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U.S. Department of Homeland Security
S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

SEP 1 6 2009

FILE: Office: NEBRASKA SERVICE CENTER Date:

LIN 07 259 50753

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 appeal will be dismissed.

The petitioner is a dry cleaner. It seeks to employ the beneficiary permanently in the United States as a precision dyer and fur and leather cleaner. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the Form ETA 750 submitted by the petitioner indicated the petitioner required three years of prior work experience, and did not support an unskilled or other worker classification as stipulated by the petitioner's I-140 petition. The director also determined that the petitioner had not submitted required initial evidence described at 8 C.F.R. § 204.5(g)(2) to establish 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.

The petitioner is self-represented. The record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the beneficiary on January 5, 2007. There is no Form G-28 in the record signed by the petitioner. On appeal, [redacted] identified on the G-28, submits the appeal but does not submit a Form G-28, signed by both him and the petitioner. The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part: "(B) Meaning of affected party. For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition." The regulation at 8 C.F.R. § 103.3(a)(2)(v) states:

> Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

Therefore, the appeal has not been properly filed, and can be rejected.

As set forth in the director's October 16, 2008 denial, the two issues in this case are whether the petitioner's classification of the instant petition as unskilled, other worker on the I-140 petition was sufficient grounds for denying the petition, and whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

> (ii) Other documentation--
>
> > (D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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] On appeal, counsel submits copies of the petitioner's Forms 1040 for tax years 2006 and 2007, with accompanying schedules. Counsel also submits the following:

- A copy of USCIS correspondence dated August 9, 2008 that refers to the petitioner's attempt to correct a typographical error on the instant petition;
- A copy of the first page of a letter dated April 24, 2008 from counsel's office requesting a change in the classification of the instant petition;
- A copy of the April 30 , 2008 Minutes from an AILA/Nebraska Service Liaison Meeting, posted by AILA on its website on October 8, 2008;
- A copy of an AILA document with a series of questions and answers identified posted by AILA InfoNET Doc. 08110767 and posted November 2008; and
- A copy of an interoffice memorandum dated June 1, 2007 from Donald Neufeld, USCIS Acting Associate Director.[2]

On appeal, counsel asserts that the petitioner made a typographical error on the I-140 petition, and that the petitioner intended to file the petition under item E., professional or a skilled worker. Counsel describes the petitioner's attempts to correct the error beginning in January 2008, and

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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).

[2] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Removal of the Standardized Request for Evidence Processing Timeframe Final Rule, 8 CFR 103.2(b), Significant Revision to Adjudicator's Field Manual (AFM) Chapters 10.5 (A), (b): New Appendix 10-9 (AFM Update AD007-05)*, HQ 70/11, 70/12. AFM Update AD07-05, June 1, 2007.

references minutes from an April 30, 2008 AILA/Nebraska Service Center Liaison Meeting that posed questions, in part, to correcting an I-140 petition that was filed in the wrong category.

On appeal, the petitioner refers to AAO memorandums and to minutes of an AILA/Nebraska Service Center Liaison Meeting as supporting the issuance of an RFE to the instant petitioner prior to the denial of the instant petition, and as guidance for allowing the correction of information submitted on petitions. As such, counsel's reference does not constitute evidentiary documentation of this issue, or provide any regulatory or statutory guidance for when USCIS should accept requests for correcting errors in submitted petitions. If a Service Center had implemented such a policy with regard to corrections on submitted petitions, the AAO is not obligated to follow the guidance outlined in policy memos, ex parte correspondence and/or other unpublished non-precedent decisions. It is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). None of the materials cited by the petitioner is binding precedent.

The AAO also notes that the petitioner did not indicate anywhere else in the record what classification it sought for the instant petition. The record contains no cover letter beyond the one submitted by counsel's paralegal that lists materials submitted to the USCIS for adjudication. Further, there is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation. The AAO affirms the director's decision with regard to the classification of the petition, and notes that the petition could also have been rejected at the time of submission based on the incompatibility of the I-140 petition classification with the work experience requirements listed on the certified ETA Form 750.

With regard to the petitioner's ability to pay the proffered wage, 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 750, Application for Alien Employment Certification,

was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is $8.32 per hour ($17,305.60 per year). The Form ETA 750 states that the position requires three years of work experience in the proffered position or in the related field of "spot remover, silks, linens, cashimire [sic], woolen delicate & fine materials."

The record contains the petitioner's owner's Forms 1040, with accompanying Schedules C for tax years 2006 and 2007 that indicate the petitioner is a sole proprietor in these two years. The petitioner's business structure for the years 2001 to 2005 is unknown, as the record contains no federal tax return information for these years.

On the petition, the petitioner claimed to have been established in 1971, to have a gross annual income of over $1,000,000, and to currently employ 20 workers. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner from January 20, 1989 to February 20, 1994.

On appeal counsel asserts that the director failed to issue a Request for Evidence in compliance with the guidelines of the Adjudicator's Field Manual, Chapter 10.5 Revisions, and references an interoffice memorandum from USCIS Acting Associate Director Donald Neufeld dated June 1, 2007. Counsel states that if the adjudicating officer was precluded from making a decision with regard to the petitioner's ability to pay the proffered wage, it was because the officer chose not to issue a request for additional evidence, as has been USCIS customary practice. Counsel states that the petitioner has been waiting for the adjudication of the instant petition for seven years, and, referring to the petitioner's Federal Income Tax Returns for 2006 and 2007, submitted on appeal, is capable of paying the proffered wage.

The AAO notes that USCIS can and should deny without a Request for Evidence any filing that lacks initial required evidence, such as is the case in the instant petition. A petitioner must establish the elements for the approval of the petition at the time of filing. Moreover, the AAO is not required to consider evidence that could or should have been provided earlier. 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg.

Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, 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 beneficiary indicated he had worked for the petitioner prior to the 2001 priority date and did not indicate that he had worked for the petitioner during the relevant period of time. The petitioner did not indicate that it had employed or paid the beneficiary wages during the relevant period of time, namely, from the 2001 priority date to 2007. Therefore it has to establish its ability to pay the entire proffered wage of $17,305.60 from the 2001 priority date and through tax year 2007.

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). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income.

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 116. "[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).

Contrary to counsel's assertion on appeal, the record does not contain evidence of the petitioner's ability to pay the proffered wage as of the 2001 priority date through tax year 2007. The record indicates that in tax years 2006 and 2007, the petitioner was structured as a sole proprietor, 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 (7th Cir. 1983).

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 supports two individuals. The proprietor's tax returns reflect the following information for the following years:

	2006	2007
Proprietor's adjusted gross income (Form 1040, line 37)	$246,316	$361,238

The AAO notes that the petitioner has not submitted any further evidence of its itemized monthly expenditures with which to establish the petitioner's ability to sustain himself and his spouse, and to

also pay the proffered wage. However, noting that the petitioner's adjusted gross income is intended to support only the petitioner and his spouse, in both tax years, the sole proprietor's adjusted gross income is sufficient to cover the proffered wage of $17,305.60.

However, the petitioner has not submitted its federal tax returns for the 2001 priority year or for years 2002 to 2005. Therefore the petitioner cannot establish its ability to pay the proffered wage in these years based on its adjusted gross income.[3] The AAO notes that since the director did not issue an RFE with regard to the submission of additional documentation with regard to the petitioner's ability to pay the proffered wage, the petitioner could have submitted all pertinent evidence on appeal, including the petitioner's federal income tax returns for 2001, the priority year, and for tax years 2002 to 2005, but chose not to do so.

Counsel's assertions on appeal cannot be concluded to outweigh the fact that the record contains no financial documentation to establish that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL and through tax year 2005.

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 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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[3] The AAO notes that if the petitioner pursues this matter any further, or files a new I-140 petition it should submit all relevant tax returns and an itemized list of monthly expenditures such as mortgage payments, food, utilities, car payments, clothing, and similar expenses

In the instant case, the only information with regard to the petitioner's business operations is found on the I-140 petition, and on its two federal tax returns. The I-140 petition indicates the petitioner was established in 1971 which is a significant length of business activity. The petition also lists the petitioner's current number of workers, and current level of gross annual income. The two federal tax returns indicates on the accompanying Schedules C that the petitioner paid wages of $660,797 in 2006 and $659,160 in 2007, which are significant wages paid to the claimed twenty workers. However, as stated previously, the record is not clear as to the sole proprietor's monthly or yearly expenses, and the record is devoid of any further evidence with regard to the petitioner's ability to pay the proffered wage in tax years 2001 to 2005. This incomplete information is not sufficient to establish the totality of the petitioner's circumstances. Thus, even considering the totality of the petitioner's circumstances, it cannot be concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not furnished a letter of verification of prior work experience, from either of the two employers[4] listed on Form ETA 750 B. 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*, 299 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 regulation at 8 C.F.R. § 204.5(l)(3) 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.

The record contains no letter of verification to establish the petitioner's requisite three years of prior work experience. This is an additional reason for denial of the instant petition.

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.

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[4] On the ETA Form 750-B, the beneficiary indicated he worked for Otto's Dry Cleaners and Laundry from April 16, 1994 to September 15, 1998, and for the petitioner from January 20, 1989 to February 20, 1994. At Item 14. of the ETA Form 750-B, it states that a letter from previous employer "Otto's Dry Cleaners & Laundry" is attached to the document, but the record does not contain any such letter.

ORDER: The appeal is dismissed