

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B6



File: [Redacted]  
WAC-04-136-55002

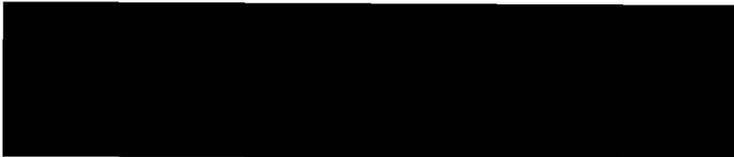
Office: CALIFORNIA SERVICE CENTER

Date: DEC 20 2007

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center (“director”) initially approved the employment-based preference visa petition. Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition (“NOIR”). Subsequently, the director revoked the Form I-140 approval in a Notice of Revocation (“NOR”). The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner operates a clothing store, and seeks to employ the beneficiary permanently in the United States as a first line supervisor or manager, retail sales worker (“Clothing Store Manager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s August 14, 2007 NOR, the petition’s approval was revoked based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence. Specifically, the petitioner submitted tax returns for a separate company who was not the petitioning entity. The petitioner did not adequately establish the relationship between the petitioner and the second company. Accordingly, the record was lacking evidence that the actual petitioner had the ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

The record shows that the appeal 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.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

---

<sup>1</sup> 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).

*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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The history of the case follows:

- On March 19, 2001, the petitioner filed Form ETA 750 on behalf of the beneficiary for the position of clothing store manager, 40 hours per week, at a pay rate of \$21.27 per hour,<sup>2</sup> equivalent to an annual salary of \$44,241.60;
- On December 29, 2003, the Form ETA 750 was approved;
- On April 14, 2004, the petitioner filed the I-140 Petition on behalf of the beneficiary, and listed the following information: established: May 20, 1999; gross annual income: \$2,866,970; net annual income: \$855,916; and current number of employees: 2.
- On August 26, 2004, the director issued a Request for Evidence (“RFE”) for the petitioner to provide evidence of its ability to pay, specifically for the year 2003, in the form of complete certified IRS copies of its federal tax returns, audited financial statements, or annual reports;
- On October 28, 2004, the director approved the I-140 petition;
- On June 26, 2007, the director issued a Notice of Intent to Revoke (“NOIR”), which provided that the petitioner, [REDACTED], failed to provide evidence that it was owned by [REDACTED] [REDACTED] c. was the entity, which the petitioner had submitted tax returns for in support of the petitioner’s ability to pay the proffered wage. The NOIR further provided that the petitioner had claimed that it had two employees, but that the petitioner had failed to provide documentation of payment or employment of the listed employees. Additionally, the NOIR provided that the petitioner’s initial evidence submitted to document that the beneficiary had the required two years of prior experience as listed on the certified Form ETA 750 was insufficient to show that the beneficiary met the listed requirements;
- The petitioner responded.

Following consideration of the petitioner’s response, on August 14, 2007, the director issued a NOR and revoked the petition with good and sufficient cause as the petitioner failed to provide evidence that [REDACTED] was owned by the same owner as [REDACTED]. Further, the director provided that even if [REDACTED] who owned [REDACTED], also owned [REDACTED], [REDACTED] was a corporation, a separate legal entity from its shareholders, and the income of other businesses or shareholders cannot be used to show the petitioner’s ability to pay the proffered wage. As the petitioner failed to demonstrate its ability to pay, the petition was accordingly revoked.<sup>3</sup> The petitioner appealed and the matter is now before the AAO.

<sup>2</sup> The petitioner initially listed the proffered wage as \$6.00 per hour, but DOL required that the petitioner increase the wage to \$21.27 per hour prior to certification.

<sup>3</sup> Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, on Form ETA 750, signed by the beneficiary on March 12, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not submit any evidence that it employed or paid the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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 the Service should have considered income before expenses were paid rather than net income.

The petitioner listed on Form ETA 750 is: La Gran Familia, with an address of [REDACTED] Los Angeles, CA 90015. The petitioner listed its "IRS Tax Number" on Form I-140 as: [REDACTED]. The petitioner listed on Form I-140 is: [REDACTED] with the same address. The petitioner submitted tax returns for the following entity: [REDACTED] Paramount, CA [REDACTED] 4, with a Federal Employment Identification Number ("FEIN") of [REDACTED]

[REDACTED] is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). From the documentation submitted, Hip Hop Connections, Inc. lists only income from its business, and its tax returns would reflect its income on line 21:

---

Dec. 582, 590 (BIA 1988). Accordingly, the director has the authority to revoke the petition at any time for good and sufficient cause.

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	\$47,476
2004	\$39,806
2003	\$46,419
2002	\$30,821
2001 <sup>4</sup>	\$69,808

While the tax returns would reflect that [REDACTED] could pay the proffered wage in 2001, 2003, and 2005, but not in two of the years, based on its net income, the petitioner has not established the connection between itself and [REDACTED]. In the absence of a connection, wages paid, and financial information related to one company, cannot be used to satisfy the petitioner's need to demonstrate that it can pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Further, [REDACTED] has not demonstrated that it is the successor-in-interest to the initial petitioner. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). There is no evidence in the record of proceeding that [REDACTED] has assumed all of the rights, duties, and obligations of the petitioner.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Again, as the petitioner did not submit any tax returns for [REDACTED], the net current assets listed below are for Hip Hop Connections, Inc.

---

<sup>4</sup> [REDACTED] was previously structured as a partnership. The 2001 Form 1065 lists that the business was started on January 1, 2000. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below."

<u>Tax year</u>	<u>Net current assets</u>
2005	\$494,641
2004	\$566,926
2003	\$244,174
2002	\$240,898
2001	\$238,714 <sup>5</sup>

While [REDACTED]'s net current assets would reflect an ability to pay the proffered wage, as addressed above, the tax returns submitted would not reflect the petitioner, [REDACTED], ability to pay the proffered wage. Further, [REDACTED] is a separate corporation, and its financial information cannot be used to demonstrate [REDACTED]'s ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. at 24; *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 530; and *Matter of Tessel*, 17 I&N Dec. at 631.

The petitioner submitted the following statements to explain the connection between the two companies:

Statement of [REDACTED] signed and undated.<sup>6</sup> The statement provided that [REDACTED] was a "fifty percent shareholder" in Hip Hop Connections, Incorporated, which began doing business in October 1998, and was later incorporated on November 2, 2001 in the state of California. Further, [REDACTED] provides that La Gran Familia was established on May 20, 1999, and that he was the sole owner of La Gran Familia. In conclusion, [REDACTED] provides that "the information available in the tax returns submitted on behalf of Hip Hop Connections reflects any and all financial information on behalf of La Gran Familia as well. La Gran Familia was included in and merged with the tax returns submitted on behalf of Hip Hop Connections."

Statement of [REDACTED], signed and undated. The statement provided that [REDACTED] had been the accountant for both Hip Hop Connections, Inc. and La Gran Familia for about five years, and that he was, therefore, familiar with transactions between the two companies for that five year time period. He provided that La Gran Familia was established by [REDACTED] on May 20, 1999, and that [REDACTED] was a fifty percent shareholder of Hip Hop Connections, Inc. Further, [REDACTED] provided that "for tax purposes, La Gran Familia has been included in and merged with the tax returns of Hip Hop Connections due to the relationship between the entities."

In the NOIR, the director provided that the evidence submitted failed to establish that "Hip Hop Connections owns The Gran Familia," and even if Mr. [REDACTED] owned both companies, Hip Hop Connections was a

<sup>5</sup> A partnership's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 15 through 17.

<sup>6</sup> The document is listed as an "affidavit" and provides that [REDACTED] has been "duly sworn, depose[s] and say[s]" the information listed in the statement. However, the statements provided have not been notarized, and are not affidavits. An affiant would swear or affirm the statement before an officer authorized to administer oaths or affirmations after the officer confirms the declarant's identity, and administers the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Further, in lieu of notarization, the declarations do not contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Similarly, the "affidavit," addressed below, provided by the petitioner's CPA has not been notarized.

separate legal entity, and its financial information could not be considered in proof of the petitioner's ability to pay the proffered wage.

In response to the NOIR, counsel provided that Hip Hop Connections Inc. is established as a subchapter S corporation, which is a "pass-through entity with the profit passing through to the shareholder as if the business were the shareholder's sole proprietorship." Further, counsel provided that Hip Hop Connections and La Gran Familia "are wholly owned and controlled by the same individual." Therefore, counsel asserted that the two companies "come under the umbrella of a single entity as they are both affiliates of the same parent or individual."

In support, the petitioner provided a second statement<sup>7</sup> from its accountant, signed and dated July 19, 2007. The statement provided that La Gran Familia was a "dba" of [REDACTED] and that La Gran Familia was a fictitious business name that [REDACTED] used for his business. Further, the accountant provided that Hip Hop Connections was established in October 1998, and incorporated as a subchapter S corporation in January 2002. The accountant explains that Hip Hop Connections was a subchapter S corporation, and that "[REDACTED] owned 50% of the shares until 2004, after which he became the sole shareholder of Hip Hop Connections, Inc." He continues that, "all income from Hip Hop and La Gran Familia therefore goes directly to [REDACTED]. For tax preparation purposes, La Gran Familia's income is included in the tax returns for Hip Hop Connections, Inc. because [REDACTED] is ultimately personally taxed on all the income." His statement includes a diagram, which shows income flowing from Hip Hop Connections to [REDACTED] (dba La Gran Familia).

The petitioner also submitted unaudited financial statements for La Gran Familia for the years ending 2004, and 2005, as well as a statement of sales for the time period January 1, 2005 to June 30, 2005. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The petitioner did not provide any accompanying report from an accountant, despite a notation to "see accountant's compilation report." However, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Even if we were to consider the unaudited statements, the statements reflect 2004 year end net income in the amount of -\$267.07, and 2005 net income in the amount of \$317.14, both of which would be insufficient to show the petitioner's ability to pay the proffered wage.

The petitioner also provided a copy of the petitioner, [REDACTED], Seller's Permit. The permit was dated May 20, 1999, and listed an account number of "SR AA 97541873," and an address of: La Gran Familia, [REDACTED], Los Angeles, CA 90015. The petitioner additionally provided a copy of its City of Los Angeles Tax Registration Statement, dated June 5, 1999, and exhibited that the petitioner was registered for "wholesale sales" with an address of [REDACTED] Los Angeles, CA 90015, as well as [REDACTED] Bell, CA 90201-1116.

---

<sup>7</sup> Similarly, the document is listed as an "affidavit," but again has not been notarized, and lacks the declaration permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746.

While these documents would establish the address and business of La Gran Familia, it would not establish that Hip Hop Connections and La Gran Familia are related entities, or any connection through which the financial information of Hip Hop Connections could be used to show La Gran Familia's ability to pay the proffered wage.

The petitioner additionally submitted copies of California State Quarterly Tax Returns for Hip Hop Connections, Inc. for the quarters ending March 31, 2004, June 30, 2004, September 30, 2004, December 31, 2004, March 31, 2005, June 30, 2005, September 30, 2005, December 31, 2005. With the exception on one return, the quarterly forms all list two employees, [REDACTED] and a second individual who has a similar surname and appears to be related. The quarterly return for the quarter ending March 31, 2004 lists one additional employee.

These documents would establish that Hip Hop Connections has employed and paid individuals, but would not establish that La Gran Familia has any employees, or that it could pay the proffered wage.

After consideration of the petitioner's response to the NOIR,<sup>8</sup> the director issued the NOR, which provided that: the petitioner failed to establish that Hip Hop Connections owns La Gran Familia; that even if Ali El Reda owned Hip Hop Connections, that company is a separate entity than La Gran Familia, and income from

---

<sup>8</sup> The petitioner provided an additional letter to document the beneficiary's experience and that he met the qualifications of the certified ETA 750. While the new letter provided does address the beneficiary's job duties, and is now properly signed, the letter is still deficient in that it fails to list whether the beneficiary's work experience gained from March 1997 to April 1999 was on a full-time or part-time basis to allow us to conclude whether the beneficiary has the full two years of prior required work experience as listed on the certified Form ETA 750. See 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii)(A). A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

Hip Hop Connections could not be used to show La Gran Familia's ability to pay the proffered wage; and the labor certification lists La Gran Familia as the petitioning entity, and not Hip Hop Connections.

On appeal, counsel provides that CIS erred "in not recognizing the unique character of a Subchapter S corporation and the treatment of its income earned." Counsel rephrases the issue that it is not "whether the corporation's income can be considered as part of the income earned. The issue is whether the income of the owner and sole shareholder of the corporation can be used as evidence of the owner's ability to pay the proffered wage to an employee of a business that he is the sole proprietor of."

Counsel asserts that as a Subchapter S corporation, Hip Hop Connections, Inc.'s income is "the personal income of [REDACTED], the owner and sole proprietor of La Gran Familia." Further, counsel asserts that 8 C.F.R. § 204.5(g)(2) would support the use of such income in consideration of the petitioner's net income and net current assets.

As noted above, a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. As Hip Hop Connections operates as a separate corporate entity, the assets of Hip Hop Connections, cannot be used to demonstrate the petitioner's ability to pay the proffered wage.

Next, counsel provides that as the petitioner is a sole proprietorship, the owner's individual income and assets should be considered in determining the petitioner's ability to pay the proffered wage. Counsel cites to a Board of Alien Labor Certification Appeals ("BALCA") case, *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) in support,<sup>9</sup> and provides that in that case, a sole proprietor had an annual loss of business income, which was caused by depreciation of capital investments. The employer, however, had enough money to pay the proffered wage when his total annual income, adjusted gross income, was taken into consideration. Counsel provides that the Board in the BALCA case determined that "the entire financial circumstances of a sole proprietorship employer should be considered when considering the ability to pay."

A sole proprietor is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

---

<sup>9</sup> Counsel does not state how DOL's BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the present matter, the record lacks conclusive documentation that the petitioner is a sole proprietorship. While the petitioner's accountant provides that "there is no legal distinction between I [REDACTED] and [REDACTED] the petitioner did not provide the sole proprietor's individual federal tax return, Form 1040, with requisite Schedule C to document the earnings of the sole proprietor, or of the petitioner, [REDACTED]<sup>10</sup> Without such documentation, we cannot determine the sole proprietor's adjusted gross income ("AGI"), and whether the sole proprietor would be able to support himself and his family (if any), and pay the beneficiary the proffered wage. In furtherance of such determination, the sole proprietor would need to provide documentation related to personal expenses incurred on an annual basis, as well as liabilities, in order to determine whether the sole proprietor's AGI would be sufficient to support both himself and his family, and pay the proffered wage. Form 1040 would reflect [REDACTED]'s earnings from Hip Hop Connections and any other businesses and be considered as part of his AGI. However, the petitioner failed to submit any such documentation. [REDACTED]'s income from Hip Hop Connections, Inc. as reflected in his AGI would be relevant to the petitioner's ability to pay the proffered wage, but the net income and net current assets of Hip Hop Connections, as a separate corporation would be legally distinct and not relevant to whether the actual petitioner had the ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. at 24; *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 530; and *Matter of Tessel*, 17 I&N Dec. at 631.

Counsel next cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), and asserts that on the basis of this decision, CIS should "look into the salary history and other items specific to the particular petitioner to determine the actual ability to pay the proffered wage."

In the present matter, the petitioner, [REDACTED], provided no evidence of paying either the beneficiary a salary, or payment of salaries to any workers. The purpose of an RFE is to obtain further information to clarify whether the beneficiary is eligible for the benefit sought. Eligibility must be established as of the time that the petition was filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). A petitioner's failure to submit requested evidence, which would preclude a material line of inquiry, serves as a ground to deny a petition. 8 C.F.R. § 103.2(b)(14). The NOIR specifically noted that the petitioner failed to submit evidence that it employed two individuals as claimed. Evidence that Hip Hop Connections employed two individuals is not relevant to establishing that La Gran Familia employed two individuals. Accordingly, we are unable to examine or consider any prior wage payments to other employees, or to the beneficiary.

More specifically, *Matter of Sonogawa*, 12 I&N Dec. 612, relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new

---

<sup>10</sup> Going on record without 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the prevailing wage. Additionally, the petitioner has not submitted the actual petitioning entity's tax returns, so that we cannot, based on the evidence provided, examine the totality of the petitioner's circumstances.

Counsel next seeks to distinguish the instant matter from *Ubeda v. Palmer*, 539 F. Supp. at 647. Counsel asserts that in *Ubeda* the sole proprietor had a small gross income, never above \$20,000, and in comparison, the petitioner in the present case had "income and assets" of several hundred thousand dollars. Further, counsel provides that the petitioner in *Ubeda* was a domestic household in contrast to the petitioner, which he asserts is "part of a number of viable businesses, all creating income for Petitioner's proprietor." Additionally, counsel provides that although La Gran Familia's income was "volatile," that the "proprietor maintained a steady growth in both income and equity over the time period in question."

As noted above, the petitioner did not provide the sole proprietor's individual federal tax returns, including relevant Schedule Cs to document the earnings of the sole proprietor, or of the petitioner, La Gran Familia. Without such documentation, we cannot determine the sole proprietor's AGI, and whether the sole proprietor would be able to support himself, and pay the beneficiary the proffered wage. Further, the sole proprietor failed to provide documentation related to personal expenses incurred on an annual basis, as well as liabilities, in order to determine whether the sole proprietor's AGI would be sufficient to support both his family, and pay the proffered wage. Accordingly, the petitioner has failed to provide any of the necessary documentation with the initial filing, in response to the RFE, in response to the NOIR, or on appeal to document that the actual petitioner had the ability to pay the proffered wage.

Based on the foregoing, the petitioner has failed to overcome the basis for the revocation in that it has not established the petitioner's ability to pay the proffered wage. The revocation was issued for good and sufficient cause pursuant to Section 205 of the Act. 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.

**ORDER:** The appeal is dismissed. The director's decision is affirmed.