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

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PUBLIC COPY

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 3 0 2010

IN RE: Petitioner: [redacted]
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:

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 $630. 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

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates homes for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petition was submitted without all of the required initial evidence. Therefore, the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and failed to establish that the beneficiary possessed minimum education and experience set forth on the Form ETA 750 for the proffered position. Accordingly, the petition was denied.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

As set forth in the director's January 20, 2009 denial, the first 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)(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 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

[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).

> 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 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 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 June 3, 2002. The proffered wage as stated on the Form ETA 750 is $1,700.40 per month ($20,404.80 per year). On the petition, the petitioner claims that the business was established on July 21, 1997, and that it has a gross annual income of $214,000, net annual income of $70,000, and two employees. On the Form ETA 750B singed by the beneficiary on March 20, 2001, she claimed to have worked for the petitioner since February 1996.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. 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. Although the beneficiary claimed to have worked for the petitioner since February 1996, the petitioner did not submit any documentary evidence such as the beneficiary's W-2 or 1099 forms, or paystubs showing that the petitioner paid the beneficiary a full or partial proffered wage in years 2002 through the present. Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage for years 2002 through the present, and thus, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage in all these relevant years.

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. A sole proprietorship 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). 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. Therefore, USCIS will consider the individual's adjusted gross income, assets and personal liabilities as part of the petitioner's ability to pay the proffered wage. The sole proprietors must show that they can pay the proffered wage out of their adjusted gross income or other available funds. In addition, they 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 [redacted] where the beneficiary's proposed [redacted] or approximately thirty percent (30%) of the petitioner's gross income.

The petitioner in the instant matter is a sole proprietorship. The record contains the sole proprietor's tax returns for 2007. The proprietor's tax return shows that the sole proprietor supports a family of two and reflects the following information:

	Proprietor's adjusted gross income[2]
2007	[redacted]

The petitioning entity structured as a sole proprietorship must establish that it could support the sole proprietor and her family on a gross income and therefore, the AAO must determine whether the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to support her family. As previously discussed, the sole proprietor's adjusted gross income was sufficient to pay the beneficiary the proffered wage for 2007, however, the petitioner did not submit a statement of monthly living expenses for her family. Therefore, without the statement of monthly living expenses for the sole proprietor's family, the AAO cannot determine whether the sole proprietor could cover her family's living expenses with the balance of [redacted] paying the proffered wage from the adjusted gross income. Thus, the petitioner failed to establish that the sole proprietor had sufficient adjusted gross income to pay the beneficiary the proffered wage as well as to support her family in 2007.

The record does not contain any documentary evidence showing that the petitioner paid the full proffered wage or the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover the sole proprietor's family's living expenses for the years from 2002 to 2006.

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[2] Adjusted gross income reflects on Line 37 of the Form 1040 for 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2002, the petitioner failed to demonstrate that the sole proprietor had sufficient adjusted gross income to pay the proffered wage as well as to cover her family's living expenses from the year of the priority date to the present.

USCIS will consider the sole proprietorship's income and the owner's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. However, in the instant case, the record does not contain any documentary evidence showing that the sole proprietor had extra liquefiable assets which can be considered in determining the petitioner's ability to pay the proffered wage as well as to cover her existing business expenses and her household living expenses.

USCIS may also 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 [redacted]. 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.

In the instant case, the petitioner failed to establish its ability to pay a single proffered wage for any relevant year. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the five years from 2002 to 2007 were uncharacteristically unprofitable years for the petitioner. 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.

Another issue in this case is whether or not the petitioner established that the beneficiary met the educational and experience requirements set forth on the Form ETA 750 for the proffered position prior to the priority date.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

> Block 14:
>
> Education: four years of high school
>
> Experience: three months of experience in the job offered

The record does not contain any evidence showing that the beneficiary completed or graduate from four years of high school. Therefore, the petitioner failed to demonstrate that the beneficiary met the minimum level of education required for the proffered position on the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien

> or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record does not contain any letters from the beneficiary's former or present employers verifying that the beneficiary possessed the requisite three months of experience in the job offered. Therefore, the petitioner also failed to establish the beneficiary's qualifications for the proffered position with regulatory-prescribed evidence.

The petitioner's assertions and evidence submitted on appeal cannot overcome the grounds of denial in the director's January 20, 2009 decision. The petitioner failed to establish its continuing ability to pay the proffered wage as well as the beneficiary's qualifications for the proffered position in this matter. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.