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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN - 4 2013

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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office (AAO), which, on July 19, 2010, summarily dismissed the appeal. The petitioner timely filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, the AAO's previous decision will be withdrawn, and the appeal will be dismissed.

The petitioner is a sole proprietor that makes window shutters.[1] It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 labor certification requires two years of full-time employment in the offered position and an offered wage of $14.54 an hour (or $30,243.20 a year based on a 40-hour work week). The petitioner seeks to classify the beneficiary pursuant to section 203(b)(A)(i) of the Immigration and Nationality Act (the Act), 8 USC § 1153(b)(3)(A)(i), as a skilled worker capable of performing skilled labor requiring at least two years of training or experience.

The director determined that the petitioner failed to demonstrate that the beneficiary possessed the required experience for the offered position at the time of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The director also found that the petitioner failed to demonstrate that it has had the continuing ability to pay the offered wage rate since the priority date of April 20, 2001. *See* 8 C.F.R. § 204.5(g)(2). The director denied the petition on both grounds.

In its July 19, 2010 decision, the AAO failed to state the proper legal standard for summary dismissal, finding that the petitioner's failure to provide new evidence to overcome the director's determinations warranted summary dismissal. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

A motion to reopen "must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." 8 C.F.R. § 103.5(a)(2). A motion to reconsider "must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy." 8 C.F.R. § 103.5(a)(3).

In its motion to reopen and reconsider, the petitioner submits a letter seeking to establish that the beneficiary possessed two years of full-time employment as a carpenter before the April 30, 2001 priority date, and profit and loss statements of its operations from 2001 to 2010. Because the petitioner's motion complies with the requirements of 8 C.F.R. § 103.5(a)(2) and because the AAO

[1] The petitioner identifies itself as [redacted] in its petition. In its motion to reopen and reconsider and in profit/loss statements that it submitted, the petitioner refers to itself as [redacted]. In a letter in support of its motion, the petitioner identifies itself as [redacted]

failed to properly state the legal standard for summary decision in its prior decision, the AAO grants the petitioner's motion to reopen and withdraws its previous decision. The AAO reconsiders the petitioner's appeal in light of the new evidence it submitted with its motion.

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.[2]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires two years of full-time experience in the offered position of carpenter. No other requirements are listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

On the labor certification, the beneficiary states that he worked 40 hours per week as a carpenter for [redacted] in [redacted] California from February 1993 to September 1995. The beneficiary stated that he began working as a full-time carpenter for the petitioner in August 1997.

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

As mentioned above, with its motion to reopen, the petitioner submitted an experience letter on behalf of the beneficiary. The letter is from Manager, on the letterhead of in California. The letter states that the company employed the beneficiary as a carpenter from February 1993 to September 1995. The letter, however, does not state whether the beneficiary worked full-time for during that time.

Also, the stated dates of the beneficiary's employment with raise questions about the letter's sufficiency and the consistency of the information in the petition. The petitioner stated on Form I-140, Immigrant Petition for Alien Worker, that the beneficiary last entered the U.S. without inspection in August 1995. Similarly, the beneficiary indicated in his application for adjustment of status that he last entered the U.S. without inspection in July 1995. Therefore, the experience letter from does not appear to correctly state that the beneficiary worked for the company in California, at least not continually, from February 1993 to September 1995. The petitioner has not established for how long the beneficiary remained outside the U.S. before he last entered the country. Assuming that the beneficiary worked full-time for Wood Shutters, the beneficiary would not have obtained the required two years of experience at if he remained outside the U.S. for more than seven months between February 1993 and September 1995. The petitioner must resolve inconsistencies by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)("Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.").

Because the experience letter that the petitioner submitted does not state whether the beneficiary worked full-time for and because the evidence is inconsistent as to whether the beneficiary's employment by was continual, the AAO finds that the petitioner has failed to demonstrate that the beneficiary met the requirements for the offered position as of the priority date.

The AAO will also review the director's other ground of denial: whether the petitioner has demonstrated a continuing ability to pay the offered wage from the priority date until the beneficiary becomes a lawful permanent resident.

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). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage, as stated on the Form ETA 750, is $14.54 an hour for 40 hours a week (or $30,243.20 a year).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner did not disclose its date of establishment, but its supporting financial documents show that it has been in business since at least 2001. The petitioner claimed to employ seven workers. On the Form ETA 750B, signed by the beneficiary and dated December 15, 2005, the beneficiary claimed to work for the petitioner since August 1997.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages. USCIS will also consider the totality of the circumstances affecting the petitioning business. *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 submitted copies of Internal Revenue Service Forms W-2, establishing that it employed and paid the beneficiary from 2001 to 2008. But the W-2 forms show that the petitioner did not pay the beneficiary the offered annual wage of $30,243.20 or greater in any of those years. Rather, the evidence shows that the petitioner paid the beneficiary $10,953.91 in 2001; $6,356.17 in 2002; $8,760.70 in 2003; $7,649.69 in 2004; $11,107.04 in 2005; $7,133.93 in 2006; $5,317.17 in 2007; and $631.96 in 2008. Thus, the differences between the offered annual wages and the annual amounts the petitioner paid the beneficiary were: $19,289.29 in 2001; $23,887.03 in 2002; $21,482.50 in 2003; $22,593.51 in 2004; $19,136.16 in 2005; $23,109.27 in 2006; $24,926.03 in 2007; and $29,611.24 in 2008.

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 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 about thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor's federal income tax returns show that he supports a family of four, including himself. The proprietor's tax returns reflect the following adjusted gross income amounts on Forms 1040[3]: $72,064 in 2001; $136,898 in 2002; $70,491 in 2003; $55,628 in 2004; $87,022 in 2006; and $131,178 in 2007.

The sole proprietor's annual adjusted gross income amounts from 2001 to 2007 are sufficient to pay the differences between the beneficiary's actual and offered annual wages in those years. But the petitioner has not demonstrated that the proprietor could have also sustained himself and his family each year while also paying the differences between the beneficiary's actual and offered annual wages. For example, in 2004, the proprietor reported an annual adjusted gross income of $55,628. The difference between the annual wage paid to the beneficiary in 2004 and the offered wage was $22,593.51. Subtracting $22,593.51 from $55,628 would leave only $33,034.91 for the proprietor to pay for the living expenses of himself and his family. Because the petitioner has not provided evidence regarding the living expenses of the proprietor and his family – including such expenses as

[3] Adjusted gross income amounts on Form 1040 are found at: line 33 for 2001; line 35 for 2002; line 34 for 2003; line 36 for 2004; and line 37 for 2005-07.

housing, utilities, food, etc. - the AAO cannot find that the proprietor more likely than not has the ability to support his family of four on $33,034.91 at his home in Orange County, California.[4]

Because the petitioner has not shown that the sole proprietor can sustain himself and his family while paying the offered wage to the beneficiary, the AAO finds that the petitioner has not demonstrated its continuing ability to pay they offered wage based on the proprietor's net income.

In the motion to reopen, the petitioner submitted copies of profit/loss statements from 2001 to 2010. As the director indicated in his May 1, 2009 decision, USCIS will not consider the petitioner's profit/loss statements because they are unaudited. Unaudited financial statements merely constitute 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. Going on record without reliable, supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). Moreover, the profit/loss statements, even if reliable, do not evidence the petitioner's continuing ability to pay the offered wage. For example, the 2009 profit/loss statement shows a net income of ($49,202.39).[5]

USCIS may consider, however, the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa, supra*. 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 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

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[4] The AAO notes that the Council for Community and Economic Research in 2010 rated Orange County, California the tenth most expensive U.S. metropolitan area in which to live. *See* http://www.huffingtonpost.com/2011/11/01/10-most-expensive-and-lea_n_1069976.html (accessed December 26, 2012). The cost of living in the proprietor's community, while not determinative, is a factor in determining his ability to sustain his family while paying the beneficiary's offered wages.

[5] The AAO places figures in parentheses to reflect negative amounts.

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, like the petitioner in *Sonegawa*, has been in business for more than 10 years. But, based on the profit/loss statements that the petitioner submitted, the petitioner lost money in 2009. In a letter with the motion to reopen, the proprietor acknowledged that "the last two years have been hard for our company financially." In addition, unlike the employer in *Sonegawa*, the petitioner has not identified any uncharacteristic expenditures or losses to explain its recent financial troubles, nor has it provided evidence of an outstanding reputation in its industry. Assessing the totality of the circumstances in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated a continuing ability to pay the offered wage rate.

In summary, the AAO grants the petitioner's motion to reopen and reconsider, and withdraws its previous decision on appeal. The AAO finds that the petitioner has not demonstrated that the beneficiary was qualified for the offered position or that it has had the continuing ability to pay the offered wage since the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, the AAO's previous decision is withdrawn, and the appeal is dismissed.