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

(b)(6)

DATE: SEP 2 7 2012 OFFICE: TEXAS 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,

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 construction company. It seeks to employ the beneficiary permanently in the United States as a bricklayer. 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.

As set forth in the director's June 3, 2009 denial, at 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is $17.81 per hour ($37,044.80 per year). The Form ETA 750 states that the position

requires seven years of experience as a bricklayer, eight years of primary school and four years of high school.

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 2001. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, 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 on April 26, 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), *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 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas

[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).

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 supports a family of four. The proprietor's tax returns reflect the following adjusted gross income (AGI) for the following years:

Tax Year	Line Number Form 1040	Sole Proprietor's AGI	AGI less Proffered Wage
2001	Line 32	$23,466.00	-$13,578.80
2002	Line 35	$36,665.00	-$379.80
2003	Line 34	$38,166.00	$1,121.20
2004	Line 36	$36,243.00	-$801.80
2005	Line 37	$50,031.00	$12,986
2006	Line 37	$38,599.00	$1,554.20
2007	Line 37	$37,054.00	$9.20

In 2001, 2002, and 2004, the sole proprietor's adjusted gross income of fails to cover the proffered wage of $37,0443.80. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Furthermore, it is also improbable that the sole proprietor could support himself and his family on the remainder in 2003, 2005, 2006, and 2007.

On appeal, counsel asserts that payments received by the beneficiary, as well as an accountant's statement re garding the sole proprietor's household expenses, were not duly considered in the director's decision. Counsel indicates that a brief and additional supporting evidence will be submitted within thirty days of the July 6, 2009 filing of the appeal. Over three years later, the AAO has received nothing further, and the regulation requires that any brief shall be submitted directly to the AAO. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii).

The record contains the beneficiary's individual income tax returns for 2002 through 2007. These returns indicate that the beneficiary was a self-employed carpenter. There is nothing in the record to establish that the beneficiary's reported earnings derived from work performed as a contractor for the petitioner. Thus, the director was correct in his conclusion that these documents did not serve as evidence of the petitioner's ability to pay the proffered wage.

The record contains an August 16, 2008 statement of the sole proprietor's monthly household expenses for 2007. The statement appears to have been prepared by President, of of New Jersey. The document indicates that the sole proprietor's average monthly expenses for 2007 were $3,311 and that total household expenses for 2007 were $39,740. In the director's decision he noted that the sole-proprietor failed to submit an accounting of his family's household expenses for 2001 through 2006. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states that, "The Service fails to consider that individuals are not required by law to keep such records of expenses and by requesting such information for a period extending more than seven years places an unreasonable burden on the Petitioner."

Counsel's argument that the petitioner should not be required to submit evidence of household expenses for each relevant year is not persuasive. As noted above, 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*, *supra.*

Counsel appears to suggest that USCIS should consider the evidence submitted for 2007 as comparable to the sole proprietor's typical expenses in any relevant year. Even assuming that information for only one year would suffice, such consideration would not result in a favorable determination of the petitioner's ability to pay the proffered wage. As noted above, in 2005, (the most favorable year under consideration,) the sole proprietor's AGI was $50,031. Subtracting $39,740 in average annual living expenses leaves only $10,291, an amount that falls well short of the proffered wage. In each of the other six years, the sole proprietor's AGI less average annual living expenses is a negative figure.

The AAO also notes that the proprietor's monthly mortgage statement for July 2007 is included in the record. Although the proprietor claimed to have paid $250 per month in real estate taxes and $1,160.00 per month in housing costs in 2007, the proprietor's mortgage statement for July 2007 indicates that his monthly mortgage payment for property located at was $5,060.41. It also states that the principal balance owed on the loan was $432,516.54, and that the proprietor had paid $15,209.33 in interest and $20,334.52 in principal

through the year-to-date in July 2007. The proprietor's 2007 federal individual income tax return also shows $5,375 in annual medical and dental expenses and $1,063 in annual gifts to charity in 2007. The proprietor listed only $540 in annual health care costs on his monthly statement of expenses, and no gifts to charity. Thus, the statement of monthly expenses submitted by the petitioner appears to be significantly understated. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

> 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.

While not mentioned on appeal, counsel previously asserted in response to the director's request for additional evidence that the sole-proprietor's compensation should be considered in the analysis of the petitioner's ability to pay. Counsel is correct that it may be considered and has already been included in the AGI calculation that was used above.

Counsel also noted the proprietor's ownership of two parcels of real estate in New Jersey and submitted a listing of bank balances in the proprietor's bank accounts as of July 6, 2007. Regarding the sole proprietor's property ownership, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such significant personal assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if 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). In addition, as noted above, the property located at [redacted] has a mortgage associated with it, and the record does not contain appraisals for either of the properties to establish their values.

The record of proceeding contains a letter dated July 6, 2007 from [redacted] indicating bank balances for the sole proprietor's personal account, his business account, an account jointly owned by the proprietor and his wife, and two accounts owned by the proprietor's wife on behalf of their children. The proprietor's bank statements for his personal bank account must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The petitioner submitted no evidence of the balances in his personal bank account for 2001, the year of the priority date. Thus, the sole proprietor's cash assets as reflected in his bank account in 2007 do not establish the petitioner's continuing ability to pay the proffered wage.

Finally, counsel is correct 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 (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 the petitioner did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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.

Evidence of the Beneficiary's Qualifications

Beyond the decision of the director, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the April 26, 2001 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

In the instant case, regarding the educational requirements, the labor certification states that the offered position requires eight years of primary school education and four years of high school education. On the labor certification, the beneficiary claims to qualify for the offered position based on education in masonry at "Vocational School" from September 1987 through June 1990. The location of this school is not noted on the labor certification.

As evidence of the above, the record contains a March 21, 2001 document signed by [redacted] Director of "[redacted]" and an accompanying English translation. This letter mentions the beneficiary's 1987 to 1991 employment as a "student/mason-plasterer" at "[redacted]" The letter from Mr. [redacted] does not establish the beneficiary's eight years of primary school education and four years of high school education. The evidence of record does not contain any diploma or school transcripts to establish that the beneficiary has eight years of primary school education and four years of high school education as required by the labor certification.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. The petitioner has also failed to establish that the beneficiary is qualified for the offered 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).

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.