(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: NOV 2 7 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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 an auto upholstering business. It seeks to employ the beneficiary permanently in the United States as an automobile upholsterer. 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, 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 July 12, 2009 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.

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). 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on November 12, 2003. The proffered wage as stated on the Form ETA 750 is $15.04 per hour ($31,283.20 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of automobile upholsterer.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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 2005 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 18, 2003, 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'l Comm'r 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'l Comm'r 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 and paid the beneficiary the full proffered wage from the priority date in 2003 onwards. The petitioner submitted evidence to indicate that the business, which was owned by and operated as a sole proprietorship using federal employee identification number (FEIN) was sold on September 30, 2005, to who also operated the business as a sole proprietorship under FEIN The sale took place after the approval of the labor certification, but before the filing of the Form I-140 on November 28, 2007. Therefore, the following analysis refers to evidence regarding both proprietors' ability to pay the proffered wage. Issues regarding a successor-in-interest will be discussed below. Evidence, including Forms W-2,

[1] 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). 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).

was submitted, indicating that the proprietors paid the beneficiary wages according to the table below.

- In 2003, the Form W-2 stated wages paid to the beneficiary of $26,220.78.
- In 2004, the Form W-2 stated wages paid to the beneficiary of $27,033.46.
- In 2005, a Form W-2[2] stated wages paid to the beneficiary of $20,483.43.
- In 2005, another Form W-2[3] stated wages paid to the beneficiary of $6,506.01.
- In 2006, the Form W-2 stated wages paid to the beneficiary of $29,954.04.
- In 2007, the Form W-2 stated wages paid to the beneficiary of $30,204.38.
- In 2008, the Form W-2 stated wages paid to the beneficiary of $32,462.75.
- In 2009, a pay stub for the period ending April 3, 2009 stated wages paid to the beneficiary of $7,130.03.

Therefore, with the exception of 2008, neither entity paid the beneficiary the proffered wage in any of the periods covered by the Forms W-2. These two businesses would be obligated to demonstrate their ability to pay the difference between wages they actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2003	$31,283.20	$26,220.78	$5,062.42
2004	$31,283.20	$27,033.46	$4,249.74
2005	$31,283.20	$26,989.44[4]	$4,293.76
2006	$31,283.20	$29,954.04	$1,329.16
2007	$31,283.20	$30,204.38	$1,078.82
2008	$31,283.20	$32,462.75	$0
2009	$31,283.20	$7,130.03	$24,153.17

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

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[2] The Form W-2 issued to the beneficiary by the sole proprietorship owned by [redacted] under FEIN [redacted] stated wages paid of $20,483.43.

[3] The Form W-2 issued to the beneficiary by the sole proprietorship owned by [redacted] under FEIN [redacted] stated wages paid of $6,506.01.

[4] The Forms W-2 from both proprietors for 2005 total $26,989.44.

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'r 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. *See 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 petitioner 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 [redacted] supported a family of two from 2003 to 2005, while the sole proprietor [redacted] supported only himself in 2006 to 2008. [redacted] submitted a listing of recurring household expenses of $780.00 per month ($9,360.00 per year). [redacted] submitted listing of recurring household expenses of $1,700.00 per month ($20,400.00 per year). The proprietors' tax returns reflect the following information for the following years:

- In 2003, the Form 1040 of [redacted] ated adjusted gross income[5] of $50,598.00.
- In 2004, the Form 1040 of [redacted] ated adjusted gross income of $47,790.00.
- In 2005, the Form 1040 of [redacted] ated adjusted gross income of $38,606.00.
- In 2007, the Form 1040 of [redacted] stated adjusted gross income of $18,132.00.
- In 2008, the Form 1040 of [redacted] stated adjusted gross income of $14,833.00.

The petitioner did not submit a Form 1040 for [redacted] for 2005, and the petitioner submitted an incomplete tax return consisting of only the Schedule C for 2006.

The sole proprietor [redacted] adjusted gross income exceeds the proffered wage of $31,283.20 in 2003, 2004, and 2005. The sole proprietor [redacted]'s adjusted gross income

[5] The adjusted gross income on the proprietors' Forms 1040 is found on line 34 in 2003, line 36 in 2004, and line 37 in 2005, 2007, and 2008.

was not demonstrated during 2005 when he purchased the business, or in 2006, a period for which an incomplete tax return was submitted. Further, adjusted gross income is insufficient to pay the proffered wage of $31,283.20 in 2007 and 2008. However, the proprietors' monthly household expenses must also be considered in determining whether or not the proprietor has the ability to pay the proffered wage.

It is improbable that the sole proprietor could pay the proffered wage on a deficit, which is what remains after reducing his adjusted gross income by the amount required to pay his household expenses in 2007 and 2008. The sole proprietor failed to submit a Form 1040 for 2005, thus the proprietor has not demonstrated his adjusted gross income for the period of September 30, 2005 to December 31, 2005, the date of the sale of the business to the end of the year. The proprietors provided a list of monthly household expenses and have demonstrated funds available to pay the proffered wage according to the table below.

Year	Adjusted Gross Income	Household Expenses	Balance Available to Pay Proffered Wage
2003	$50,598.00	$9,360.00	$41,238.00
2004	$47,790.00	$9,360.00	$38,430.00
2005[6]	$38,606.00	$9,360.00	$29,246.00
2005[7]	1040 not submitted	$20,400.00	unknown
2006	1040 not submitted	$20,400.00	unknown
2007	$18,132.00	$20,400.00	$0
2008	$14,833.00	$20,400.00	$0

The proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the proffered wage of $31,283.20 in 2007 and 2008 and has not been sufficiently demonstrated in 2005 and 2006. Thus, from an analysis of both sole proprietors' adjusted gross income, the ability to pay the proffered wage has not been fully demonstrated in 2005 after the sale of the property and N ownership ceased, as well as in 2006, 2007, and 2008. However, the AAO notes that the record includes evidence that the sole proprietor received non-taxable Social Security income, which was not included in his adjusted gross income for 2007 and 2008. According to the Forms 1040, these amounts of non-taxable Social Security income were $15,756.00 in 2007 and $16,119.00 in 2008. The AAO notes that when these funds are added to the petitioner's adjusted gross income for the years 2007 and 2008, the sole proprietor has sufficient funds available to pay the recurring monthly household expenses as well as the

[6] As the business was sold on September 30, 2005, the sole proprietor need demonstrate the ability to pay the proffered wage only until that date.

[7] As the business was sold on September 30, 2005, the sole proprietor need demonstrate the ability to pay the proffered wage beginning on that date.

difference between the proffered wage and the wage paid in 2007 and 2008 according to the table below.

Year	Adjusted Gross Income plus non-taxable income	Household Expenses	Balance Available to Difference of Proffered Wage and Wage Paid
2005[8]	1040 not submitted	$20,400.00	unknown
2006	1040 not submitted	$20,400.00	unknown
2007	$33,551.00	$20,400.00	$13,151.00
2008	$30,952.00	$20,400.00	$10,552.00

Therefore, the sole proprietor did not demonstrate the ability to pay the proffered wage in 2005 and 2006.

On appeal, counsel asserts that: 1) USCIS should consider the additional personal income of the petitioners as reflected in the bank statements submitted and the amount of Social Security income received; and 2) USCIS should consider the unusual circumstances involved in the change in ownership of the business and the medical problems of the proprietor which affected the business.

The AAO notes that the non-taxable Social Security income of the proprietor has been considered above. The proprietor has failed to submit the regulatory-prescribed evidence required by 8 C.F.R. § 204.5(g)(2), which must include either copies of annual reports, federal tax returns, or audited financial statements for the period after the business was sold in 2005 and for all of 2006. Consideration of the bank statements for these periods without evidence of the complete tax returns or other regulatory-prescribed evidence cannot establish the proprietor's ability to pay the proffered wage.

Further, the funds in the bank statements submitted are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

[8] As the business was sold on September 30, 2005, the sole proprietor need demonstrate the ability to pay the proffered wage beginning on that date.

(Reg'l Comm'r 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, 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, on September 30, 2005, the business was sold. The second sole proprietor did not adequately establish that a successor-in-interest relationship existed between the two businesses, failed to submit a tax return or other regulatory-prescribed evidence to cover the period in 2005 after the purchase of the business, and failed to submit a complete tax return for 2006. The proprietor's gross receipts during the relevant years varied, as did the amount of wages paid. The proprietor indicated on the Form I-140 that he employs only four people. Salaries and wages were not substantial. The proprietor has now been in business since 2005, but the evidence does not indicate that he earns substantial compensation. In addition, there is no evidence in the record of the historical growth of the proprietor's business. Counsel has indicated that 2006 was a "start-up year" and that the business made investments, which resulted in higher profits in 2007. The AAO notes that the Schedule C for 2006 submitted did reflect additional expenses for depreciation as well as materials and supplies in 2006, but absent the complete Form 1040 for 2006, or other-regulatory-prescribed evidence, the proprietor's ability to pay the proffered wage in that year cannot be determined.

The record also includes a letter from [redacted], which states that [redacted] was under his care when hospitalized from March 7, 2007 to March 14, 2007. The AAO notes that the letter indicates the treatment took place in 2007 rather than in 2006, the year in which counsel asserts that the business had uncharacteristic first year losses. Thus, the evidence does not adequately demonstrate that the proprietor's medical issues resulted in uncharacteristic business expenditures or losses from which it has since recovered.

Further, the record does not contain any evidence of the petitioner's reputation within its industry. In addition, the funds in the business bank accounts appear to be included on the proprietor's

Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income. 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.

Beyond the decision of the director,[9] the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner in this case is a different sole proprietor from the sole proprietor who filed the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The petitioner has not established a valid successor relationship for immigration purposes. The record includes a copy of the Conditional and Restricted Bill of Sale dated September 30, 2005, which states that [redacted] is selling office equipment and "equipment included in the purchase of [redacted] The document does not describe any other assets, liabilities, or essential rights to be transferred. The AAO notes that the evidence indicates that the business remained in the same location, uses the same name, and appears to be operating as an automobile upholstery business as it was prior to the purchase, but absent evidence that the new owner purchased the essential rights and obligations of the predecessor necessary to carry on the business, the petitioner has not established that a successor-in-interest relationship existed. In addition, the petitioning successor, [redacted], must prove by a preponderance of the evidence that the business is eligible for the immigrant visa in all respects. In this case, [redacted] has been unable to demonstrate his ability to pay the proffered wage as required. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

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

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[9] 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).

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.