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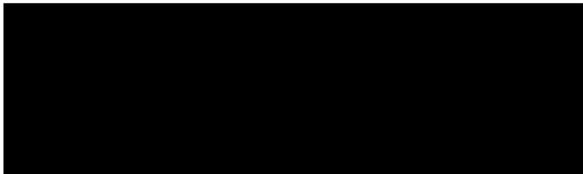
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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**PUBLIC COPY**

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FILE: LIN 07 017 52728 Office: NEBRASKA SERVICE CENTER

Date **MAY 05 2010**

IN RE: Petitioner:  
Beneficiary:



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:

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).

Perry Rhew  
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 rejected. The AAO further finds that the petition is dismissible on its merits.

The petitioner is a gasoline station. It seeks to employ the beneficiary permanently in the United States as a business manager. 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 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. On March 7, 2008, the director denied the petition accordingly.<sup>1</sup>

The record of proceeding contains an executed Form G-28 (Form G-28), Notice of Entry of Appearance as Attorney or Representative for the beneficiary's representative containing the beneficiary's signature as the person consenting. The record contains no Form G-28 executed by the petitioner. The Form I-290B appellate form was filed and signed by the beneficiary's representative. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). No evidence suggests that the petitioner consented to the filing of the appeal.

As the appeal was not properly filed, and it is unclear whether or not the petitioner consented to having an appeal filed on its behalf, it will be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).<sup>2</sup>

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<sup>1</sup>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.

<sup>2</sup> It is noted that the beneficiary's representative designates number 4, "Others" on the G-28, and describes his status as a representative as an "Immigration Advocate" Member of American Bar Association # [REDACTED]. The G-28 was dated October 16, 2006 and, as noted above, was signed by the beneficiary. Notwithstanding the fact that the beneficiary or his representative has no standing to file an appeal, it is additionally not clear from the record, that the individual designated as a representative was authorized to act as a representative. The regulation at 8 C.F.R. § 1.1(f) states:

The term attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law.

The regulation at 8 C.F.R. § 292.1(a)(6) encompasses the following type of foreign attorneys:

Attorneys outside the United States. An attorney other than one described in Sec. 1.1(f) of this chapter who is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he/she resides and who is engaged in such practice. Provided that he/she represents persons only in matters outside the geographical confines of the United States as defined in section 101(a)(38) of the Act,

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.

Further, the AAO notes that the Immigrant Petition for Alien Worker, (Form I-140) could have been rejected by the director at the outset. The I-140 was submitted and signed by the beneficiary not the petitioner. The regulation at 8 C.F.R. § 204.5 (c) provides that only a U.S. employer intending to employ an alien may file a petition for classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of Section 203 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153.<sup>3</sup>

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and that the Service official before whom he/she wishes to appear allows such representation as a matter of discretion.

The regulation at 8 C.F.R. § 292.1(a)(4) defines an accredited representative as a person representing an organization described in 8 C.F.R. § 292.2 who has been accredited by the Board of Immigration Appeals (BIA). The regulation at 8 C.F.R. § 292.2 describes the processes by which the BIA (1) recognizes an organization as authorized to provide accredited representatives, and (2) accredits a person as a representative of a recognized organization.

The record of proceeding indicates that the representative did not belong to any category of persons that USCIS authorizes to appear before it in a representative capacity. The unchecked boxes on the form indicate that he was neither an attorney (whose status permitted him to act as a licensed attorney) nor an accredited representative of an organization recognized by the BIA. The Form G-28 did not clearly identify the representative as belonging to a category of persons that the regulation at 8 C.F.R. § 103.2(a)(3) entitled to act as a representative before USCIS. Further, it is noted that the representative is not listed on the most recent Roster of Recognized Organizations and Accredited Representatives maintained by the Executive Office for Immigration and Review, available on the Internet at <http://www.usdoj.gov/eoir/statpub/raroster.htm> (accessed on 4/15/10). Also, the record of proceeding contains no documentation that establishes that the individual belonged to any category of persons identified at 8 C.F.R. § 103.2(a)(3) as authorized to appear in a representational capacity before USCIS. The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(I) provides that an appeal filed with USCIS by a person not entitled to file it “must be rejected as improperly filed.”

<sup>3</sup> The regulation at 8 C.F.R. § 204.5(c) adds that an “alien may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).” Here, the alien initially filed the I-140 seeking classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability. The director’s request for evidence permitted the amendment of the visa classification category to that of a skilled worker, which requires a job offer from a U.S. employer, a labor certification approved by DOL and an I-140 signed by the petitioner attesting to the accuracy of the information therein contained. In this case, although the director permitted the visa classification category to be amended, it remains that the I-140 was never signed by the petitioner, and as such, was improperly filed as an I-140 seeking a skilled worker visa classification pursuant to section 203(b)(3)(A)(i) of the Act.

Assuming that the I-140 and the appeal were properly filed, it is observed that the petition was not approvable on its merits. The petitioner failed to establish its continuing financial ability to pay the proffered wage. Beyond the decision of the director, the petitioner also failed to establish that the beneficiary possessed the required work experience and education as set forth in the terms of the ETA 750.<sup>4</sup>

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 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 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although overall 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).

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).

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<sup>4</sup>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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, which amounts to \$31,200 per year. The Form ETA 750 states that the position requires a four year high school education and two years of experience in the job offered as a business manager.

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 evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary makes no claim of prior employment and makes no claim of attendance at any school. Pursuant to 8 C.F.R. § 204.5(l)(3),<sup>6</sup> and in response to the director's request for additional evidence, the sole proprietor submitted a letter, dated October 18, 2007, stating that the beneficiary had worked for him as a full-time, manager at the gas station market from August 23, 1998 until January 1, 2001. The sole proprietor also described the beneficiary's job duties and stated that this letter "replaces and duplicates one issued in April 2001." Without additional corroboration, this letter does not sufficiently establish that the beneficiary acquired the requisite two years of experience as set forth on Item 14 of the ETA 750. As indicated above, the beneficiary signed Part B of the ETA 750, under penalty of perjury, on April 28, 2001. The instructions direct the alien to list all jobs during the past three years and to list any jobs related to the occupation for which the alien is seeking certification. The beneficiary listed nothing. *See Matter of Leung*, 16 I&N Dec. 2530(BIA 1976), where the Board's dicta notes

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<sup>6</sup> 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.

(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.

that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. It is incumbent on the petitioner 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In view of this discrepancy as to the beneficiary's employment history attested to on the ETA 750B, which conflicts with the sole proprietor's letter, the petition may not be approved on this basis. The petitioner failed to address this inconsistency and failed to provide credible corroboration of such employment, such as first-hand evidence of wages paid and state quarterly wage reports identifying the beneficiary as a listed worker. Further, other documents in the record suggest that the sole proprietor may be the beneficiary's uncle.<sup>7</sup>

As noted above, the record contains no evidence of the beneficiary's completion of high school. The beneficiary failed to list any education completed on Part B of the ETA 750. Therefore, the petitioner failed to establish that the beneficiary completed the education required as set forth on the ET 750. The petition may not be approved on this basis. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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)).

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. To the extent that a petitioner may have compensated a beneficiary less than the proffered wage, those amounts may be considered. If either the petitioner's net assets or net income could cover the difference between actual wages paid during a given period and the full proffered wage, the petitioner will be deemed to have the ability to pay the full proffered wage during that period of time. In the instant case, the petitioner has not established that it employed and paid the beneficiary wages.

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

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<sup>7</sup> The raises a question as to the *bona fide* nature of the job offer. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 2000-INA-93 (BALCA May 15, 2000).

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).

As stated above, 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.

Pursuant to this inquiry, the director on September 19, 2007, issued a request for evidence. In addition to evidence related to the visa classification selected and the beneficiary's experience, the director specifically requested that the petitioner provide evidence of the petitioner's ability to pay the proffered wage of \$31,200 per year including a list of monthly recurring household expenses, including but not limited to; "1) mortgage or rent payments; 2) automobile payments; 3) installment loans; 4) credit card payments; 5) household expenses;" and "b. Bank account balances."

In response to the request for evidence in regard to the petitioner's ability to pay the proffered wage, the petitioner submitted copies of the sole proprietor's Form 1040, U.S. Income Tax Return for 2001, 2002, 2003, 2004, 2005, and 2006. The petitioner did not submit a summary of the sole proprietor's household expenses as requested by the director. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It is noted on appeal, the petitioner submitted copies of documents related to a car payment, bank account balances, a loan payment and household expenses consisting of copies of an electric bill and gas bill. The director specifically requested such information in his request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for

the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. In his decision denying the petition, the director noted that the petitioner had failed to submit a summary of household expenses and found that this inability or unwillingness to do so constituted grounds for denial. On appeal, it is asserted that the sole proprietor's income was sufficient to cover the beneficiary's proffered wage.

The jointly filed tax returns indicate that in 2001, the sole proprietor declared his spouse and three dependents. In 2002, 2003 he declared his spouse and four dependents. On the 2004, 2005 and 2006 tax returns, the space for listing of exemptions states "See Statement 1." Except for the 2006 tax return, statement 1 was not provided, however other than his spouse listed as an exemption, the sole proprietor declared five dependents in 2004, 2005 and 2006.

The sole proprietor's tax returns reflect the following information for the following years:

Year	2001	2002	2003	2004
Wages	n/a	n/a	n/a	n/a
Taxable Interest	n/a	n/a	n/a	\$ 229
Business Income (line 12, Form 1040)	\$38,858	\$77,805	\$39,360	\$106,550
Proprietor's adjusted gross income	\$33,000	\$72,308	\$36,579	\$ 99,902
Year	2005	2006		
Wages	n/a	n/a		
Taxable Interest	\$1,216	\$17,943		
Business Income	\$66,377	\$61,684		
Proprietor's adjusted gross income	\$63,506	\$76,076		

The AAO concurs with the director's decision to deny the petition. As cited by the director, the petitioner's failure to submit the requested evidence of household expenses constitutes a material line of inquiry and is grounds for denial. *See* 8 C.F.R. § 103.2(b)(14). Further, in this matter, even without considering household expenses, the proffered wage of \$31,200 represented the following percentage(s) of the petitioner's adjusted gross income of \$33,000 in the following years:

Year	Proffered Wage	Approx. Percentage of Sole Proprietor's Adjusted Gross Income (AGI)
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2001	\$31,200	95% of AGI of \$33,000
2002	\$31,200	43% of AGI of \$72,308
2003	\$31,200	85% of AGI of \$36,579
2004	\$31,200	31% of AGI of \$99,902
2005	\$31,200	49% of AGI of \$63,506
2006	\$31,200	41% of AGI of \$76,076

It is noted that the sole proprietor's family size as reflected by the number of dependents he supported was the same size as the family in *Ubeda v. Palmer* in 2004, 2005 and 2006, one dependent smaller in 2003, and two dependents smaller in 2001. As in that case, the AAO finds that the sole proprietor has not established the ability to pay the proffered wage where, even without considering household expenses, which the petitioner did not sufficiently document or timely provide in response to the director's request for evidence, the petitioner would not have had sufficient income to cover both payment of the proffered wage and reasonable household expenses when the proffered wage already represented such a high percentage of the sole proprietor's adjusted gross income. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). Based on the information submitted, it is highly unlikely that the sole proprietor could support himself, his spouse and three to five declared dependents on the amounts remaining after reducing the adjusted gross income by the amount required to pay the proffered wage. It is noted that on appeal, the petitioner submitted a copy of a draft of a letter from Wells Fargo Bank that indicates that the sole proprietor transferred \$85,000 from a market account to a savings account on September 8, 2003. Without seeing a history of these accounts, a copy of a letter memorializing a one-time transfer of funds does not establish a sustainable ability to pay the proffered wage in 2003, or for the entire relevant time period. The petitioner did not submit any other first-hand evidence of cash or cash equivalent assets for consideration.

In some cases, 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 including the established historical growth of the petitioner's business, the overall operation of the

business including the number of workers employed, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry.

In this case it is noted that Part 5 of the I-140 requesting the petitioner's date established, number of employees, annual and gross income was not completed except for a report of 4.8 million dollars in annual income. It is noted that although Schedule C, Profit or Loss of Business reflects that the petitioning business reported a substantial increase in gross sales of approximately \$38,800 in 2001 to six million in 2006, expenses also increased commensurately. No evidence of number of workers employed, reputation, or uncharacteristic business expenditures or losses was submitted that would indicate factors analogous to the *Sonegawa* petitioner that would justify approval of the petition.

The regulation at 8 C.F.R. 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning on the priority date.<sup>8</sup> (Emphasis added). Based on a review of the evidence and arguments submitted to the underlying record and on appeal, the petitioner has not established that it had the continuing ability to pay the proffered wage. Further, the petitioner failed to establish that the beneficiary possessed the requisite work experience in the job offered and had a high school education as required by the terms of the ETA 750.

As stated above, the appeal will be rejected as improperly filed.

Further, the AAO finds that even if properly filed, the petition is deniable based on the independent and alternative bases that: 1) the I-140 was filed by the beneficiary not the petitioner; 2) the petitioner failed to demonstrate that the beneficiary possessed the required two years of experience in the job offered; 3) the petitioner failed to establish that the beneficiary possessed a high school education; and 4) the petitioner failed to demonstrate that it had the continuing financial ability to pay the proffered wage. 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.

**ORDER:** The appeal is rejected as improperly filed. Further, the petition remains denied based on the petitioner's failure to file the petition signed by the petitioner; failure to establish the beneficiary's educational and experiential qualifications and failure to establish that the petitioner has had the continuing ability to pay the proffered wage.

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<sup>8</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.