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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: VERMONT SERVICE CENTER Date: MAR 11 2010

EAC 03 158 50644

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner and the beneficiary filed suit in the United States District Court for the District of Delaware (Court) seeking review pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §704, of the AAO's decision. The Court granted the plaintiffs' motion to remand the case to the AAO for further consideration. The matter is now before the AAO on remand. The appeal will be sustained. The petition will be approved.

The petitioner is a retail convenience store/mini market. It seeks to employ the beneficiary permanently in the United States as a manager. 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 (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.

In its decision, the Court upheld the AAO's decision to disregard the petitioner's line of credit. The Court also found that the AAO did not disregard the appropriate protocol for reviewing I-140 petitions submitted by sole proprietors. The Court further noted that the "AAO's decision to reject much of [the sole proprietor's] financial documentation because it was unaudited may have been appropriate if submitted by [the sole proprietor] himself and without being analyzed by [the petitioner's accountant]." The Court further noted that the AAO "disregarded the expert financial analysis submitted by [the petitioner's accountant] which stated that [the petitioner] had 'ample financial resources' to pay [the beneficiary's] annual wage." The Court stated that the "AAO was obligated to fully consider [the petitioner's accountant's] financial analysis establishing [the petitioner's] ability to pay and, if the AAO were to disregard [the petitioner's accountant's] analysis as unaudited documentation, it must give specific reasons for doing so." Thus, the primary issue on remand is whether the documentation reviewed and prepared by the petitioner's accountant satisfies the auditing requirement of 8 C.F.R. § 204.5(g)(2).

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 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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).[1] The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL 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 July 29, 2002. The proffered wage as stated on the Form ETA 750 is $745.00 per week, or $38,740.00 per year.

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 appeal.[2]

In a request for evidence (RFE) dated September 4, 2009, the AAO stated the following:

> Your organization submitted the following documents relating to its ability to pay the proffered wage: the petitioner's cash flow statements; a letter from the petitioner's certified public accountant, [redacted], dated June 15, 2004; IRS Forms 1040, U.S. Individual Income Tax Returns, for the sole proprietor for 2001, 2002, and 2003; IRS Forms W-2, Wage and Tax Statements, for the sole proprietor's wife for 2001, 2002, and 2003; the petitioner's unaudited cash flow statement for the year ending December 31, 2002; the petitioner's unaudited cash flow statement for the period ending June 14, 2004; the petitioner's unaudited balance sheet and income statement for the

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[1] 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, United States Citizenship and Immigration Services (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).

[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).

year ending December 31, 2002; the petitioner's unaudited balance sheet and income statement for the period ending May 31, 2004; the sole proprietor's mortgage payment information; the sole proprietor's Roth IRA retirement statement for April, 2004; the sole proprietor's car payoff information; the sole proprietor's line of credit agreement dated June 8, 2004, evidencing a maximum line of credit of $50,000.00; and the sole proprietor's Wachovia bank account information dated June 9, 2004 . The record contains no evidence of your household expenses for any relevant year.

As previously noted, the primary issue on remand is whether the documentation reviewed and prepared by the petitioner's accountant, [redacted], satisfies the auditing requirement of 8 C.F.R. § 204.5(g)(2). Audited financial statements must contain a report from an independent auditor which states whether the audit has been made in accordance with generally accepted auditing standards. These standards require the auditor to state whether, in his opinion, the financial statements are presented in conformity with generally accepted accounting principles (GAAP) and to identify those circumstances in which such principles have not been consistently observed in the preparation of the financial statements.[3] In the instant case, the record does not contain any evidence showing that the documentation reviewed and prepared by the petitioner's accountant satisfies the auditing requirement of 8 C.F.R. § 204.5(g)(2).

The AAO noted in our decision dated May 26, 2006, that 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 (BIA 1967). 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. Her clients included Miss Universe, movie actresses, and society matrons. 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

[3] *See* http://www.aicpa.org/download/members/div/auditstd/AU-00110.PDF (accessed August 21, 2009); see also *Barron's Dictionary of Accounting Terms* 30-32 (2nd ed. 1995).

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.

The priority date in the instant case is July 29, 2002, and therefore, your organization must establish the ability to pay the beneficiary the proffered wage from 2002 onward.

Therefore, please submit the following documentation:

- Evidence required by 8 C.F.R. § 204.5(g)(2) to establish that the petitioner had the ability to pay the full proffered wage in 2004, 2005, 2006, 2007 and 2008;

- Copies of the beneficiary's IRS Forms W-2 or IRS Forms 1099 if the beneficiary was employed by the petitioner in any relevant year;[4]

- Evidence to establish the number of years the petitioner has been doing business;

- Evidence to establish the overall number of employees employed by the petitioner in 2002, 2003, 2004, 2005, 2006, 2007 and 2008;

- Evidence to establish the occurrence of any uncharacteristic business expenditures or losses in connection with the petitioner's business in 2002, 2003, 2004, 2005, 2006, 2007 and 2008;

- Evidence to establish the petitioner's reputation within its industry;

- Evidence to establish that the beneficiary will replace your wife as manager, including verification of her full-time employment, her job title, and her duties with the petitioner;

- Evidence of your yearly household expenses for 2002, 2003, 2004, 2005, 2006, 2007 and 2008, including, but not limited to, the following: mortgage/rent, food, car payments, insurance (auto, household, health, life, etc.), utilities (electric,

[4] 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.

gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, and any other recurring monthly household expenses;

· Your savings, personal checking, IRA, and pension account statements for all relevant months in 2002, 2003, 2004, 2005, 2006, 2007 and 2008, if you wish to have such assets considered in determining your ability to pay the proffered wage;

· Evidence regarding your unencumbered, liquefiable personal assets that you wish to have considered in determining your ability to pay the proffered wage, together with evidence of any encumbrances relating to such assets; and

· An audit report from [redacted], in accordance with Generally Accepted Auditing Standards (GAAS), relating to his review of the petitioner's cash flow statements for the year ending December 31, 2002, and the period ending June 14, 2004.

In response to the AAO's RFE, counsel for the petitioner submitted the following: a brief; a statement dated November 19, 2009, from [redacted][5] the petitioner's unaudited cash flow statements for 2002, 2003, 2004, 2005, 2006, 2007 and 2008; the petitioner's compiled financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008; a letter dated November 11, 2009, from [redacted]; a personal financial statement of the sole proprietor dated October 15, 2009; [redacted] franchise system statements; the sole proprietor's amended federal income tax returns for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, together with copies of the returns originally filed; bank statements from Wachovia Bank; statements from the sole proprietor's investment account at LPL Financial; statements from the sole proprietor's Roth IRA accounts at

[5] We note that [redacted] Permit to Practice in the State of Delaware expired on June 30, 2005. *See* https://dpronline.delaware.gov/mylicense%20weblookup/Details.aspx?agency_id=1&license_i[redacted] (accessed February 19, 2010). While he has an active CPA Certificate, a Delaware CPA Certificate does not license [redacted] to practice accountancy in Delaware. *See* http://www.dpr.delaware.gov/boards/accountancy/newcertificate.shtml (accessed February 19, 2010). Individuals who have a CPA Certificate and not a Permit to Practice are entitled to use the title Certified Public Accountant or the acronym CPA only if: the Certificate is active and in good standing, the individual neither engages in nor offers to engage in practicing certified or public accountancy, and the individual places the words "not in public practice" next to his CPA title on any type of document or device. *Id.; see also* Del. Code tit. 24 § 107, which requires each person who intends to be or is engaged in the practice of certified public accountancy in the State of Delaware to obtain and maintain a valid certificate and permit to practice certified public accountancy, or to qualify for the practice privilege under Del. Code tit. 24 § 108. The record is not clear as to whether [redacted] is licensed as a CPA in any other state, although his letterhead states that he is a member of the Delaware Society of Certified Public Accountants and it appears that his principal place of business is in Delaware. Delaware Code title 24 § 115 prohibits any person or firm from performing compilation, review or audit services, as defined by the American Institute of Certified Public Accountants (AICPA), except holders of a valid permit to practice.

Wells Fargo; receipts for jewelry purchases; evidence regarding the sole proprietor's ownership of property in Bangladesh; verification of the sole proprietor's monthly expenses; the petitioner's IRS Forms W-3 and W-2 for 2003; the petitioner's IRS Forms W-2 for 2004, 2005, 2006, 2007 and 2008; the petitioner's payroll stubs for various periods in 2009; medical documentation for [redacted] description of duties of [redacted], letter of resignation dated November 15, 2009, from [redacted] and a letter dated November 16, 2009 from [redacted].

On remand, counsel asserts that the petitioner has the ability to pay the proffered wage based on its reasonable expectation of future financial profit and the totality of the circumstances of the petitioner's business. He states that the petitioner has a sound business reputation. He asserts that based on the petitioner's accountant's analysis, the petitioner has established its ongoing ability to pay the proffered wage. He states that it is inappropriate and impermissible for the AAO to "attempt to assert expertise in finance or tax law" and that the AAO improperly substituted "its own financial analysis of the documents in the record for the expert analysis of the financial information in the record provided by a CPA." He further asserts that the denial of the case is a bad policy choice and harmful to small business owners such as the petitioner. He states that the beneficiary will replace the current manager of the petitioner's business and that the wages paid to her would be available in the future to pay the beneficiary for the same job. Counsel also states that the sole proprietor has substantial unencumbered personal assets that he is willing to use to pay the beneficiary's salary. Counsel asserts that the rationale of the case of *O'Connor v. Attorney General*, 1987 WL 18243 (D. Mass. 1987), should be adopted in the instant case, and that the AAO should consider the totality of the petitioner's finances in its determination of the petitioner's ability to pay the proffered wage. Counsel notes that the sole proprietor purchased a franchise with substantial good will. Counsel states that:

> A reasonable fact finder would be compelled to conclude, either by relying solely on the business' success as explained by the CPA's audit or that by utilizing some percentage of each of sources of financing and capital... that [the sole proprietor] had unfettered access to as the sole proprietor of his business, he clearly had the ability to pay the proffered wage.

Counsel further asserts that certain expenses reflected on the petitioner's 2002 tax return were one-time expenses relating to [redacted] franchise start-up costs. He states that the sole proprietor, in conjunction with a professional CPA expert analysis of the petitioner's financial position, "is in a far better position to know whether his specific business has the ability to pay an employee a specified wage than an immigration agency does."

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 1997, to have a gross annual income of $1,299,735.00 and to currently employ seven workers. On the Form ETA 750B, signed by the beneficiary on July 20, 2002, the beneficiary did not claim to have worked for the petitioner.

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 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. 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 2002 onwards. However, on remand, the petitioner has presented sufficient evidence to establish that the beneficiary will replace its current manager, [redacted][6] Therefore, the wages paid to [redacted] may be considered in the determination of the petitioner's ability to pay the proffered wage.

The IRS Forms W-2 for [redacted] show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form W-2 stated compensation of $23,842.50
- In 2003, the Form W-2 stated compensation of $18,007.50.
- In 2004, the Form W-2 stated compensation of $18,922.50.
- In 2005, the Form W-2 stated compensation of $19,920.00.
- In 2006, the Form W-2 stated compensation of $38,260.00.
- In 2007, the Form W-2 stated compensation of $44,200.00.
- In 2008, the Form W-2 stated compensation of $45,050.00.

Therefore, for the years 2007 and 2008, the petitioner has established that it employed and paid the full proffered wage to its manager. For the years 2002, 2003, 2004, 2005, and 2006, the petitioner

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[6] On remand, the petitioner submits medical documentation for [redacted] a description of the duties of [redacted] IRS Forms W-2 for [redacted] issued by the petitioner; and a letter of resignation dated November 15, 2009, from [redacted]. These documents contain competent evidence of the wages paid to [redacted] and her fulltime employment, verify that her duties are those of the proffered position as set forth on the labor certification application, and contain evidence that the petitioner will replace her with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

has not established that it employed and paid its manager the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is $38,740.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid and the proffered wage, which is $14,897.50, $20,732.50, $19,817.50, $18,820.00, and $480.00 in 2002, 2003, 2004, 2005, and 2006, respectively.

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). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner 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.

In the instant case, the sole proprietor's household size is three, including the proprietor, his wife and his son. With the petition, the sole proprietor submitted his IRS Forms 1040, Individual U.S. Income Tax Return, for 2002 and 2003. The proprietor's tax returns reflect his adjusted gross income as follows:

- In 2002, the proprietor's adjusted gross income was -$2,043.00.
- In 2003, the proprietor's adjusted gross income was $21,309.00.

In 2002, the sole proprietor's adjusted gross income of -$2,043.00 fails to cover the difference between the wages actually paid and the proffered wage, without any consideration of the proprietor's household expenses.[7] In 2003, the sole proprietor's adjusted gross income covers the difference of $20,732.50 between the wages actually paid and the proffered wage. However, it does not also cover the proprietor's expenses as set forth in his personal financial statement. Therefore, the petitioner has not established its ability to pay the proffered wage in 2002 or 2003.

On remand, the petitioner submits the sole proprietor's "recasted" and amended federal income tax returns for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The petitioner's accountant, [redacted]., states in a letter dated November 11, 2009, that the tax returns for the years 2001, 2002, 2003 and 2004 "have been re-casted as opposed to amending them" because he "unknowingly deducted expenses on these returns for 2001 through 2004 that were for paid-in capital." He asserts that "[r]ecasting was done because of the Statute of Limitations on filing returns." He further states that the tax returns for 2005, 2006, 2007 and 2008 were amended because "[s]ales were grossly understated and income was distorted." Despite counsel's explanation of the rationale for amending the petitioner's corporate tax returns, because the petitioner amended its returns in the middle of the proceedings, USCIS would require IRS-certified copies to corroborate the assertion that the amended returns were actually processed by the IRS. The amended returns are not certified copies. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). 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)). Thus, USCIS will only examine the version of the petitioner's tax returns that were initially submitted and not the amended version as submitted on remand. The proprietor's original tax returns reflect his adjusted gross income as $28,154.00, $37,451.00 and $66,038.00 in 2004, 2005 and 2006. Therefore, for the years 2004 and 2005, the sole proprietor's adjusted gross income covers the difference between the wages actually paid and the proffered wage. However, it does not also cover the proprietor's yearly household expenses of $43,897.00 as set forth in his personal financial statement. In 2006, the petitioner has established that its adjusted gross income covers the difference between the wages actually paid and the proffered wage, with consideration of the proprietor's personal household expenses. In sum, based on the petitioner's tax returns and Forms W-2 issued to its current manager, the petitioner has established its ability to pay the proffered wage in 2006, 2007 and 2008. The petitioner has not established its ability to pay the proffered wage in 2002, 2003, 2004 and 2005.

On remand, the petitioner also submits its cash flow statements for 2002, 2003, 2004, 2005, 2006, 2007 and 2008; its compiled financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008; a statement dated November 19, 2009, from [redacted] regarding the petitioner's ability to pay the proffered wage; and a letter dated November 11, 2009, from [redacted] setting forth a disclaimer with regard to [redacted] review of the petitioner's financial

[7] In a personal financial statement dated October 15, 2009, the proprietor indicated that his yearly expenses were $43,897.00.

documentation. As noted in the AAO's RFE, the regulation at 8 C.F.R. § 204.5(g)(2) requires financial statements to be audited. Audited financial statements must contain a report from an independent auditor which states whether the audit has been made in accordance with generally accepted auditing standards. These standards require the auditor to state whether, in his opinion, the financial statements are presented in conformity with generally accepted accounting principles (GAAP) and to identify those circumstances in which such principles have not been consistently observed in the preparation of the financial statements.[8] In his statement dated November 19, 2009, [redacted] states "it is my professional opinion, based on my audit of the records herein attached, that [the sole proprietor] has absolutely had the ability to pay the salary of $38,740.00 from 2002 to the present." Attached to his statement are the petitioner's cash flow statements for 2002, 2003, 2004, 2005, 2006, 2007 and 2008, and the petitioner's compiled financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The cash flow statements are not audited, as they do not contain a report from an independent auditor which states whether the audit has been made in accordance with generally accepted auditing standards. Further, the financial statements are not audited, as the accountant's reports from [redacted] accompanying each statement make clear that they were produced pursuant to a compilation rather than an audit. As the accountant's reports also make clear, financial statements produced pursuant to a compilation are the representations of the owner compiled into standard form. The unsupported representations of the owner are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In a letter dated November 11, 2009, [redacted] further states that a "disclaimer is set forth with the general accepted auditing procedures and generally accepted accounting principals. An audit as such, cannot be performed because the third party accounting." He states that all accounting for sales, payroll and expenses are conducted by the franchisor at its national headquarters. He states that the petitioner prepares its tax returns from the information that was provided by the franchisor. Based on the statements of the petitioner's accountant and the reports attached to the petitioner's financial statements, the petitioner's cash flow statements for 2002, 2003, 2004, 2005, 2006, 2007 and 2008, and its financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008 are not audited as required by 8 C.F.R. § 204.5(g)(2). Therefore, the documentation reviewed and prepared by the petitioner's accountant cannot be accepted as evidence of the petitioner's ability to pay the proffered wage, as it does not satisfy the auditing requirement of 8 C.F.R. § 204.5(g)(2).

On remand, counsel states that the sole proprietor has substantial unencumbered personal assets that he is willing to use to pay the beneficiary's salary. With regard to the sole proprietor's personal assets, the AAO's original decision stated as follows:

> Counsel states that "[t]he Roth IRA when valued in combination with [the] petitioner's other assets, more than demonstrates [the] petitioner's ability to pay the proffered wage." The record contains the owner's retirement statement for April 2004 for the owner's Roth IRA, which includes time deposits and money market funds, of $9,873.84. The record also includes bank accounts information dated June

[8] *See* http://www.aicpa.org/download/members/div/auditstd/AU-00110.PDF (accessed August 21, 2009); see also *Barron's Dictionary of Accounting Terms* 30-32 (2nd ed. 1995).

9, 2004 regarding the owner's money market funds and Roth IRAs. While Roth IRAs do represent a form of liquid assets available to pay the wage, the market value of $9,873.84 cannot be considered because it does not take into account penalties that will be assessed if money is withdrawn prior to the owner meeting all the qualifications for a Roth IRA withdrawal, and the record does not contain information regarding the amount the owner will actually have after penalties have been assessed. Moreover, $9,873.84 is not enough to cover the difference between the proffered wage and the petitioner's adjusted gross income for 2003. Furthermore, the AAO cannot determine the amount of money the owner had in his Roth IRAs in 2002 and 2003 as the retirement statement is for April 2004 and the other bank accounts information were dated June 9, 2004.

Counsel states that the owner's other assets include its checking account balance, money market and individual retirement accounts, home equity, and net worth of franchise, and the amounts for those assets for 2002 and 2004 are indicated on the petitioner's cash flow statements. The record also contains information regarding the owner's mortgage payment. The AAO, as shown above, has already addressed the owner's cash flow statements, where information regarding the owner's checking account is listed, and retirement accounts. Moreover, home equity and net worth of franchise are not liquid assets. Thus, they cannot be considered as available cash for the sole proprietor to pay the proffered wage and/or personal expenses. Additionally, using the home's equity would involve obtaining a loan and creating a debt. Similarly, the net worth of the franchise would only be valued if the petitioner sought a loan or sold the business.

Counsel states that "[the owner] has paid off his BMW," and the record contains the owner's car payoff information. However, the car payoff information does not indicate the amount the owner paid. Additionally, the fact that the owner paid off his car on June 4, 2003 is irrelevant to the petitioner's ability to pay the proffered wage because it does not show that the amount of cash used for payment was available in 2002 and that amount was definitely not available in 2003 to pay the proffered wage because it was used to pay for the car.

In response to the AAO's RFE, the petitioner submitted a personal financial statement of the sole proprietor dated October 15, 2009; bank statements from Wachovia Bank; statements from the sole proprietor's investment account at LPL Financial; statements from the sole proprietor's Roth IRA accounts at Wells Fargo; handwritten receipts for jewelry purchases; evidence regarding the sole proprietor's ownership of property in Bangladesh; and verification of the sole proprietor's monthly expenses. The Wachovia bank statements indicate that the sole proprietor had $5,329.59 in a Wachovia bank account on October 14, 2009; that the sole proprietor and his wife had a money market account at Wachovia valued $23,250.45 on September 14, 2009; and that the sole proprietor and his wife owned several certificates of deposit in 2007, 2008 and 2009. However, these statements do not establish the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, or 2005. The petitioner also established that the sole proprietor and his wife had an investment account

at LPL Financial valued at $18,631.91 on August 31, 2009; that the sole proprietor had a Roth IRA account at Wells Fargo valued at $28,102.02 on September 30, 2009; and that the sole proprietor's wife had a Roth IRA account at Wells Fargo on September 30, 2009, although the value of the account was not provided. These statements do not establish the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, or 2005. The handwritten receipts provided by the petitioner in response to the AAO's RFE indicate that the sole proprietor and/or his wife purchased several pieces of jewelry from [redacted] between 1991 and 1999. However, the petitioner did not provide appraisals of that jewelry concurrent with any of the years relevant to the instant case, and it did not provide evidence that the sole proprietor owned the pieces of jewelry reflected by the receipts in any of the relevant years. Therefore, the value of the pieces of jewelry cannot be used to establish the petitioner's ability to pay the proffered wage in 2002, 2003, 2004, or 2005. The petitioner also provided evidence that he inherited partial ownership of certain properties in Bangladesh upon the death of his mother on March 16, 2008. However, the petitioner did not submit verification of the value of the proprietor's interest in those properties and did not verify his ability to liquefy his interest in those properties to pay the proffered wage. Further, since the proprietor's ownership interest in the properties did not occur until 2008, the value of his interest in those properties cannot be used to establish the petitioner's ability to pay the proffered wage in years prior to the vesting of his ownership interest.[9] Finally, the personal financial statement of the sole proprietor dated October 15, 2009, lists assets valued at $3,963,957. The AAO's RFE specifically requested the proprietor's savings, personal checking, IRA, and pension account statements for all relevant *months* in 2002, 2003, 2004, 2005, 2006, 2007 and 2008, and evidence regarding the proprietor's unencumbered, liquefiable personal assets, together with evidence of any encumbrances relating to such assets.[10] The petitioner failed to provide sufficient evidence of personal assets available to pay the proffered wage.

On remand, counsel again asserts that certain expenses reflected on the petitioner's 2002 tax return were one-time expenses relating to [redacted] franchise start-up costs. With regard to these expenses, the AAO stated in its original decision:

> The Form 1040 U.S. Individual Income Tax Returns for 2001 and 2002 include [redacted] charges" under the Schedule C, Part V as other expenses. A letter from the petitioner's certified public accountant dated June 15, 2004 states that the charges were paid prior to operation of the franchise and thus should not be included. The AAO would consider not looking at [redacted] charges if it was a one-time expense and the record contains documents showing that the charges were in fact money used to buy the franchise. However, the charges appear on two different tax returns, in 2001 and 2002, and nothing in the record aside from the certified public accountant's statement indicate that the charges were in fact the cost of the franchise and/or not

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[9] A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

[10] 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).

> recurring annual fees. 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)).

Based on the [redacted] franchise system" statements submitted by the petitioner in response to the AAO's RFE, the [redacted] charges are annual franchise charges and do not appear to be one-time costs associated with start-up of the business.[11] Therefore, counsel's assertion regarding these costs is without merit.

On remand, counsel asserts that the petitioner has the ability to pay the proffered wage based on its reasonable expectation of future financial profit and the totality of the circumstances of the petitioner's business. He states that the petitioner has a sound business reputation. Counsel notes that the sole proprietor purchased a franchise with substantial good will. 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 (BIA 1967). 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. Her clients included Miss Universe, movie actresses, and society matrons. 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,[12] 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.

The AAO considered the totality of the petitioner's circumstances in its original decision and stated:

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[11] The franchise statements indicate that the petitioner paid $144,276.20, $168,141.78, $220,237.56, $184,121.43, $188,145.94, $200,899.55, $197,885.25, and $180,544.85 in franchise costs to [redacted] in 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, respectively.

[12] In response to the AAO's RFE, the petitioner submitted its IRS Forms W-3 and W-2 for 2003 and its IRS Forms W-2 for 2004, 2005, 2006, 2007 and 2008. The petitioner employed six workers in 2003, four workers in 2004, five workers in 2005 and 2006, and three workers in 2007 and 2008.

> Nothing in the record, aside from counsel's assertion, indicates that the petitioner underwent expansion in 2002, and 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). The petitioner did not have an adjusted gross income that covered the annual proffered wage in 2002 and 2003. The petitioner's adjusted gross income in 2001 was $40,238.00, and it is unlikely that the petitioner could have paid the expenses of a household of 3 in 2001 with $1,498.00, which is the amount left over after subtracting the proffered wage. Thus, unlike the petitioner in *Sonegawa* with one uncharacteristically unprofitable or difficult year but only in a framework of profitable or successful years, the record indicates that all three of the years the AAO reviewed were unprofitable years.
>
> Counsel also states that "the fact this franchise has been in operation since 1997, supports seven (7) employees, and has increased its revenues from $867,771.00 to $1,865,423.00 in just two years, there should be no question that this petitioner both had a reasonable expectation of paying the proffered wage, and the ability to pay and continue to pay the proffered wage." The facts that the petitioner has been in operation for 9 years and employs 7 employees are not in and of themselves unique factors. Moreover, the petitioner's certified public accountant's assertion that the petitioner was listing the money used to buy the franchise in its 2001 and 2002 tax returns calls into question when the current owner acquired the franchise and how long has he personally been the owner. The fact that the petitioner increased its revenues in 2 years is likewise not a unique factor, especially since the AAO cannot determine the profitability of the petitioner for the years before 2001 and/or after 2003 based on the evidence in the record. As stated earlier, the petitioner in this case is distinct from the petitioner in *Sonegawa*, and the totality of the circumstances in this case do not show that the petitioner has the ability to pay the proffered wage.

In response to the AAO's RFE, the petitioner submits a letter dated November 16, 2009 from [redacted], indicating that the sole proprietor established his [redacted] franchise twelve years ago and that the proprietor's "reputation and business acumen within the industry is well-known." The letter states that the proprietor:

> has garnished a reputation with other [redacted] franchisees as a prudent and reliable businessman. He is very decisive and well informed. He is reliable and respected in the business community and was the Secretary for the Delaware Franchise Owner's Association for three (3) years.

The letter further states:

> Since establishing his [redacted] sales have increased from $600,000.00 through the years to a high of $1,900,426.00 in 2003, which includes commission fees and other income. Sales since 2004 through 2009 have leveled out at approximately to

> $1,120,000.00 and the reason for the decline in sales is due to the face [sic] that Delaware has increase the tax on cigarettes.

The [redacted] franchise system statements submitted by the petitioner in response to the AAO's RFE show the petitioner's total sales as follows: $867,771.48, $1,299,734.94, $1,865,423.26, $1,479,327.45, $1,456,678.73, $1,562,419.48, $1,420,810.19, $1,120,465.39 in 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, respectively.[13] [redacted] the petitioner's franchisor, has confirmed the petitioner's high gross sales, its longevity in business and its valuable reputation with [redacted] Further, on remand, the petitioner has presented sufficient evidence to establish that the beneficiary will replace its current manager, [redacted] Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.

[13] In 2009, the petitioner's total sales as of September were $766,049.77.