U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 2 4 2009
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IN RE: Petitioner:
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:

[redacted]

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.

John F. Grissom, 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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner's business is computer related services. It seeks to employ the beneficiary permanently in the United States as a technical advisor/petroleum industry. As required by statute, the petition is accompanied by an unsigned Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The 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 dated February 13, 2007, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and beyond the decision of the director whether or not the original certified ETA Form 9089 has been signed by the employer, alien, attorney and/or agent.

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 at 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 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification

as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on July 10, 2006. The proffered wage as stated on the Form ETA 9089 is $29.78 per hour ($61,942.40 per year).

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Relevant evidence in the record includes: the original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; the petitioner's U.S. Internal Revenue Service Form (IRS) 1040 tax returns for 2003, 2004 and 2005;[2] and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that Infobase Technologies is structured as a sole proprietorship.[3] On the petition, the petitioner claimed to have been established in 1996 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were $151,532.00 and $137,644.00 respectively. On the Form ETA 9089, unsigned by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The director issued a request for evidence to the petitioner dated December 22, 2006.

In response counsel submitted a cover letter dated January 24, 2007, the petitioner's unaudited financial statements for 2006, and the petitioner's "Additional Household Income, Payments, and Expenses ...."

The director denied the petition on February 13, 2007.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

[2] Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date but will be examined generally. .

[3] According to the Internet website at http://kepler.sos.ca.gov accessed December 5, 2008, the [redacted] is an active California corporation maintaining its principal place of business at [redacted] which is the address given by the petitioner.

On appeal, counsel makes no assertions that the director erred in law or fact.

Accompanying the appeal, counsel submits additional evidence not introduced below which is the petitioner's U.S. Federal Tax Return Form 1040 for 2006 stating adjusted gross income of $435,256.00; an explanatory letter dated February 22, 2007, from Hamid Taghdiri, president of the petitioner; the petitioner's unaudited financial statements dated February 22, 2007; the sole proprietor's "individual-household" statement for 2006 stating monthly expenses of $8,429.00 per month (indicating expenses of $101,148.00 yearly); as well as three Form 1099-Misc Statements and Form W-2 Wage and Tax Statements for the sole proprietor that substantiates his earned income for 2006; and the petitioner's checking and savings account data.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Application for Permanent Employment Certification ETA 9089 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. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not employed and paid the beneficiary who is resident in Iran according to the petition.

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. 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. *See 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. at 647.

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. 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. at 647.

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 instant case, the sole proprietor supported a family of three. The tax return reflects the following information:

	2006
Proprietor's adjusted gross income[4] (Form 1040)	$435,256.00
Petitioner's gross receipts or sales (Schedule C)	$317,089.00
Petitioner's wages paid (Schedule C)	$ 73,541.00
Petitioner's net profit from business (Schedule C)	$ 48,226.00

In 2006 the sole proprietorship's adjusted gross incomes covers the proffered wage of $43,992.00 with consideration of the sole proprietors' yearly personal expenses of $101,148.00.

Based upon the evidence submitted upon appeal, the petitioner has demonstrated its ability to pay the proffered wage from the priority date. Therefore, the director's decision is withdrawn. However, the matter must be remanded because an additional ground of ineligibility has been identified.

The 9089 was certified but submitted unsigned by the petitioner, beneficiary and counsel. The employer who is the petitioner herein and the alien applicant who is the beneficiary herein must certify to the conditions of employment listed on the Application for Permanent Employment Certification under penalty of perjury. Failure to attest to any of the conditions results in a denial of the application. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. The pertinent regulation states in pertinent part: "DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent."[5]

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[4] Without reference to the petitioner's net operating loss.

[5] The regulation at 20 C.F.R. § 17(a)(1) states in pertinent part:

> Filing applications. (1) Except as otherwise provided by Sec. Sec. 656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must

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).

Therefore, this matter will be remanded. The director may seek additional evidence and must issue a new decision, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is remanded to the director for issuance of a new, detailed decision.

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file a completed Department of Labor Application for Permanent Employment Certification form (ETA Form 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.