

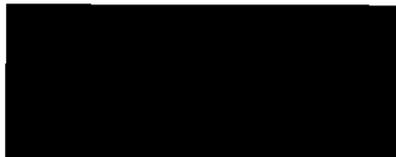
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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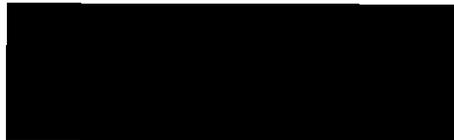
Date: Office: TEXAS SERVICE CENTER
APR 07 2011

FILE: [REDACTED]
SRC 07 164 51694

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

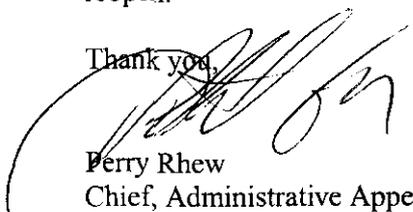


INSTRUCTIONS:

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 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 is a liquor store. It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, an ETA Form 9089, Application for Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary possessed the educational credentials required by the terms of the labor certification and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the beneficiary's credentials satisfied the terms of the ETA Form 9089 and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

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

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the

¹The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date which is the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that it has had the continuing ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on October 20, 2006.² The Immigrant Petition for Alien Worker (Form I-140) was filed on May 4, 2007. The proffered wage is \$25.00 per hour, which amounts to \$52,000 per year.

The job duties of a sales manager are set forth on Part H-11 of the ETA Form 9089. The job duties are described as follows:

- Assist the Owner in developing business and marketing plans.
- Responsible in sales and budget attainment.
- Directs the sales staff including hiring, training and performance management.
- Works with vendors to place orders, get competitive bids on contracts and services.
- Work with sales staff and owner to develop customer retention strategies.
- Develop and maintain a thorough knowledge of products available and pricing.
- Exercise judgment in resolving service, billing or pricing problems.
- Complete regular sales reports in a timely manner.

Part H of the ETA Form 9089 set forth the minimum education, training and experience required for the certified position. Part H-4 reflects that for the position of sales manager, an applicant must have a Bachelor's degree. Part H-4B is for the major field of study. On this item, which is pertinent to the reason that the director denied the petition, the petitioner states "[G]eneral Study." Part H-6 requires that the beneficiary have 24 months of experience in the job offered. Part H-7 indicates that the petitioner will not accept an alternate field of study and Part H-9 reflects that a foreign educational equivalent is acceptable.

In denying the petition, the director indicated that the specified major field of study was "general studies," declining to accept the petitioner's explanation of this phrase. The petitioner

² 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.

had submitted a letter, dated November 16, 2007, from the owner, he had stated that:

in which

We indicated on the form that the minimum education required was a Bachelor's Degree. We also indicated that the major field of study was "General Study." Our intent was to convey that potential Sales Managers must have achieved a Bachelor's Degree in any field. . . .

We do not demand from potential Sales Managers that they have a degree in an area of study called 'General Study' as many universities do not offer such a degree and such a demand would limit our job applicants.

As indicated in the record, the beneficiary obtained a bachelor's degree in materials engineering from Hanyang University, South Korea in 1987 following four years of attendance from 1983 to 1987 and subsequently received a master's degree in materials engineering in 1990 from the same university following attendance from 1988 to 1990.³

³ It is noted that on Part J-11, in response to the question of what the highest level of education achieved relevant to the requested occupation, the beneficiary answered "Bachelor's," but lists both degrees on Part J-12. The record contains an evaluation report, dated May 1, 2007, from the International Services, Inc. It is signed by [REDACTED]. She determines that the beneficiary's B.S. in Materials Engineering from Hanyang University is the U.S. equivalent to a bachelor's degree in materials science and engineering. She concludes that the beneficiary's M.S. in Materials Engineering is the U.S. Equivalent of a master's degree in materials science and engineering.

This office has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. It is additionally noted that in *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009),

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁴ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

EDGE provides that a South Korean bachelor's degree (*Haksa*) is awarded upon the completion of four years of college or university education and is comparable to a U.S. bachelor's degree. A South Korean master's degree (*Soksa*) is awarded upon the completion of two years of graduate education and is comparable to a U.S. master's degree.

⁴ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

DOL assigned the occupational code of 11-2022.00, sales manager to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at 11-2022.00 at <http://online.onetcenter.org/link/summary/11-2022.00>⁵ and extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See *id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

⁵ (Accessed November 26, 2010).

More specific to this position, O*NET provides that 57 percent of responding sales managers' applicants have a bachelor's degree and 19 percent have a master's degree or higher, for a total of 76 percent possessing a bachelor's or higher degree.⁶ Further, DOL's Occupation Outlook Handbook, available online at <http://www.bls.gov/oco/ocos020.htm>, provides:

Education and Training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis in marketing.

* * *

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel.⁷

Based on the position's job title, job duties, experience required, educational requirements as set forth on the ETA Form 9089, the SVP identified by DOL, and the majority percentage of respondents that have a bachelor's degree or higher, the job is a professional position. However, in some cases, it may also be classified as a skilled worker position. It is noted that

⁶*See Id.*

⁷In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

the petitioner refers to the position as a professional position on Part I-a-1 of the ETA Form 9089, but requests a visa classification as a skilled worker in the correspondence submitted with the petition.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Even if this job was considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B), which, in this case requires a baccalaureate degree.

USCIS will also examine whether the petitioner's intent to accept some other form of an academic equivalency or an unspecified field of study was communicated to DOL and to U.S. workers in the labor market test.

The AAO issued a request for evidence (RFE). In response to the AAO's RFE, counsel asserts that the documentation delineating the petitioner's minimum requirements of the certified position never limited the recruitment to a specific bachelor's degree, and shows the petitioner's intent to hire a degreed individual in any field.

However, contrary to counsel's assertion that the petitioner was willing to accept an individual with a degree in any field, only one of the advertisements provided actually showed that the employer's intent was to hire an individual with a bachelor's degree. That advertisement is a copy of a job listing that appeared in CAIJobs with a close date of August 25, 2006. While it states the job opening as a sales manager and accurately states the experience and proffered wage, the posting suggests that it may be less than what would be regarded by U.S. workers as a full-time job because it states that the hours per week are 31-40.⁸ It is not clear that this is the

⁸ The regulation at 20 C.F.R. § 656.3 defines *Employment* as:

(1) permanent, full-time work by an employee for an employer other than oneself. . . In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the *Application for Permanent Employment Certification*.

same job listed on the ETA Form 9089 in this case as the labor certification must be an offer of full-time employment. It is additionally noted that, according to the petitioner, it received no applications from interested individuals.

While the specific issue in this case is whether Part H-4B “[G]eneral Study” is intended to include only applicants who obtained a bachelor’s degree in a major field of study named “general studies” or whether that designation should be interpreted as any field of study, the other advertisements also fail to demonstrate that the petitioner’s intent was to hire a degreed individual at all. Actual newspaper advertisements from the *Daily News*, dated August 13, 2006, and August 20, 2006, respectively, have been provided. They both merely stated, [REDACTED] then gave the address and contact name. There was no mention of a degree requirement at all as asserted by the petitioner to be the minimum requirement and no mention of an experience requirement in contrast to the certified labor certification, which requires a bachelor’s degree and two years of experience.⁹ An advertisement that appeared on television on September 11th through 14th of 2006 contained the same information as the newspaper advertisements. An internal job opening notice, dated August 1, 2006, submitted by the petitioner, only mentions a minimum requirement of 2 years of experience in the position offered and fails to advise of a degree requirement. A copy of an Americajobs.com advertisement also just states that an opening for a sales manager exists and omits any minimum educational, experience or wage information except that “compensation is negotiable per year.”

Based on the foregoing, we do not conclude that the petitioner’s advertisements and recruitment efforts showed the petitioner’s intent to hire a degreed individual in any field. The AAO cannot conclude that the petitioner has established that the petition should be approved on the basis that it would accept a bachelor’s degree in any field.

Relevant to the petitioner’s ability to pay the proffered wage, it is noted that the AAO requested evidence from the petitioner on this issue as part of its request for evidence issued on June 2, 2010. In response, counsel provided copies of the sole proprietor’s individual income tax returns for 2006, 2007, 2008, and 2009, as well as corresponding summaries of the sole proprietor’s annual household expenses and evidence of other cash assets. Counsel additionally asserts that a 2007 loss of income claimed for rental property was remedied when the properties were sold.

⁹ The regulation at 20 C.F.R. § 656.17 states in pertinent part:

(f) *Advertising requirements.* Advertising placed in newspapers of general circulation or in professional journals before filing the *Application for Permanent Employment Certification* must:

(3) Provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought[.]

It is further noted that on Part 5 of the Immigrant Petition for Alien Worker, (I-140), the petitioner indicates that it was established in 1994, declares a gross annual income of \$211,531, a net annual income of \$82,142, employs four workers. The ETA Form 9089 does not indicate that the beneficiary has worked for the petitioner.¹⁰

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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).

In reviewing the petitioner's ability to pay the proffered wage, USCIS will examine whether the petitioner employed and paid wages to the beneficiary. 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). 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.*

¹⁰ It is noted that the beneficiary states on the ETA Form 9089 (Part K-a) that he was the owner of [REDACTED] from October 18, 2004 to October 2006. He signed the ETA Form 9089 on November 20, 2006. The beneficiary subsequently signed Form G-325A on June 28, 2007, stating that he has been self-employed from November 2004 to the present time (date of signing) for [REDACTED]. The AAO finds this information to be inconsistent in view of the additional fact that pertinent online state records indicate that [REDACTED] remains an active corporation with the beneficiary as the registered agent for service of process. These circumstances also raise a question as to whether the intent to become the employee for another liquor store establishment is *bona fide*. 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 (BIA 1988).

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 CIS, 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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).

In support of its ability to pay the proffered wage of \$52,000, the petitioner submitted copies of the individual federal tax return (Form 1040) of the owner and his spouse for 2006 through 2009. They reflect that the owner and his spouse filed jointly and claimed no dependents on the returns filed during these years. The individual tax returns submitted to the record indicate that the petitioner was operated as a sole proprietorship, or where one person operates the

business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). The tax returns contain the following information:

Year	2006	2007	2008	2009
Taxable Interest	\$ 751	\$33,721	\$ 2,869	\$ 7,648
Business Income	\$94,021	\$76,436	\$74,321	\$73,864
Adjusted Gross Income ¹¹	\$90,086	\$29,162	\$75,335	\$82,491

The analysis of the petitioner's ability to pay a certified salary is slightly different when the petitioner is a sole proprietor. 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, personal 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). For that reason, sole proprietors provide evidence of pertinent household expenses that are considered as part of the calculation of their continuing financial ability to pay the proffered wage. The petitioner provided the requested household expenses in response to the AAO's request for evidence as follows:

Year	Household Expenses
2006	\$89,065
2007	\$89,445
2008	\$85,485
2009	\$86,195

In this matter, for 2006, after payment of the household expenses, the sole proprietor would have \$1,021 to pay the proffered wage of \$52,000, or is \$50,979 short of the amount needed.

In 2007, after payment of household expenses of \$89,445, the remaining -\$60,283 would be insufficient to cover the proffered wage of \$52,000 per year.

In 2008, the remaining -\$10,150 would be insufficient to cover the proffered wage after payment of household expenses.

¹¹ Adjusted gross income is shown on line 37 on the returns filed.

In 2009, after payment of household expenses of \$86,195, the remaining -\$3,704 was insufficient to cover payment of the \$52,000 proposed wage offer.

In addition to the submission of the tax returns, the petitioner provided copies of documentation from the Center Bank in Los Angeles, California indicating that the sole proprietor and his spouse had opened two certificates of deposit for \$100,000 and \$50,000, respectively. Counsel cites these holdings as available to pay the proffered wage. Although the sums are significant, it is noted that these accounts were not opened until January 22, 2010. The priority date sought by the petitioner is October 20, 2006. Therefore, lacking evidence that these amounts were clearly available during the relevant years of 2006, 2007, 2008 and 2009, they do not overcome the evidence set forth on the tax returns.¹² The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also asserts that the value of the petitioner's inventory alone as a current asset was sufficient to cover the proffered wage. However, as noted above, the business assets and liabilities are indistinguishable from those of the sole proprietor. Inventory, as part of the calculation of cost of goods sold is already reflected as part of the Schedule C calculation of business income, which is brought forward to page 1 of the return and included in the review of the sole proprietor's adjusted gross income.

The petitioner has not demonstrated that it had the *continuing* financial ability to pay the proffered wage as of the priority date of October 20, 2006, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).

As indicated above, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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

¹² Even if the total funds were available in 2006, which has not been demonstrated, the amounts would be completely exhausted in three years and would not demonstrate the petitioner's ability to pay for the entire time period.

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.

Even accepting counsel's explanation for the sole proprietor's lower adjusted gross income in 2007, which was asserted to be due to two onetime rental property losses, in this matter, although the liquor store may have been in business for a number of years, its net profits reflected as business income on the respective tax returns, set forth above, have declined in the past four years from a high of \$94,021 in 2006 to \$73,864 in 2009. Further, although the sole proprietor's certificates of deposit opened in 2010 are significant amounts, they would be expended in three years of payment of the proffered wage. In this matter, there is insufficient evidence that would establish a framework of profitability as in *Sonegawa*. Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* are persuasive in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

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 See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(the AAO's *de novo* authority is well recognized by the federal courts.)

Based on the foregoing, and in addition to the determination that the petition may not be approved based on the failure of the petitioner to establish that its job vacancy required a bachelor's degree in any field, the petitioner has also not established its continuing ability to pay the proffered wage. It is considered as an independent and alternate 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.

ORDER: The appeal is dismissed.