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

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U.S. Citizenship and Immigration Services

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[redacted]

Date: APR 0 8 2011 Office: TEXAS SERVICE CENTER FILE: [redacted] SRC 07 035 50371

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, 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 is a convenience store. It seeks to employ the beneficiary permanently in the United States as a shift 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 (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 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.

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is $9.00 per hour ($18,720.00 per year).

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, *inter alia,* its federal income tax returns (Forms 1040) for 2000,[2] 2001, 2002, 2003, 2004, and 2005.

On January 24, 2007, the director requested, *inter alia,* that the petitioner submit additional evidence of its ability to pay the proffered wage from the priority date through 2004. Additionally, the director's requested evidence of the proprietor's personal assets; monthly statements of the proprietor's savings and checking accounts; evidence of stocks and bonds, or assets from any other business "you may own." Further, the director requested a copy of the proprietor's federal income tax (Form 1040) return for 2006, and the proprietor's monthly bank statements.

Counsel submitted, *inter alia,* an explanatory letter dated April 21, 2007; the proprietor's federal income tax returns (Forms 1040) for 2000, 2001, 2002, 2003, 2004, 2005 and 2006; a "1999 Tax Organizer" document;[3] and four copies of the petitioner's bank business checking statements for January 31, 2007, and February 28, 2007.

On appeal, counsel submitted a legal brief; a General Warranty deed; a realty transfer settlement sheet dated July 12, 2001; and a realty tax assessment notice.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on March 29, 2002, the beneficiary did not claim to work for the petitioner.

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[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).

[2] Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, the AAO will consider the petitioner's 2000 federal income tax return generally.

[3] Counsel's reliance on the unaudited financial record identified as the "1999 Tax Organizer" is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further the statement pertains to a time period two years before the priority date and is not probative of the petitioner's ability to pay the proffered wage from the priority date.

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, 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 not established that it employed the beneficiary. 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 onwards.

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 (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 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 supported a family of four from 2001 through 2004, and five members in 2005 and 2006. The proprietor's tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income	$19,498.00	$18,460.00
	2003	2004
Proprietor's adjusted gross income	$12,720.00	$34,052.00
	2005	2006
Proprietor's adjusted gross income	$44,703.00	$47,237.00

In 2002 through 2003, the proprietor's adjusted gross incomes fails to cover the proffered wage of $18,720.00. In 2001, 2004, 2005, and 2006, the proprietor's adjusted gross incomes fails to cover the proffered wage and his reasonable recurring monthly personal expenses.[4] It is improbable that the sole proprietor could support himself on a deficit after those expenses.

Although the petitioner did not provide a list of his household expenses, evidence of some recurring household expenses can be gleaned from the record. For example, the petitioner filed Schedule A (Itemized Deductions) in 2004, 2005, and 2006. In these schedules, the petitioner claimed to have paid mortgage interest and real estate taxes as follows: 2004-$15,940.00; 2005-$15,385.00; and 2006-$19,753.00. After reducing the petitioner's adjusted gross income in those years by these disclosed expenses, it is improbable that the petitioner could have paid any remaining expenses (e.g., food, utilities, clothing) and the proffered wage.

[4] Generally a family's household living expenses are as follows: housing (rent or mortgage), food, car payments (whether leased or owned), 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.

For example, after, reducing the petitioner's adjusted gross income in 2004 ($34,052.00) by the Schedule A interest and taxes ($15,940.00) and the proffered wage ($18,720.00), the petitioner would have had negative income without even considering other reasonable recurring expenses. Although the petitioner would have had positive income in both 2005 and 2006 after reducing his adjusted gross income by both the Schedule A expenses and the proffered wage ($10,598.00 and $8,764.00 respectively), it is not credible that the petitioner could have paid the remaining undisclosed reasonable recurring expenses in those years from these sums.

On appeal, counsel asserts that the proprietor's adjusted gross income for 2000 demonstrates the petitioner's ability to pay the proffered wage from the priority date. Counsel's contention is misplaced. As already stated, tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

Counsel submitted four copies of the petitioner's bank business checking statements for January 31, 2007 and February 28, 2007. Counsel asserts that the amount stated in the petitioner's bank checking account monthly balances (i.e. $11.94 and $212.50) are evidence of the petitioner's ability to pay the proffered wage. The ending balances are not sufficient to cover the remaining full wage on a monthly basis.

Counsel contends the permanent employment of the beneficiary as "shift manager," is necessary because the petitioner's business growth requires qualified manpower in order to generate more income and that the decline in income "may be caused by the unmanageable burden on the Petitioner alone if he should not be allowed to employ someone like the Beneficiary." The assertions of the counsel do not constitute evidence. 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).

Counsel asserts that the petitioner's assets, (i.e. his personal residence), demonstrate the petitioner's ability to pay the proffered wage from the priority date. Regarding the sole proprietor's property value, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes

that the petitioner's tax returns suggest that 2001 was one of its best years in the context of its gross receipts reported from 2001 (i.e. $183,183.00), and after 2001, it gross receipts declined (i.e., $117,437.00 and $36,840.00) in 2002 and 2003 respectively.

Counsel states on appeal that the proprietor's income (i.e. adjusted gross income) "have become moot and academic upon considering the [proprietor's] need not [to] pay the Beneficiary during those years simply because [the] Beneficiary did not work for the Petitioner at that time." Counsel is incorrect. The regulation 8 C.F.R. § 204.5(g)(2) states "The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

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. 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, 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, counsel states on appeal in 2007 that, as an "aftermath of 9/11" the proprietor's business has grown and "starting two years ago, |the| Petitioner's actually has sufficient income to pay the Beneficiary." As already stated, the proprietor must demonstrate his ability to pay the proffered wage from the priority date in 2001, not 2005. The petitioner failed to state in the I-140 petition when he established his business, or how many employees he has currently. The petitioner stated gross receipts in 2001 of $183,183.00; 2002-$117,437.00; 2003-$36,840.00;[5] 2004-$373,392.00; 2005-$493,612.00; and 2006-$1,262,609.00. Despite the eventual increase in the proprietor's business receipts, his adjusted gross incomes for the 2002 and 2003 were below the

[5] Commencing in 2003, the Schedule C stated gross receipts from from two business locations identified as #1 and #2.

proffered wage. For the period 2002, 2004 through 2006, the proprietor could not be expected to support himself, his spouse and three, then four dependents, on what remains after payment of the proffered wage and his reasonable recurring household expenses despite the higher gross receipts stated in the tax returns.

Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a shift manager will significantly increase the petitioner's profits. Counsel's assertion is erroneous. Proof of ability to pay begins on the priority date, April 26, 2001, that is when petitioner's Application for Alien Employment Certification was accepted for processing by the DOL. Petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. Counsel's assertion cannot be concluded to outweigh the evidence presented in the tax returns.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa,* to establish that the time period examined, 2001 through 2006, was an uncharacteristically unprofitable period for the petitioner. By the evidence presented, the petitioner, while a on going concern, is not a business that has proved its ability to pay the proffered wage from the priority date.

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 as a shift manager or six months of experience in an un-named occupation with retail sales experience.

The beneficiary under penalty of perjury, stated in the Form ETA 750B that he was employed fulltime from June 1996, to "present," (i.e. March 29, 2002) as an assistant manager and driver with the Checker Cab Management Company, located in Queens, New York. His duties there were to "Drive a cab and assist in management of routes, schedules, licenses and other drivers."

Similarly, from July 1994, to June 1995, the beneficiary stated that he was employed fulltime as a Checker cab driver for L&M Management located in New York, New York, from July 1994, to June 1996. His stated duties there were to "drive a cab and managed [sic] my own one vehicle taxi company."

From June 1992, to June 1994, the beneficiary stated he was employed fulltime in a service station and garage as an assistant manager by Grand Central Auto, located in Queens, New York. His stated duties there were described as "Under [the] general supervision of convenience or grocery store manager and owners, supervised [a] shift of retail sales workers and stockers."

The beneficiary's above job experiences as a cab driver are not directly relevant to the job of shift manager of a convenience store. No substantiation was presented that the beneficiary worked as an assistant manager for Grand Central Auto.

The Form ETA 750, Part A, Line 13, describes the job duties of shift manager as follows:

> Under general supervision of convenience or grocery store manager and owners, supervise [a] shift of retail sales workers and stockers.

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.
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> * * *
>
> (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.

According to the Form ETA 750, Part B, Line 12 and 13, the beneficiary stated that he has over eight years of management experience, and that he has a New York taxi license.[6]

Counsel has submitted a letter from Lord's Snacks and Confectionery of Dhaka, Bangladesh dated November 16, 2006, concerning the beneficiary's reputed employment as a store manager there from January 1991 to December 1991. The beneficiary failed to list this experience on the Form ETA 750. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the decision's *dicta* notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

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 reputed job reference from Lord's Snacks and Confectionery is not persuasive evidence in this matter.

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[6] Counsel submitted various documents from the DOL's recruitment process: a "Statement of Employer Concerning Internal Posting" dated March 19, 2002; the "Posting Notice;" a copy of the advertisement placed February 25, 2002, for the offered job in the Tulsa World newspaper; and a support letter dated November 15, 2006, from the petitioner concerning the job offered to the beneficiary. No evidence from the interested applicants such as their resumes or the results of their job interviews was submitted.

The one statement submitted in the record concerning the beneficiary's qualifications stated above 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.