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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

B6



Date: Office: TEXAS SERVICE CENTER

APR 27 2011

FILE: [Redacted]  
SRC 07 179 51418

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:



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,

*Kenneth S. Ponlos for*

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 construction company. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager of construction.<sup>1</sup> 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. 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 December 5, 2007 denial, the primary 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)(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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

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<sup>1</sup> It is noted that the Form ETA 750 indicates that the beneficiary will supervise no employees and that the petitioner indicated that it had no employees; however, the petitioner asserts on appeal that the beneficiary will supervise subcontractors.

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.45 per hour, which equates to \$34,216 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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 proceedings shows that the petitioner was structured as a sole proprietorship from 2001 through March 17, 2007, after which it incorporated as a C corporation. On the petition, the petitioner claimed to have initially been established on May 26, 2000, and to have a gross income of \$745,628 and net annual income of \$93,000, and no employees. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary indicated he was unemployed from November 2000 to the date he signed the Form ETA 750B,<sup>3</sup> and that he had previously been employed by Varkert Building & Remodeling Co. in Hungary as a painting supervisor from January 1993 through September 1999.<sup>4</sup>

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'l Comm'r 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'l Comm'r 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).

<sup>3</sup> The beneficiary later notified the DOL that he had been unemployed from September 1999 to November 2000.

<sup>4</sup> It is noted that the beneficiary failed to note this employment in Hungary on a Form G-325, Biographic Information sheet, signed by the beneficiary under penalty of perjury on April 28, 2007.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's Internal Revenue Service (IRS) Forms 1099 show compensation received from the petitioner of \$18,680 in 2005 and \$21,450 in 2006. Therefore, the petitioner has not established that it employed the beneficiary in 2001, 2002, 2003, and 2004, but it did establish that it paid partial wages in 2005 and 2006. Since the proffered wage is \$34,216 per year, the petitioner must establish that it can pay the full proffered wage in 2001, 2002, 2003, and 2004, and the difference between the wages actually paid to the beneficiary and the proffered wage in 2005 and 2006, which is \$15,536 and \$12,766, respectively.

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); *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. 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).<sup>5</sup>

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<sup>5</sup> Counsel asserts on appeal that the plaintiff deducted various amounts for depreciation, which "should be added back to the net." 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

The record reflects that the petitioner has filed at least one other Form I-140, Immigrant Petition for Alien Worker, on behalf of another beneficiary.<sup>6</sup> The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until each beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner was a sole proprietorship from 2000 through March 13, 2007,<sup>7</sup> 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'r 1984). Therefore the sole proprietor's adjusted gross income (AGI), 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. *See 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 the petitioner 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.

The record before the director closed on October 29, 2007 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the sole proprietor's 2007 federal income tax return was not yet due; and, therefore, his 2006 tax return is the most recent return available. The sole proprietor supports himself and his spouse. The information provided by the sole proprietor regarding his AGI<sup>8</sup> and personal yearly expenses<sup>9</sup> reflects the following:

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should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

<sup>6</sup> USCIS records reflect that the I-140 petition, SRC 07 161 52061, filed on behalf of [REDACTED] with a priority date of April 27, 2001, was approved on January 15, 2008. There is no evidence in USCIS records indicating that [REDACTED] has yet adjusted status to that of a permanent resident. In a letter dated October 1, 2007, in response to the director's Request for Evidence (RFE) dated August 14, 2007 concerning the instant case, the petitioner stated "[A]ttached is a copy of [REDACTED] Application for Alien Employment Certification;" however, a copy of that certification is not included in the record of proceedings. The record contains no information as to the proffered wage in that case.

<sup>7</sup> The petitioner incorporated on March 13, 2007.

<sup>8</sup> From the sole proprietor's federal income tax returns (Forms 1040, line 33 for 2001; line 35 for 2002; line 34 for 2003; line 36 for 2004; and, line 37 for 2005 and 2006).

<sup>9</sup> From personal expense reports provided by the sole proprietor that include expenses for property tax, home loan, home insurance, bank service charges, life insurance, medical insurance, phone,

<u>Year</u>	<u>AGI (\$)</u>	<u>Yearly Expenses (\$)</u>
2001	0	27,730.74
2002	645	30,869.15
2003	15,029	30,570.92
2004	19,545	30,515.38
2005	40,790	34,369.30
2006	95,743	37,561.21

From 2001 through 2004, the sole proprietor's expenses are greater than his AGI. It is improbable that he could support himself and his spouse on a deficit, which is what remains after reducing the AGI by the amount required to pay the proffered wage. As previously indicated, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2005 and 2006, which is \$15,536 and \$12,766, respectively. In 2005, the sole proprietor's AGI exceeded his yearly expenses by only \$6,420.70, a sum insufficient to cover the difference between the wages actually paid to the beneficiary and the proffered wage. In 2006, the sole proprietor's AGI exceeded his yearly expenses by \$58,181.79, a sum sufficient to cover the difference between the wages actually paid to the beneficiary and the proffered wage.<sup>10</sup>

On appeal, counsel submits a brief statement asserting that:

...[i]n each of the tax years from 2001 to 2005, the petitioner has deducted various amounts for contract labor and/or wages/commission, amounts that were paid to independent contractors, including an outside painting supervisor, who held the

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utilities, groceries and miscellaneous. On appeal, the sole proprietor explains that he had no out-of-pocket medical expenses; that because he is in the painting/reconstruction business, he does not have to hire outside help to do repairs; and, car expenses were not listed as personal expenses because they are incorporated into the petitioner's business expenses.

<sup>10</sup> As previously noted, the petitioner filed one other I-140 petition which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The other petition (for [REDACTED]) was approved in January 2008. The record in the instant case contains no information about the proffered wage for that petition, the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary or the date of any hiring.

position offered to the beneficiary. Once the beneficiary was authorized to work, and was placed on payroll, he replaced the outside painting supervisor, and therefore the amounts paid to the outside help became available to pay his salary. In addition, the company deducted various amounts for depreciation, amounts which are taken for accounting purposes only, and do not affect the cash flow; therefore, they should be added back to the net. Further, the petitioner submitted his personal and business bank statements which showed funds available for wages. In addition, the petitioner had net current business assets, a statement of which will be provided.

Subsequent to the filing of the appeal, counsel also submitted a brief and a Form 1099 Summary from the petitioner showing nonemployee compensation paid in 2001. Relevant evidence in the record also includes the sole proprietor's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2001 through 2006; the beneficiary's IRS Forms 1099, Miscellaneous Income, for 2005 and 2006; business and personal bank statements for the sole proprietor and his spouse; and, house appraisals for 2001 through 2006.

On appeal, counsel claims that the beneficiary has replaced a contract worker. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to present. On appeal, the petitioner indicates that the beneficiary is to replace a prior independent contractor, [REDACTED] who worked as a painting supervisor, and was paid \$50,431 in non-employee compensation in 2001. In 2002, the petitioner asserts that it paid \$14,621 for contract labor and that that amount would have been available to pay the beneficiary's salary. In 2003, the petitioner asserts that it paid \$45,369 in contract labor, and that a portion of that amount was paid to a painting supervisor, which would have been available to pay the beneficiary. In 2004, the petitioner claims that it paid \$74,845 in contract labor, part of which was paid to a painting supervisor and would have been available to pay the beneficiary. In 2005, the petitioner asserts that it paid \$187,860 to independent contractors, \$53,152 of which was paid to [REDACTED] a painting supervisor. The petitioner asserts that those funds would have been available to pay the beneficiary. There is no evidence of whether the contract workers' work involved the same duties as those set forth in the Form ETA 750.<sup>11</sup> If the workers performed other kinds of work, then the beneficiary could not replace him/her. Therefore, the wages paid to the other workers may not be utilized to prove the petitioner's ability to pay the wage offered to the beneficiary at the priority date of the petition and continuing to the present.

The record contains the sole proprietor's house appraisals for the years 2001 through 2006. Based on the documentation submitted, the sole proprietor's home also appears to be the petitioner's business premises, and the home is jointly owned by the sole proprietor and his spouse.

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<sup>11</sup> In a letter dated October 1, 2007, the petitioner stated "[t]he company hires sub-contractors on a full-time basis and provides supervision of these sub-contractors. It has been necessary to hire a painting supervisor, but much of the supervision has been handled by the owners of the company." Further, the 1099 summary reports submitted on appeal do not indicate that the workers named by the petitioner worked full-time as painting supervisors.

Regarding the sole proprietor's home property value, the proprietor's home is not a readily liquefiable asset.<sup>12</sup> It is unlikely that a sole proprietor would sell such a significant personal asset as his home (where his business is located) to pay the beneficiary's wage. Moreover, if the proprietor were to obtain a line of credit based on the equity in his personal residence, USCIS gives less weight to loans and debt as a means of paying salary since the debts will increase the proprietor's liabilities and will not improve his overall financial position. It is also noted that the petitioner provided a listing of his net current assets on appeal which includes automobiles used in his business and his business equipment and tools. The petitioner has provided no evidence that he would be willing and able to sell these business items to pay the proffered wage. It is not clear that he would be able to operate his business without these items, or replacements thereof. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). USCIS must evaluate the overall financial position of a petition to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage.

The record also contains bank statements from the sole proprietor's personal checking accounts, his individual retirement account (IRA), and the petitioner's checking and money market accounts. The funds in the petitioner's checking accounts represent the sole proprietorship's business checking accounts. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of an entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The personal accounts of the sole proprietor include the following:

**United Bank of California Checking**

**2001**

January	\$424.88
February	\$304.03
March	\$535.68
April	\$1,204.37
May	\$324.01
June	\$117.20
July	\$199.75
August	\$265.61
September	\$96.74
October	\$205.94

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<sup>12</sup> Furthermore, there is no documentation contained in the record indicating whether or not there are any debts or encumbrances against the sole proprietor's home/business property.

November \$137.28  
December \$341.39

**2002**

January \$309.32  
February \$0  
March \$241.63  
April \$125.05  
May \$49.69  
June \$256.13  
July \$4,916.91  
August \$2,162.71  
September \$106.58  
October \$2,831.84  
November \$110.17  
December \$6,853.26

**2003**

January \$899.34  
February \$3,888.39  
March \$5,861.14  
April \$1,642.59  
May \$1,775.52  
June \$723.35  
July \$22,452.94  
August \$157.20  
September \$528.60  
October \$220.65  
November \$2,823.30  
December \$182.10

**2004**

January \$1,860.71  
February \$2,660.88  
March \$4,041.62  
April \$2,119.25  
May \$292.80  
June \$2,350.78  
July \$3,710.86  
August \$2,593.03  
September \$745.25  
October \$2,197.47  
November \$2,289.70  
December \$25,723.04

**2005**

January	\$1,727.09
February	\$786.19
March	\$1,227.37
April	\$2,370.83
May	\$851.79
June	\$2,969.71
July	\$2,576.91
August	\$1,035.36
September	\$992.82
October	\$2,253.18
November	\$3,508.56
December	\$1,812.67

**2006**

January	\$5,256.18
February	\$2,507.44
March	\$5,124.73
April	\$507.40
May	\$4,045.47
June	\$5,858.73
July	\$2,294.62
August	\$2,336.77
September	\$7,128.79
October	\$3,426.87
November	\$3,665.48
December	\$1,086.60

**2007**

January	\$4,048.28
February	\$854.06
March	\$837.13
April	\$2,781.19
May	\$6,753.47
June	\$1,763.94
July	\$20,529.78
August	\$10,923.43
September	\$18,413.78

**United Bank of California Savings**

**2000**

October	\$665.09
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November \$665.09

**2001**

January \$667.09  
February \$667.09  
March \$667.09  
April \$669.09  
May \$461.05  
June \$289.87  
July \$419.33  
August \$419.33  
September \$419.33  
October \$170.68  
November \$140.90  
December \$137.90

**United Bank of California IRA**

**2001**

June \$8,068.23

**United Bank of California Money Market**

**2006**

November \$79,009.09<sup>13</sup>  
December \$70,104.23

**2007**

February \$40,256.49  
March \$40,307.76  
June \$ 0

In the instant case, the petitioner has not established its ability to pay the full proffered wage in 2001, 2002, 2003 and 2004 based on its AGI. Thus, the proprietor's statements must show an initial total average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year by an amount exceeding the full proffered wage. The average annual balance in the proprietor's United Bank of California checking account [REDACTED] in the year 2001 was \$346.41; the average annual balance in the proprietor's United Bank of California savings account [REDACTED] in 2001 was \$427.40; and the balance as of June 30, 2001 in the sole proprietor's Simplified Employee Pension (SEP) IRA

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<sup>13</sup> A petitioner must establish its ability to pay from the time of the priority date, which in this matter is April 27, 2001. 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'r 1971).

account was \$8,068.23.<sup>14</sup> The sum of these balances, \$8,842.04, is not sufficient to cover the full proffered wage in 2001. Thus, the sole proprietor's cash assets as reflected in his checking, savings and IRA accounts do not establish the petitioner's ability to pay the proffered wage as of the priority date.<sup>15</sup>

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 (Reg'l Comm'r 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.

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<sup>14</sup> The record of proceeding contains statement covering the period from January 1, 2001 to June 30, 2001 from the sole proprietor's SEP IRA. The petitioner did not provide a statement establishing the account's average annual balance in 2001. Assuming that the sole proprietor would be willing to take withdrawals from the IRA account to pay the proffered wage, withdrawals from a SEP IRA before age 59 ½ are considered early withdrawals. The record does not indicate if the sole proprietor was under age 59 ½ in each relevant year. If an individual takes an early withdrawal from a SEP IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408. Even without taking into account the tax burden that would result from the sole proprietor's IRA withdrawals, the balance in the account on June 30, 2001, together with the 2001 average annual balances from the proprietor's personal checking and savings accounts, is not sufficient to cover the full proffered wage in 2001.

<sup>15</sup> Accounts held by the sole proprietor's spouse are not considered in the determination of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 2000 and claimed to have no employees as of the date the petition was filed in May 2007. There is no assertion that there was an occurrence of any uncharacteristic business expenditures or losses.

There is no evidence of the historical growth of the petitioner's business, the petitioner's reputation within its industry, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. It is also noted that the petitioner has filed a petition for an additional beneficiary that was pending during the requisite period and the petitioner has not produced evidence that it has the ability to pay the proffered wages to all of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

The petitioner has failed to establish its ability to pay the proffered wage of its pending petitions from the priority date of each petition and continuing until the beneficiary of each petition obtains permanent residence.

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

**ORDER:** The appeal is dismissed.