except when considering the totality of the circumstances affecting the petitioning business.

Feldman, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

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

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

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

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

In the instant case, the sole proprietor supported a family of two in 1996. As the sole proprietor's complete Forms 1040 for 1997 through 2006 are not in the record of proceeding, the AAO is unable to determine the number of family members the sole proprietor supported in those years. The sole proprietor's 1996 adjusted gross income was \$25,675 or \$11,733 less than the difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary of \$15,840 in 1996. In addition, as the sole proprietor failed to provide a list of his personal monthly expenses, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary in the years 1997 through 2006 and support his additional family members.⁴

⁴ It is noted that the director requested the sole proprietor's monthly expenses and evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. Both the director's denial and the AAO's dismissal specifically states that the director did not receive the sole proprietor's

On motion, counsel claims that “the Appeals Unit fails to reiterate that Schedule C’s for the years 1997, 1998, 1999 were provided to the Appeals Unit under a sworn affidavit. . .” Counsel is mistaken. *See* footnote 1.

Counsel asserts that on “paragraphs 2 & 3, page 4, of the discussion (Exhibit ‘A’) talks about “adjusted gross income” on a Form 1099. There is no accounting basis in any standard acceptable accounting practice that inserts “adjusted gross income” on a Form 1099.” Again, counsel is mistaken. Nowhere in the AAO’s dismissal is there any reference to there being adjusted gross income on a Form 1099. The two paragraphs counsel refers to specifically state the following:

On appeal, counsel provided 2000 and 2001 Form 1099 miscellaneous income statements showing that Inca Gunité Pools, Inc. paid the petitioner \$324,000 and \$366,700 during those years, respectively. Counsel states that because the petitioner is a sole proprietorship the proprietor is free to allocate whatever portion of that income he wishes to pay the proffered wage.

In so stating, counsel is arguing that the petitioner’s gross income or receipts should be considered in determining the petitioner’s ability to pay the proffered wage, rather than its net profit, or the adjusted gross income of the petitioner’s owner.

These statements do not suggest that the sole proprietor’s adjusted gross income is any part of Form 1099, but merely that the sole proprietor’s ability to pay the proffered wage is not based solely on his income (from Form 1099-MISC) without also considering the expenses necessary to maintain the business. The net profit is the result of the sole proprietor’s income minus its expenses which is transferred to the front page of his Form 1040 (line 12) and is included in the sole proprietor’s adjusted gross income. The sole proprietor’s ability to pay the proffered wage is based on his adjusted gross income, not its gross receipts.

Counsel contends that the AAO misapplied the holding in *KCP Food Co., Inc., vs Sava* as it pertains to gross income. However, counsel does not explain how the AAO misapplied that case. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

Counsel claims that “the ability of the petitioner to pay is not determinative of the actual amount of wages paid on a W-2, . . .” Counsel is correct. However, the petitioner is obligated to show that it had sufficient

monthly expenses, and the AAO’s dismissal specifically states that the petitioner had not submitted any evidence of its ability to pay the proffered wage in 1997 through 2000. The petitioner’s monthly recurring personal expenses and complete forms 1040 for 1997 through 2006 were not submitted on motion. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the sole proprietor declined to provide copies of his tax returns or his monthly recurring personal expenses. The tax returns would have demonstrated the amount of taxable income the sole proprietor reported to the IRS and further reveal his ability to pay the proffered wage. The sole proprietor’s failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). Actually paying wages to the alien is one indicia. In this case, the petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$53,248 and the actual wages paid to the beneficiary in 1996 through 2006. The petitioner has not done so.

Counsel asserts that the sole proprietor's assets and income have established the petitioner's ability to pay the proffered wage. Again, the AAO will not consider only the sole proprietor's income when determining the petitioner's ability to pay the proffered wage, but must also take into account those expenses necessary to the running of the business.

With regard to the two properties the sole proprietor refers to as evidence of his ability to pay the proffered wage, property is considered to be a long-term asset (having a life longer than one year) and is not considered to be readily available to pay the proffered wage to the beneficiary. Therefore, the AAO will not consider the real estate property of the petitioner's owner when determining the petitioner's ability to pay the proffered wage of \$53,248. Additionally, business owners seldom liquidate or encumber real property to pay employee wages.

In summary, the sole proprietor has only submitted one complete Form 1040 (1996), has not submitted evidence of his ability to pay in 1997 through 2006, has not submitted his monthly expenses, and has not shown that he possesses other available funds with which to pay the proffered wage of \$53,248.

For the reasons discussed above, the evidence submitted on motion fails to overcome the decision of the AAO.

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the pre-existing family, business, or personal relationship may have influenced the labor certification. 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). It appears that the owner of the petitioner and the beneficiary are brothers. See letter dated January 31, 2008 from the sole proprietor.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a bona fide offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that

[CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary is the brother of the owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The AAO's decision of July 16, 2003 is affirmed. The petition remains denied.