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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

b6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 0 6 2010

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] is a contractor. It seeks to employ the beneficiary permanently in the United States as a framer.[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). 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. The director denied the petition accordingly.

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

As set forth in the director's denial, an 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO

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[1] The petitioner also does business as [redacted] Although the petitioner indicated in the petition and labor certification that it is a corporation, the petitioner reports his income for tax purposes as a sole proprietorship. If the ownership of the business owned and operated by the petitioner who is sole proprietorship has changed from a corporate form of organization, then in that case, evidence of transfer of ownership must show that a successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

[2] In the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested the visa preference classification for "any other worker" requiring less than two years of training or experience by checking box (g) in Part 2. However, the petition was accompanied by an ETA Form 750 Part A which requires two years of experience. The director proceeded to adjudicate the petition as one seeking an unskilled worker. The petitioner has not objected to the director's use of discretion in this manner, and the AAO will consider the appeal as one pertaining to a request to classify the beneficiary pursuant to Section 203(b)(3)(A)(iii) of the Act. That being said, the AAO notes that, even if the director's decision was withdrawn in this matter, the appeal could not be sustained for this reason. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The alien is also identified in the electronic records of USCIS as #A 073 654 750.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 either 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 accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour ($20,800.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.[3]

Accompanying the petition and labor certification, counsel submitted, *inter alia*, its federal income tax return (Form 1040) for 2006, and a 1099-MISC Statement issued by the petitioner to beneficiary.

On September 8, 2007, the director requested that the petitioner submit evidence of its ability to pay the proffered wage from the priority date. The director requested that, according to the regulation 8 C.F.R. § 204.5(g)(2), the petitioner submit at least one of the following documents for each of the years 2001 through 2005: copies of the petitioner's annual reports, or federal tax returns, including copies of all supplementary schedules, or audited financial statements.

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

The director stated that for any year in which the petitioner was incorporated, the petitioner was requested to submit federal tax returns filed by the corporation.

The director also stated that for any year in which the petitioner operated as a sole proprietorship, the petitioner was requested to submit federal tax returns (Forms 1040) with accompanying schedules filed by the proprietor.

Additionally, the director's requested a summary of the proprietor's family's living expenses for any year the petitioner operated as a sole proprietorship. The director stated that the summary must include the costs of housing, food, transportation, clothing, tuition and other recurring expenses. Further, the director stated that the sole proprietor's current assets such as certificates of deposits and cash held in accounts, as well as evidence of income generated by the petitioner's dependents could also be submitted. No summary of the proprietor's family's living expenses was submitted.

Regarding the beneficiary, the director requested evidence of any wages the petitioner paid to the beneficiary during 2001 through 2005 by Wage and Tax Statements (W-2) or payroll records. No payroll records were submitted by counsel; however, on appeal the beneficiary's 1099-MISC statements for 2001 and 2006 were submitted. Further, counsel submitted the sole proprietor's federal income tax returns (Forms 1040) for 2001 through 2005.

Accompanying the appeal, counsel submitted a legal brief dated November 28, 2007, the sole proprietor's federal income tax returns (Forms 1040) for 2001 through 2006, and, as already stated, 1099-MISC Statements issued by the sole proprietor to the beneficiary for 2001 and 2006 as well as the beneficiary's personal federal income tax returns for the same years.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to work for the petitioner, however, 1099-MISC Statements issued by the petitioner to the beneficiary were submitted for 2001 and 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, USCIS 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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.

The petitioner submitted 1099-MISC Statements evidencing wages paid to the beneficiary[4] by the petitioner for the following years:

Petitioner's Tax Return for Year:	Proffered Wage	Wage Paid	Difference between the Proffered Wage and the Wage Paid in Each Year:
2001	$20,800	$18,000	$2,800
2006	$20,800	$21,900	-0-

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 through 2005. In 2006, the petitioner paid the beneficiary the proffered wage.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

[4] According to the 1099-MISC statements submitted, the beneficiary is identified as having a tax payer identification number, and the petition states that the beneficiary does not have a social security number. The electronic records of the USCIS indicate that the beneficiary does have a social security number, i.e. [redacted] (the number is obscured for privacy purposes). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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

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

Although requested by the director to submit a summary of the proprietor's family's living expenses for any year the petitioner operated as a sole proprietorship, none was submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The AAO notes that the petitioner filed Schedules A with his Forms 1040 for years 2001, 2002, and 2006 that stated principally medical, tax, and home mortgage expenses. While presumably the petitioner had recurring family household expenses, he did not submit them when requested.[5]

In the instant case, the sole proprietor supported a family of two in 2001 and 2002, and became a family of three thereafter. The proprietor's tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Form 1040)	$6,276.00	$23,543.00
	2003	2004

[5] Generally a statement must indicate all of the family's household living expenses. Such items includes the following: housing (rent or mortgage), food, car payments (whether leased or owned), installment loans, insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses.

Proprietor's adjusted gross income (Form 1040)	$23,031.00	$26,377.00

	2005	2006
Proprietor's adjusted gross income (Form 1040)	<$5,413.00>[6]	$102,360.00

In 2001, 2002, 2003, 2004, and 2005, the sole proprietor's adjusted gross incomes fails to cover the proffered wage of $20,800.00, as it is improbable that the sole proprietor could support himself on recurring yearly deficits, which are what remains after reducing the adjusted gross incomes by the amounts required to pay the proffered wage and the petitioner's reasonable household expenses. Even in the absence of disclosed household expenses, those expenses appearing in the returns, e.g. mortgage interest, reduce the petitioner's adjusted gross income to less than the proffered wage in 2001 and 2002. Considering reasonable expenses for food and shelter in the other years, it is not credible that the petitioner's gross income would have been sufficient to pay the proffered wage, or the difference between the proffered wage and wages paid, in any of the years from 2001 through 2005.

In 2006, the petitioner paid the beneficiary the proffered wage.

On appeal, counsel asserts that the Form 1040, Schedules C listed the wages that the employer pays through the course of his business and that this is the amounts that the director should have focused upon and not the amount that the petitioner who is a sole proprietor "lists as his personal earnings."

By this, the AAO believes that counsel means to say that the director should not have considered the petitioner's adjusted gross incomes for years 2001 through 2005 over wages stated on the Form 1040, Schedules C. The sole proprietor has stated wages on the Schedules C for 2001-$77,650.00; 2002-$17,300.00; 2003-$40,925.00; 2004-$10,250.00; and 2005-$14,000.00. No cost of labor expense (Form 1040, Schedule C, Part III, Line 37) was stated in any year. Therefore, by implication, counsel is stating that either the payroll expenses demonstrate the petitioner's ability to pay the proffered wage, or that the beneficiary was paid for years 2002 through 2005 as demonstrated by the Schedule C amounts.

No pay roll records were produced by the petitioner, although requested by the director. To establish that the employer does in fact have an employee roster, substantiation is necessary such as payroll records, identification of the employees by name, social security number, titles, duties, hours worked, wages paid, identification of projects, quarterly payroll reports, and unemployment compensation or workmen compensations reports. Therefore, the amounts stated in the Schedules C are insufficient evidence of the sole proprietor's payroll roster and costs. Further, the suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages

[6] The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

paid to others cannot be used to prove the ability the ability to pay the proffered wage. There is no evidence that the beneficiary was employed by the sole proprietor from 2002 through 2005.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. [redacted] The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, although the petitioner identifies itself as a corporation, the sole proprietor reports his adjusted gross income as a sole proprietorship. The sole proprietor's gross receipts reported on Forms 1040, Schedules C were in 2001-$155,000.00; 2002-$143,198.00; 2003-$308,788.00; 2004-$23,407.00; 2005-$62,000.0; and 2006-$107,200.00. Otherwise, there is a paucity of data in the record relating to the petitioner's finances. Payroll, personnel rosters, and recurring personal expenses were not provided, although requested by the director. There is no information in the record concerning the petitioner's business reputation or business profits expectations. Counsel has not asserted that there was an occurrence of any uncharacteristic business expenditures or losses that USCIS deems relevant to the petitioner's ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 states that the position requires two years of experience or one year of experience in the related occupation of construction.[7]

The beneficiary under penalty of perjury stated in Form ETA 750B that he was employed from 1996 through 1999 by [redacted] as a framer (wood). The job duties stated are similar to those stated in the labor certification for the offered job. No other job experience was provided.

The Form ETA 750, Part A, Line 13, describes the job duties of framer, and since the labor certification is part of the record, will not be repeated here.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

> (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.
>
> * * *
>
> (D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Counsel submitted two certificates by two architects to demonstrate the beneficiary's experience. The first certificate is dated [redacted] August 22, 2005, by Architect [redacted] stated in an un-notarized statement:

> That I know [redacted] with the identity cedule number [redacted] He works in quality of [redacted] He enjoys my confidence. By such I recommend for any kind of work, related with the file of Carpentry in the Construction.

The second certificate is similarly dated "[redacted]," August 22, 2005, by [redacted] stated in an un-notarized statement:

> That [redacted] with the identity cedule number [redacted] implied the Quality of principal carpenter, in all the contracted construction by this office, Since July 1995 till

[7] In this instance, although the petition was adjudicated as unskilled, USCIS and the AAO cannot ignore the requirements of the labor certification. Further, even a petition is for an unskilled (other) worker, must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

February 1997, demonstrating responsibility and honesty. He enjoys our truthfulness and appreciation.

The statements submitted in the record concerning the beneficiary's qualifications received from [redacted] and [redacted] are insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. The statements are not from the beneficiary's prior employer, [redacted] and there is no description of the training received by the beneficiary or a description of his duties. There is no other evidence submitted concerning the beneficiary's qualifications to meet the requirements of the labor certification.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Furthermore, in connection with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the petitioner signed a Form G-325A on February 2, 2008. In that form, the beneficiary was required to disclose his last occupation abroad. The beneficiary chose to leave that space blank. Moreover, both the Form I-485 and the Form G-325A indicate that the beneficiary came to the United States in February 1997. As the beneficiary claims in the Form ETA 750 to have been engaged in Ecuador until 1999, it appears that the beneficiary's employment abroad was a likely fabrication. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.