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

[redacted]

DATE: JUN 20 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 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 irrigation/landscaping business. It seeks to employ the beneficiary permanently in the United States as a team leader. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). By decision dated February 19, 2010, the director denied the petition stating that the petitioner had failed to establish the continuing ability to pay the proffered wage from the priority date onward. The director further determined that the petitioner failed to establish that the beneficiary had 36 months of experience in the proffered position as required by the ETA Form 9089. The director denied the petition accordingly. On October 22, 2009, the petitioner filed a motion to reopen and motion to reconsider the director's decision. The director found the motion to have been properly filed and reconsidered the matter along with new evidence submitted by the petitioner. By decision dated February 19, 2010, the director again found that the petitioner had failed to establish the continuing ability to pay the proffered wage from the priority date. The director also found that the petitioner failed to establish that the beneficiary had 36 months of experience in the proffered profession as required by the labor certification. The director noted that the grounds for denial stated in its decision dated February 19, 2010 had not been overcome by the petitioner on motion and affirmed its prior decision denying the petition. From that determination the petitioner filed the present appeal.

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, the issues in this case are 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, and whether the beneficiary is qualified for the position offered.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on May 22, 2008. The proffered wage as stated on the ETA Form 9089 is $32.19 per hour ($66,955.20 per year). The ETA Form 9089 states that the position requires 36 months of experience in the proffered position as Team Leader or 36 months in the alternate occupation of irrigation system supervisor.

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 1985 and to employ an unstated number of workers. On the ETA Form 9089, signed by the beneficiary on October 31, 2008 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 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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

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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 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).

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 2008 onwards. The petitioner did submit, however, a W-2 Form showing that it paid the beneficiary wages in 2008 of $14,280. Thus, it will be necessary for the petitioner to establish the ability to pay the difference between wages paid to the beneficiary in 2008 and the full proffered wage. That sum is $52,675.20.[2]

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

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[2] The petitioner sent W-2 Statements for 2009 to 2012 for a separate taxpayer identification number. Nothing shows that company is the successor to the initial petitioner and those W-2 Statements can be accepted to show the petitioner's ability to pay the proffered wage.

In the instant case, the sole proprietor stated that his monthly living expenses in 2008 were $6,086.90 per month, or $73,042.80 per year. Thus, for 2008, the petitioner must establish the ability to pay the sum of $125,718 (the difference between wages paid to the beneficiary and the full proffered wage[$52,675.20] plus annual expenses of $73,042.80).

The petitioner's 2008 tax return states an adjusted gross income $137,910. That tax return would, therefore, state sufficient adjusted gross income to pay the difference between wages paid to the beneficiary and the full proffered wage plus the sole proprietor's annual living expenses in this year.[3]

On appeal, counsel asserts that the petitioner has sufficient assets to pay the proffered wage and that the beneficiary has 36 months of experience in the proffered position as required by the labor certification.

Subsequent to the filing of the appeal, the AAO issued an RFE asking that the petitioner provide the following information with respect to the petitioner's ability to pay the proffered wage:

- Complete copies of the petitioner's federal tax returns for 2009, 2010, 2011 and 2012.
- Copies of W-2 Forms, Forms 1099 or other proof of wages paid to the beneficiary from 2008 to the present, if any.
- Any other relevant information which would tend to show a sustained history of growth and profitability such as copies of the petitioner's complete tax returns for 2003 through 2006 which could be reviewed to determine the petitioner's ability to pay the proffered wage based on a totality of the circumstances. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). While the petitioner must establish its ability to pay the proffered wage from the priority date onward, and the prior tax returns are, therefore, not required, such evidence will be considered in determining the petitioner's ability to pay the proffered wage based on a totality of the circumstances in this instance.
- The sole proprietor provided a list of his monthly living expenses in response to the director's request for evidence dated April 25, 2009. Please provide a list of the sole

[3] The petitioner initially submitted unaudited financial statements. 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. On motion, the director found that the sole proprietor's expenses and the proffered wage proffered wage totaled $139,999 and exceeded the sole proprietor's adjusted gross income. The petitioner subsequently submitted, in response to the AAO's RFE, the beneficiary's W-2 statement for 2008.

proprietor's recurring monthly living expenses and those of any dependents for years 2010, 2011 and 2012.

The petitioner was also asked to provide copies of its 941 quarterly wage statements for 2010, 2011 and 2012 to establish that the position was a full-time position. The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

With regard to the experience requirements of the ETA Form 9089, the petitioner was informed that the experience letters of record were insufficient to establish that the beneficiary had 36 months of experience in the proffered position. Specifically, the petitioner was informed of the experience letter deficiencies and asked to provide additional information as set forth below:

> The position requires 36 months three years of experience in the position offered or 36 months of experience in the alternate occupation of irrigation system supervisor. The documentation provided by the petitioner with regard to the beneficiary's work experience is insufficient to establish that the beneficiary meets the 36 month experience requirement of the ETA Form 9089. The petitioner produced letters from which stated that the beneficiary worked as a supervisor of immigration systems from May 15, 1990 to June 15, 1995. It is unclear what relationship the author of the experience letters had with the beneficiary as the author states in one letter that: "It is important to mention I do not have or run a Company or Firm, I work on my own." In another letter the author states that he, the author, is an independent worker in the agricultural field. Experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The experience letters presented do not provide the title of the author who prepared the letters or adequately explain the relationship between the author and the beneficiary to determine if the author was the trainer or employer. As such, it cannot be determined with certainty that the beneficiary had the required experience as of the priority date. The petitioner should provide additional documentation from the stated employer which addresses this issue and provides all information required by the above cited regulation (8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The documentation should also state whether the employment was on a full-time or part-time basis.

In response to the AAO's RFE, the petitioner provided, in part, copies of corporate tax returns (tax years 2009, 2010, 2011 and 2012) from (EIN) to establish its ability to pay the proffered wage. The petition was, however, filed by with a Federal Tax Identification Number (FEIN) of The petitioner is a separate legal entity from The petitioner notes in a letter to counsel that is now In support of that statement, the petitioner provided evidence that incorporated in 2009 and obtained a new FEIN. The record does not, however, establish that is the successor-in-interest to the petitioner,

In order to establish a valid successor-in-interest relationship between these two organizations for immigration purposes, it will be necessary for the parties to establish that three conditions are satisfied. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482. The record does not establish that is the successor-in-interest to the petitioner. The submitted tax returns from for years 2009, 2010, 2011 and 2012 will not be considered and the petitioner has not submitted statutorily prescribed documentation to establish its ability to pay the proffered wage for years 2009 onward. The same must be said for W-2 Forms which were submitted for years 2009 – 2012 showing wages paid to the beneficiary by Those wages will not be considered as they were paid by an entity that appears to be unrelated to the petitioner as the present record now stands. If the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 or subsequent to the Form I-140 filing is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

It is noted that even if the tax returns submitted by were considered, the ability to pay the proffered wage would still not be established from the priority date onward. The stated tax returns were filed on Tax Form 1120S for a Subchapter S corporation. In determining the petitioner's ability to pay the proffered wage during a given period for this type of corporation, 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 alleged successor-in-interest has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from 2009 or subsequently. W-2 Forms were submitted showing wages paid to the beneficiary by the alleged successor as follows:

- 2009 - $14,640.50
- 2010 - $15,200
- 2011 - $14,780
- 2012 - $16,800

It would be necessary for the successor to establish the ability to pay the difference between the wages paid to the beneficiary and the full proffered wage. Those sums are as follows:

- 2009 - $52,314.70
- 2010 - $51,755.20
- 2011 - $52,175.20
- 2012 - $50,155.20

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). 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.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay

> wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 27, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2009 federal income tax return was the most recent return available. The record now contains, however, additional tax returns submitted by the petitioner on appeal, with those tax returns being the tax returns of the alleged successor-in-interest. The alleged successor's tax returns demonstrate its net income for 2009 through 2012, as shown in the table below.

- In 2009, the Form 1120S stated net income[4] of ($58,236).
- In 2010, the Form 1120S stated net income of ($16,664).
- In 2011, the Form 1120S stated net income of ($61,918).
- In 2012, the Form 1120S stated net income of $90,366.

Therefore, for the years 2009, 2010 and 2011, the alleged successor's tax returns would not state sufficient net income to pay the proffered wage or the difference between wages paid to the beneficiary and the full proffered wage. The alleged successor's 2012 tax return would state sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed June 18, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for 2009 through 2012, the petitioner's net income is found on Schedule K of its tax returns.

petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The alleged successor's tax returns demonstrate its end-of-year net current assets for years 2009 through 2012, as shown in the table below.

- In 2009, the Form 1120S stated net current assets of $37,286.
- In 2010, the Form 1120S stated net current assets of $33,498.
- In 2011, the Form 1120S stated net current assets of $24,979.
- In 2012, the Form 1120S stated net current assets of $59,032.

Therefore, for the years 2009, 2010 and 2011, the alleged successor's tax returns do not state sufficient net current assets to pay the difference between wages paid to the beneficiary and the full proffered wage. As previously noted, the alleged successor's 2012 tax returns states sufficient net income or net current assets to pay the difference between wages paid to the beneficiary and the full proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The tax returns of the alleged successor, if accepted, would not establish the continuing ability to pay the beneficiary the proffered wage from 2009 (the date of incorporation of the alleged successor) onward through an examination of wages paid to the beneficiary, or its net income or net current assets.

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

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[5]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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's 2008 tax return would show sufficient adjusted gross income to pay the diference between the proffered wage and wages paid to the present beneficiary, and the sole proprietor's expenses. The petitioner, however, did not provide proof of its ability to pay the proffered wage, or difference between wages paid to the beneficiary and the full proffered wage, in any other year. As noted, the tax returns submitted to establish the petitioner's ability to pay the proffered wage in all years subsequent to 2008 were provided by another entity and it has not been established that the other entity is a valid successor-in-interest to the petitioner. Even if the tax returns of the alleged successor were considered, the ability to pay has still not been established. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 36 months experience in the proffered position as Team Leader or 36 months of experience in the alternate occupation of irrigation system supervisor. On the labor certification, the beneficiary claims to qualify

for the offered position based on experience as an irrigation system supervisor.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The documentation provided by the petitioner with regard to the beneficiary's work experience is insufficient to establish that the beneficiary meets the 36 month experience requirement of the ETA Form 9089. The petitioner produced letters from which stated that the beneficiary worked as a supervisor of immigration systems from May 15, 1990 to June 15, 1995. It is unclear what relationship the author of the experience letters had with the beneficiary as the author states in one letter that: "It is important to mention I do not have or run a Company or Firm, I work on my own." In another letter the author states that he, the author, is an independent worker in the agricultural field. Experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The experience letters presented do not provide the title of the author who prepared the letters or adequately explain the relationship between the author and the beneficiary to determine if the author was the trainer or employer. As such, it cannot be determined with certainty that the beneficiary had the required experience as of the priority date. It is noted that the petitioner was asked to address these issues and to provide additional documentation from the stated employer in the AAO's RFE. The petitioner did not address or otherwise respond to the AAO's request in this regard. In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). For this additional reason, the petition may not be approved.

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

As noted above, the petitioner was also asked to provide copies of its 941 quarterly wage statements for 2010, 2011 and 2012 to establish that the position was a full-time position. The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner provided those documents for the asserted successor. An examination of the quarterly wage statements does not show that the asserted successor offers full-time employment for all of its workers throughout the year. The quarterly returns show 24 employees from April to June and only five employees from October to December. Additionally, based on the W-2 Statements submitted, the beneficiary appears to be currently employed on a part-time basis.

Accordingly, 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.