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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 29 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a [redacted] It seeks to employ the beneficiary permanently in the United States as a [redacted] 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 or not the petitioner 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 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 was 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 26, 2001. The proffered wage as stated on the Form ETA 750 is [redacted]

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.[1]

Accompanying the petition and the labor certification, the petitioner submitted his federal income tax returns (Forms 1040) for 2001, 2002, 2003, 2004, 2005, and 2006.

On July 31, 2008, the director requested that the petitioner submit evidence of its ability to pay the proffered wage from the priority date. Additionally, the director's requested the sole proprietor's average recurring monthly expenses for 2001 through 2007, including but not limited to the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; and household expenses. Further, the director requested a copy of the sole proprietor's annual reports or third-party audited financial statements for 2001 through 2007, and also additional evidence such as profit/loss statements and personnel records.

Counsel submitted an explanatory letter dated September 10, 2008, and stated that the sole proprietor's did not employ the beneficiary. Along with the letter, counsel submitted the sole proprietor household expenses for 2001 through 2007. Counsel also submitted [redacted] (the sole proprietor's spouse) savings account statement for the period July 31, 2008, to August 31, 2008, and an "Account Certification Letter" for [redacted] stating an account balance of [redacted]

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 1982 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to work for the petitioner. According the labor certification, the beneficiary was not employed from April 1998, to April 2001.

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.

[1] 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).

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).

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 stated it has not employed the beneficiary.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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.

The petitioner is a sole proprietorship, a business in which one person operates the business in his 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 [redacted] where the beneficiary's proposed salary was [redacted] approximately thirty percent [redacted] of the petitioner's gross income.

The sole proprietor submitted his yearly approximate household expenses which are: [redacted]

In the instant case, the sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Forms 1040)	[redacted]	

	2003	2004
Proprietor's adjusted gross income (Forms1040)	[redacted]	

	2005	2006
Proprietor's adjusted gross income (Forms 1040)	[redacted]	

No Form 1040 tax return was submitted for 2007. In 2001, 2003, 2004, 2005, and 2006, the sole proprietor's adjusted gross incomes, above noted, fail to cover the proffered wage of [redacted] and the sole proprietor's "yearly approximate household expenses" for the same years. It is improbable that the sole proprietor could support herself on a deficit in 2001, 2003, 2004, 2005, and 2006, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

On appeal, counsel submits a legal brief dated November 20, 2008, and a medical report for an unnamed individual, and asserts "We prove and provide additional evidence to show that the petitioner has the ability to pay the wage." Counsel is contending, on appeal, that the spouses' saving accounts combined are evidence of the sole proprietor's ability to pay the proffered wage for two years out of the five years for which the petitioner has failed to prove the ability to pay.

In the brief, counsel states without substantiation, that the "petitioner has a saving [redacted] of [redacted] which is enough to pay close to two years of the beneficiary's wage." As already stated, counsel submitted [redacted] (the sole proprietor's spouse) savings account statement for the period July 31, 2008, to August 31, 2008, and an "Account Certification Letter" for [redacted] stating an account balance of [redacted] for September 10, 2008.

There is no statement in the record from either [redacted] offering to pay the proffered wage from their savings accounts, or any statement detailing what claim the sole proprietor has on his wife's savings account to pay his business expenses. The unsupported

statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya,* 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980)l; *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Further, it is not clear why account statements dated 2008 are relevant to show the ability to pay the proffered wage from the priority date in 2001.

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 $100,000.00. 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 [redacted] Her clients included [redacted] The petitioner's clients had been included in the lists of the best-dressed [redacted] The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in [redacted] 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, the business is a sole proprietorship established in 1982, and in 2007, employed one worker. According to the Schedules C in the record, the proprietor is [redacted] The proprietor's spouse according to the Schedules C in the record is a real estate agent and contributes net income to the spouses' Form 1040 and to the adjusted gross incomes for the years for which tax returns were submitted. In 2001, the sole proprietor stated gross receipts of [redacted] and in 2006, [redacted] Comparing these two years, the business' gross receipts were approximately the same. In the instant case, there is sufficient information concerning the finances of the petitioner to demonstrate that it did not have the ability to pay the proffered wage from the priority date and to pay "yearly approximate household expenses" of [redacted] n 2001; [redacted] in 2003; [redacted] in 2004; [redacted] in 2005; [redacted] in 2006; and [redacted] in 2007. There is insufficient evidence submitted of the petitioner's financial solvency and viability since 2001 and no allegation of any temporary and uncharacteristic disruption in the petitioner's business activities to account for its inability to pay the proffered wage from the priority date. 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 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 six months experience in the offered job or one year of experience in the related occupation of carpenter.

The beneficiary under penalty of perjury stated in Form ETA 750B that he was not employed from April 1998, to April 2001. Further, there is no stated employment in the labor certification for the time period December 1990, to April 2001, an approximate 10 year period. From February 1990, to December 1990, and from January 1987 to August 1989, the beneficiary stated that he was employed as a [redacted] whose business is [redacted] According to the beneficiary he was employed to [redacted]" From August 1989, to January 1990, the beneficiary stated he was employed as a [redacted] whose business is stated in the labor certification as "individual." According to the beneficiary, he was employed to build a [redacted] and participated in "all phases of [redacted]

The Form ETA 750, Part A, Line 13, describes the job duties of [redacted] as follows:

> Install of [redacted] Using special [redacted] Measure, [redacted] to the [redacted]

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 a letter dated March 5, 2004, from [redacted] who states he is the [redacted] In pertinent part, [redacted] stated the beneficiary [redacted] control inside the facilities of my [redacted] but does not state what the beneficiary's duties were in the [redacted] or the duration of the beneficiary's employment. The sole statement submitted in the record concerning the beneficiary's qualifications received from [redacted] is 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. 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.

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.