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



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

B6

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

AUG 25 2010

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

[REDACTED]

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:

[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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a “urine/hair/saliva” collection company. It seeks to employ the beneficiary permanently in the United States as a “certified professional collector.” 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).<sup>1</sup> 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 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 September 19, 2008 denial, the 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.

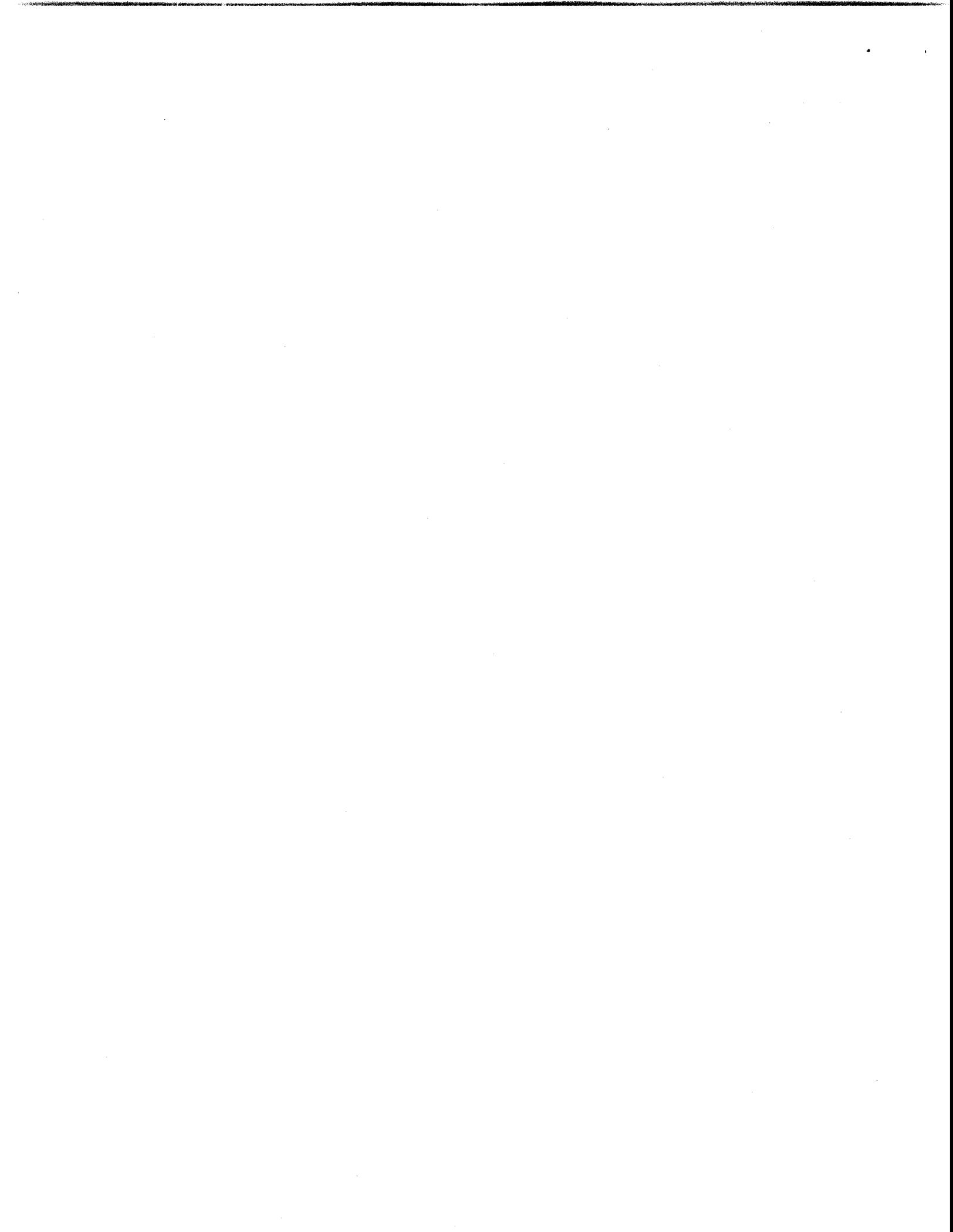
Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing other/unskilled labor skilled labor, 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

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<sup>1</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner filed a labor certification application on ETA Form 9089 seeking to convert the previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750.



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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on December 17, 2004. The proffered wage as stated on the ETA Form 9089 is \$10.40 per hour (\$21,632.00 per year). The ETA Form 9089 states no specific educational, training or experiential requirements.

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.<sup>2</sup>

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 2003 and to currently employ three workers. On the ETA Form 9089, signed by the beneficiary on August 9, 2007 the beneficiary claimed to work for the petitioner since January 1, 2004.

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. Comm. 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 Sonogawa*, 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

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<sup>2</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).



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 2004 onwards. The petitioner submitted documentation listing checks paid to the beneficiary for wages from January 23, 2004 until July 19, 2008. The petitioner, however, submitted copies of only nine checks (front and back of the check) that it claims represent wages paid.<sup>3</sup> The copies of cancelled checks (all made payable to the beneficiary) submitted by the petitioner as proof of wages paid to the beneficiary reveal the following:

- October 11, 2007 - \$150.00
- September 28, 2007 - \$100.00
- July 26, 2007 - \$50.00
  
- July 19, 2008 - \$309.35
- July 12, 2008 - \$309.35
- July 5, 2008 - \$81.27
- May 22, 2008 - \$100.00
- May 8, 2008 - \$50.00

As previously stated, the proffered wage is \$21,632.00 per year. Thus, the petitioner must establish that it had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage in each year from 2004 through 2007. In this instance, the record closed with the issuance of the director's decision on September 19, 2008. At that time, the 2008 return was not yet due and the most recent return available would have been 2007. The petitioner must, therefore, establish its ability to pay the full proffered wage in 2004, 2005 and 2006 because the record does not establish that wages were paid to the beneficiary in those years. The proprietor must establish the ability to pay \$21,332.00 in 2007.

USCIS records indicate that the petitioner is also sponsoring another beneficiary with a 2004 priority date. In that case, the proffered wage is also \$21,632.00 per year. With regard to the second beneficiary, the petitioner has not established that it employed and paid the second beneficiary the

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<sup>3</sup> Eight of the checks are made payable to the beneficiary. One check is payable to [REDACTED]. The petitioner offered no explanation as to why a check made payable to another individual or entity should be considered wages for the beneficiary. That check will not be considered. The list of checks provided by the petitioner to prove wages were paid to the beneficiary that are not supported by copies of cancelled checks will not be considered as proof of wages paid to the beneficiary. 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)). Alternatively, the petitioner should submit the beneficiary's W-2 statements in any further filings.



full proffered wage from the priority date in 2004 onwards. The petitioner similarly submitted documentation listing checks paid to the other beneficiary for wages from January 15, 2004 until July 19, 2008. Based on accepted front and back checks submitted, the petitioner must establish its ability to pay the full proffered wage for the second beneficiary in 2004 and 2006. The petitioner must establish the ability to pay the second beneficiary \$18,882.00.00 in 2007, and \$21,432.00 in 2005.

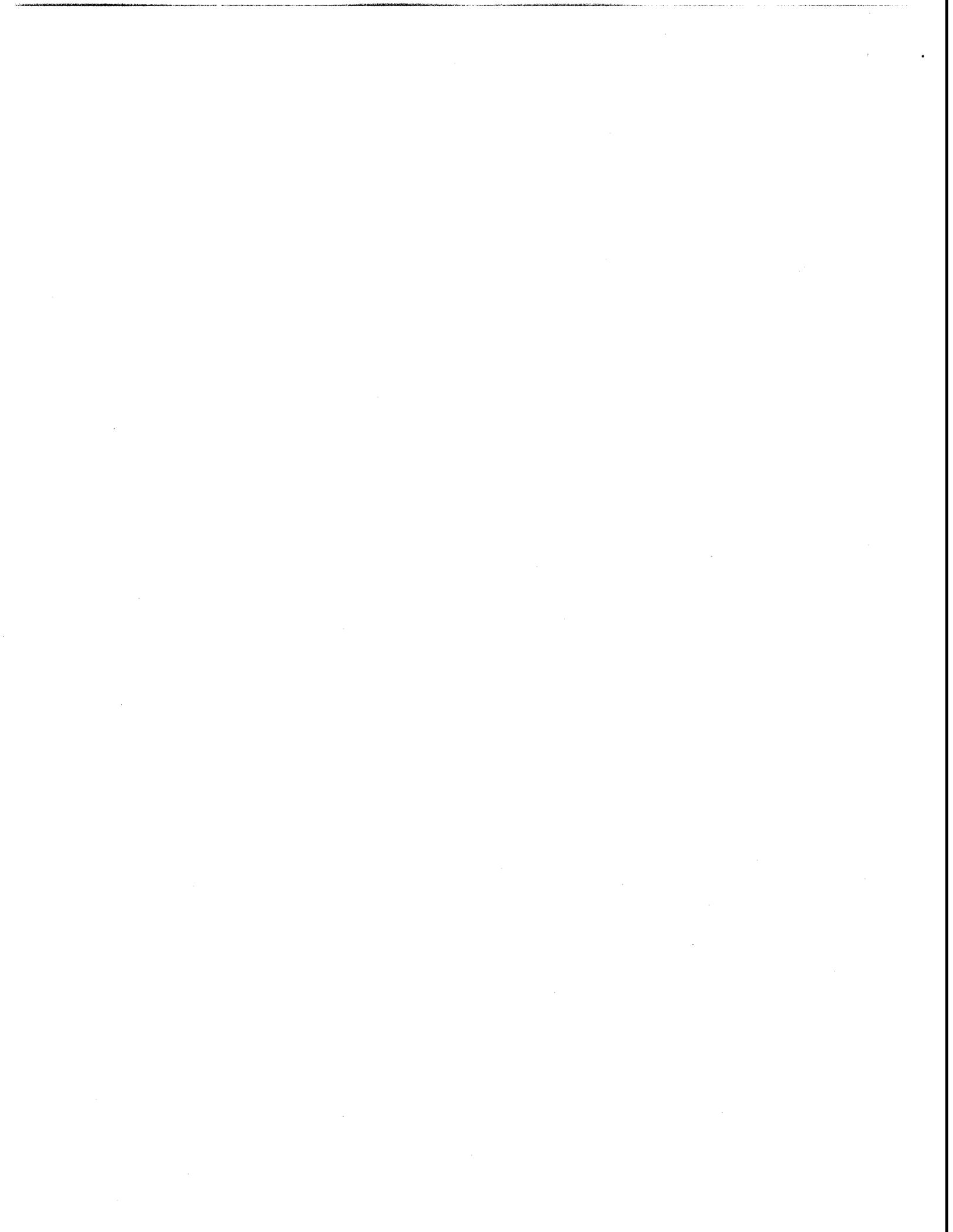
If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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).

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. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> 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 lists no dependents on his tax returns. Thus, it will be necessary to establish that he can support himself and pay both proffered wages during each year from 2004 through 2007. The proprietor's tax returns reflect the following information for the following years:

- The proprietor's adjusted gross income in 2004 was \$53,523.00.
- The proprietor's adjusted gross income in 2005 was \$34,453.00.
- The proprietor's adjusted gross income in 2006 was (\$9,198.00).



- The proprietor's adjusted gross income in 2007 was \$19,989.00.

While the proprietor's adjusted gross income would be sufficient to pay both the proffered wages in 2004, the proprietor has failed to sustain his burden of proof in that year as well as in any other relevant year. It cannot be determined whether or not the proprietor had the ability to pay the proffered wage, or difference between the proffered wage and wages paid to the beneficiaries, plus his personal living expenses because those living expenses were not provided. The proprietor submitted an estimated list of his average personal monthly living expenses for 2008 only (\$32,988.00 per year). From the record, it is unclear that these would also be the sole proprietor's monthly expenses in 2004, 2005, 2006 or 2007. The sum of the personal living expense for 2008 plus the proffered wage of \$21,632.00 is \$54,620.00. With the second beneficiary this amounts to \$76,352.00. The sole proprietor's adjusted gross income does not support his ability to pay for both beneficiaries and his self-estimated expenses in all the relevant years, which are deficient as noted above.

On appeal, counsel submitted additional information about the proprietor's personal financial situation and asserts that the proprietor has established the ability to pay the proffered wage during all relevant time periods. The following documentation was submitted/referenced on appeal in this regard:

- Counsel states that the non-taxed portion of the proprietor's social security benefits should be considered as additional income as the benefits were not considered when arriving at adjusted gross income. The AAO agrees that nontaxable social security benefits (net benefits at line 20a of the 1040 tax return minus taxable benefits at line 20b) which are not reflected in the proprietor's adjusted gross income might be considered when determining the proprietor's ability to pay the proffered wage if certain conditions are met. In this instance, however, the proprietor did not provide evidence of the social security benefits paid, such as a Form SSA-1099, to establish the benefits received. Further, the proprietor has provided evidence of bank/money market/investment accounts which he states should be considered in determining his ability to pay the proffered wage. The record does not establish where the social security benefits were held. If they were deposited into a bank/money market account/investment account, the funds would be inappropriately counted twice if the benefits are considered singularly as well as part of the proprietor's bank account. In this instance, the record is insufficient to allow consideration of the non-taxed portion of social security benefits reported on the proprietor's tax returns.
- Counsel provided tax assessment information about real estate owned by the petitioner stating that the equity in the real estate should be considered when determining the ability to pay the proffered wage. The tax assessment value of the real estate is not deemed the fair market value of the real estate. Further, the record does not establish that the real estate is unencumbered.<sup>4</sup> Thus, the amount of equity in the real estate, if any, cannot be determined.

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<sup>4</sup>The petitioner's self-estimated financial statement reflects \$122,000.00 owed on a property as of August 1, 2008, but submitted a mortgage balance of \$62,896.44. It is incumbent on the petitioner



The petitioner states that there is equity in the real estate but fails to provide documentation to establish that equity does in fact exist, such as fair market value real estate appraisals and title opinions stating what encumbrances exist or that there are none. 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)). It also cannot be determined from the record when the real estate referenced was purchased. The petitioner must establish the ability to pay the proffered wage in each year from 2004 until the beneficiary obtains lawful permanent residence. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, real estate is not a readily liquefiable asset.

- Counsel submitted documentation to establish that in September of 2005 the petitioner had a [REDACTED] in the amount of \$85,727.07. While the petitioner may have had this sum of money in 2005, it has not been established that this amount of money was available to the petitioner for all of 2005, or that it was available in 2004, 2006 or 2007. It is also noted that IRA accounts are subject to restrictions on their use and, therefore, it is not clear the funds are deemed to be unencumbered liquefiable assets which could be used to pay the proffered wage. Even if we accepted use of the full funds, with it being unclear that all funds were immediately available, the petitioner would exhaust almost the full amount in one year in paying both wages and the sole proprietor's living expenses.
- Counsel submitted documentation to establish that the petitioner's wife had \$89,271.84 in an IRA account on December 31, 2007. The spouse has not indicated any willingness to have these funds to be used to pay the proffered wages, but such funds might be used to support household expenses. Again, it is noted that IRA accounts are subject to restrictions on their use and, therefore, it is not clear the funds are deemed to be unencumbered liquefiable assets which could be used to pay the proffered wage.
- Counsel submitted a bank statement that shows that the petitioner had \$10,000.00 in a 12 to 17 month certificate of deposit on August 8, 2008 which was issued on November 14, 2006 and renewed on November 14, 2007. That asset is subject to restrictions as to its use and may result in penalties for early withdrawal. The value of the certificate cannot be determined because the restrictions on its use are unknown as are the penalties involved with cashing the certificate before its maturity. Further, the asset was not in existence prior to November 9, 2006 and was not available at the time of the priority date.

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to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).



- The proprietor submitted a personal financial statement for consideration in determining his ability to pay the proffered wage. The statement, however, will not be considered as it is not supported by corroborating documentation of all assets claimed and is based solely on statements of the proprietor.
- The proprietor submitted evidence of Dominion stock which is jointly held with his spouse having a value of \$4,436.59 on September 22, 2008. The record does not establish that this stock was available or owned by the proprietor from the time of the priority date onward.

Even if we considered all the IRA accounts, certificates of deposit, stocks, verifiable wages paid and adjusted gross income, without factoring in any relevant penalties, these amounts would be deficient to pay wages to both sponsored workers and support personal household expenses based on the petitioner's 2008 estimate for the entire relevant time period. Additionally, it is not entirely credible that the petitioner would exhaust all his retirement assets to pay the proffered wages. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 record fails to establish that the petitioner had the ability to pay the proffered wage during any year of the requisite period based upon the petitioner's income tax returns. While the petitioner has provided evidence of personal assets of value, as discussed above, the record does not establish that those assets are unencumbered and liquefiable so that they could be used to pay the



proffered wage during each year from 2004 until the beneficiary obtained lawful permanent residence. It is further noted that the petitioner filed another Form I-140 petition based on an ETA Form 9089 with a priority date of December 17, 2004. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner's gross receipts during each year from 2004 onward are minimal (2004 - \$4,168.00; 2005 - \$25,098.00; 2006 - \$40,949.00; and 2007 - \$75,010.00) and it is not clear that those gross receipts would support full-time employment of two beneficiaries. In three out of four years, the combined proffered wages exceeded the petitioner's gross receipts. Again, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). 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).

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

**ORDER:** The appeal is dismissed.

