

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



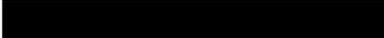
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



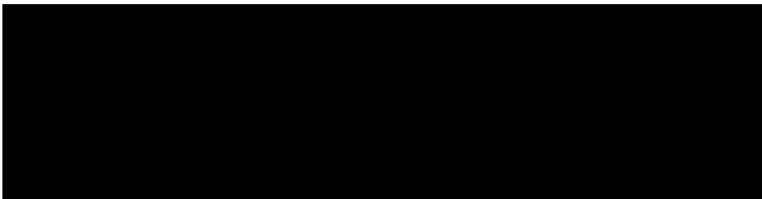
B6

Date: **MAY 25 2011** Office: CALIFORNIA SERVICE CENTER FILE: 

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On November 8, 2000, the director, California Service Center (CSC), approved the preference visa petition. However, on September 28, 2005, the director revoked the approval of the petition, finding that the beneficiary had not established that she had worked for the petitioner since May 1995 and did not have the requisite work experience necessary to perform the duties of the position. On October 21, 2005, the petitioner filed an appeal on Form I-290B, Notice of Appeal or Motion, with the Administrative Appeals Office (AAO). The appeal was rejected as untimely pursuant to 8 C.F.R. § 205.2, and the AAO returned the matter to the director for consideration as a motion to reopen. On March 13, 2008, the director granted the motion to reopen but denied the petitioner's request to reinstate the petition's approval.¹ The matter is now before the AAO on appeal. The appeal will be dismissed.

The facts and procedural history of this case are complex, and are summarized as follows. The petitioner is an individual who owns a laundromat/alteration business. It seeks to employ the beneficiary permanently in the United States as a tailor. 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 record shows that the DOL received and approved the Form ETA 750 on March 6, 1997 and April 7, 1999, respectively. The director adjudicating the Form I-140 initially approved the petition on November 8, 2000. After the petition was approved, the beneficiary then filed a Form I-485, Application to Register Permanent Residence or Adjust Status, with the CSC on January 26, 2001. The record shows that the beneficiary was interviewed in regards to her adjustment of status request at the Los Angeles District Office on October 27, 2003. After the adjustment of status interview, the director suspected that the beneficiary had not been truthful about her employment with the petitioner. More specifically, the director suspected that the beneficiary had not been working for the petitioner since May 1995 as she claimed on her Biographic Information (Form G-325).² The record includes a letter dated December 2, 1997 sent by [REDACTED] (the beneficiary's counsel of record at the time) and the petitioner to the California Employment Development Department (EDD), which states that the beneficiary, at the time the letter was issued, was unemployed and had not worked since February 1994.³

¹ The AAO notes that the petitioner filed a second visa petition for the beneficiary on September 5, 2006 ([REDACTED]), which was approved by the director, Nebraska Service Center, on December 20, 2007.

² On her Form G-325, which she filed along with the Form I-485, the beneficiary stated she had worked for the petitioner since May 1995.

³ The letter from [REDACTED] to the California EDD states, "The alien [referring to the beneficiary] states she has been unemployed for the period of February 1994 to February 1997, and specifically from February 1997 to present, she is still unemployed."

Immediately after the beneficiary was interviewed on October 27, 2003, the director advised the beneficiary to produce additional evidence to demonstrate that she had been employed by the petitioner since May 1995.⁴ In response, the beneficiary submitted the following evidence:

- A letter dated November 1, 2003 from the petitioner's tax preparer, [REDACTED] stating that [REDACTED] has owned [REDACTED] (the petitioner) since 1995 and that she hired the beneficiary to work at [REDACTED] in 1995 as an independent contractor;
- A letter dated November 12, 2003 from [REDACTED] stating that the beneficiary has been her employee although she has been treated as an independent contractor for tax filing purposes;
- Photocopies of [REDACTED] and [REDACTED]'s individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2000 through 2002;
- A letter from [REDACTED] dated November 1, 2003 noting that although the owners of the petitioner [REDACTED] reported negative adjusted gross income (AGI) of \$104,496 in 2000, their true income in that year was \$96,895, since [REDACTED] social security income of \$14,502 was not reported as taxable income and because the following items were included in calculating their AGI: carryover net operating loss of \$140,312 from prior years due to real estate rental losses; depreciation of \$22,577; and wages of \$24,000 paid to [REDACTED] (the beneficiary);
- A letter from [REDACTED] dated [REDACTED] noting that although the owners of the petitioner [REDACTED] reported negative AGI of \$104,366 in 2001, their true income in that year was \$52,851, since [REDACTED] social security income of \$15,048 was not reported as taxable income and because the following items were included in calculating their AGI: carryover net operating loss of \$99,864 from prior years due to real estate rental losses; depreciation of \$18,305; and wages of \$24,000 paid to [REDACTED];
- A letter from [REDACTED] dated [REDACTED] noting that although the owners of the petitioner [REDACTED] reported negative AGI of \$111,101 in 2002, their true income in that year was \$62,418, since [REDACTED] social security income of \$15,408 was not reported as taxable income and because the following items were included in calculating their AGI: carryover net operating loss of \$119,341 from prior years due to real estate rental losses; depreciation of \$14,770; and wages of \$24,000 paid to [REDACTED];

⁴ The director gave the beneficiary a list of items to submit before the adjustment of status application could be processed. The list included: a letter from the employer describing the duties and responsibilities of the beneficiary and the hours and wages per week; a letter from the beneficiary's previous employer; copies of the petitioner's federal income tax returns for the years 2000 through 2002; copies of the petitioner's current business license and rental and lease agreements; copies of the petitioner's California DE-3/DE-6 for the last four (4) quarters; and other evidence of the petitioner's ability to pay the prevailing wage.

- A copy of a lease agreement signed by [REDACTED] on [REDACTED] whereby she agreed to lease the property at [REDACTED] 15 years;
- A letter dated November 7, 2003 from Vandenberg Federal Credit Union stating that [REDACTED] had as of November 7, 2003, a current balance of \$30,033.40 with a 60-day average balance of \$34,703 in her savings account;
- A copy of the petitioner's business license (issued on January 1, 2003 and expired on December 31, 2003);
- Pictures of the exterior and interior of the petitioner's place of business;
- Photocopies of various property deeds showing that [REDACTED] owns several properties in California; and
- A copy of an employment certificate from the beneficiary.

On July 12, 2005, the director issued a NOIR, specifically noting that the letter from [REDACTED] was inconsistent with the beneficiary's claim earlier that she had been working for the petitioner since May 1995. The director referred to the beneficiary's Form G-325 where she claimed she had been working for the petitioner since May 1995. The director stated in the NOIR that this inconsistency in the beneficiary's stated employment history with the petitioner casts doubt on the remainder of her proof and that the beneficiary might not qualify as a skilled worker under 8 C.F.R. § 204.5(j) as the requisite four years work experience before the petitioner filed the labor certification application (Form ETA 750) was suspect.

The director further advised the petitioner to produce additional evidence such as Forms W-2, 1099-MISC, or DE-6 (Quarterly Wage Withholding Report) to show that the beneficiary had been employed by the petitioner since May 1995.

In response to the director's NOIR, the petitioner submitted the following evidence:

- A copy of the December 2, 1997 letter from [REDACTED] and the petitioner to the California EDD stating that the beneficiary was not employed by the petitioner from February 1994 to February 1997 and specifically from February 1997 to present (December 2, 1997);
- The beneficiary's individual tax returns filed on Forms 1040 for the years 1995 through 1997 and 2004;
- The beneficiary's Form W-2 for 2004;
- Copies of cancelled checks paid to the beneficiary in 2005; and
- The petitioner's Form DE-6 for 2004 and 2005.

[REDACTED] the petitioner and the beneficiary's counsel of record at that time, also indicated in her response to the director's NOIR that the beneficiary was a housewife,⁵ that she was indeed unemployed from 1994 to 1997, and that the information concerning the beneficiary's employment with the petitioner since May 1995 on the Form G-325 was a "clerical typing error." [REDACTED] further asserted that the beneficiary did not commit any fraud nor did she intend to

⁵ [REDACTED] inted to the word "housewife" under the beneficiary's occupation in each of her tax returns that she and her husband filed from 1995 to 1997.

submit false documents to gain any immigration benefit and that the beneficiary fully qualified for the proffered position through her prior employment in Iran.

Upon receipt of the evidence submitted by the beneficiary and the response from [REDACTED] the director revoked the approval of the previously approved petition. The director found that the beneficiary did not qualify as a skilled worker under 8 C.F.R. § 204.5(j), because she failed to submit additional concrete evidence such as Forms W-2, 1099-MISC, or DE-6 to show that she worked for the petitioner beginning in May 1995 and did not resolve the inconsistencies in the record pertaining to her work experience with the petitioner in 1995, 1996, and 1997.

On appeal, [REDACTED] contended that neither the beneficiary nor the petitioner had Forms W-2, 1099-MISC, or DE-6 to prove the beneficiary's employment with the petitioner from 1995. [REDACTED] nevertheless, asserted that the beneficiary had the requisite work experience to perform the duties of the proffered position since she had over four years of work experience as a designer and tailor in Iran. In addition, [REDACTED] asserted that the beneficiary was not required under any regulation to work for or be employed by the petitioner during the processing of the labor certification application and subsequent processing of the I-140 petition.

[REDACTED] stated:

The contention of whether or not the alien worked for the petitioner during the pendency of the labor certification is part of the basis of the certification is simply untrue. Whether or not an alien works during this time had nothing to do with the issuance of the certification. The reality of the situation is that the alien's work history from 1995 to the date of the interview only becomes important from the time he/she receives their employment authorization and not before except for the prior experience gained with another employer.

On appeal, counsel maintains that the beneficiary had at least four years of the requisite work experience necessary to perform the duties of the position as of the priority date. Counsel, however, now asserts that the beneficiary has been employed by the petitioner from 1996.⁶ Counsel submits the following evidence as evidence of his assertions:

- A social security earnings printout for the beneficiary and her husband showing earnings received from 1991 to 2008 for the beneficiary's husband and from 2003 to 2008 for the beneficiary;
- Copies of the beneficiary's Forms 1040X, Amended U.S. Individual Income Tax Return, for 1996 and 1997;
- A copy of a transmittal notice dated September 30, 1998 from the California EDD stating that the California labor department had completed the processing of the petitioner's

⁶ Counsel representing the petitioner and the beneficiary on the instant appeal is [REDACTED] in a letter dated June 19, 2008 [REDACTED] stated that [REDACTED] died after a long battle with cancer in April 2007. [REDACTED] in the June 19, 2008 letter indicated that he took over [REDACTED] law office.

application for labor certification;

- A copy of the job posting placed by the petitioner on June 16, 17, and 18 of 1998;
- Copies of the beneficiary's Forms W-2 for 2004-2007; and
- Copies of cancelled checks made payable to the beneficiary from 1996 to 2000.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As set forth in the director's September 28, 2005 decision to revoke the prior approval of the immigrant visa petition, the single issue in this case is whether the beneficiary possessed the requisite work experience to qualify for the position as advertised on the Form ETA 750 labor certification.

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(l)(3)(ii)(A) provides:

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.

In addition, the petitioner must demonstrate that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor (DOL) – the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, as noted earlier, the Form ETA 750 was filed and accepted for processing by the DOL on March 6, 1997. The petitioner sought to hire an experienced tailor, one who had at least four (4) years of experience in the job offered. Further, under the job description, the petitioner stated:

The occupant of this position will alter clothing to fit our individual customers, repair customers' defective garments, [follow customers' orders], and [repair or remove] tags or marks on garments. [The applicant] will examine tag or garment to ascertain necessary alterations. [The applicant] must be able to shorten or

lengthen sleeves and legs, expand or narrow waist and chest, raise or lower collars and inserts or eliminate padding shoulders while maintaining drape and proportions of garment. [The applicant] may repair or replace defective garment parts, such as pockets, pocket flaps, and coat linings.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), 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).

On the Form ETA 750, signed by the beneficiary on February 17, 1997, she represented that she worked at [REDACTED] Iran, as a designer and tailor from May 1980 to May 1986. Submitted along with the Form ETA 750 was an employment certificate issued by [REDACTED]. The certificate verified the beneficiary's employment as a designer and tailor at [REDACTED] for six years between May 1980 and May 1986. The author of the certificate stated that the beneficiary was employed by [REDACTED] as a designer and tailor and that during her employment, the beneficiary designed various types of men's dresses for various occasions using various patterns from May 1980 to May 1986.

The beneficiary stated on her Form G-325 that she worked for the petitioner since 1995. In 1997, however, she asserted through her attorney and the petitioner that she was unemployed from 1995 to 1997. This fact is corroborated by the beneficiary's tax returns for 1996 and 1997, which list the beneficiary as a housewife and her husband's occupation as laundromat. In 2003 immediately after the beneficiary was interviewed for her adjustment of status, the beneficiary changed her testimony about her employment with the petitioner. In the letters dated November 1, 2003 and November 12, 2003 from [REDACTED] (the sole proprietor), respectively, the authors stated that the beneficiary had been employed as an independent contractor by the petitioner since 1995.

In 2005, the beneficiary through her counsel again changed the recitation of her employment history. Responding to the director's July 12, 2005 NOIR, [REDACTED] stated that the beneficiary was a housewife and that the beneficiary's claim that she worked for the petitioner from 1995 in the Form G-325 was a result of a clerical error.

Finally in 2008, the beneficiary claimed that she had been working for the petitioner since 1995. As evidence of the assertions, the petitioner through counsel submitted copies of cancelled checks made out to the beneficiary by the petitioner for wages in 1996 and 1997. The beneficiary and her spouse also submitted copies of their amended tax returns for the years 1996 and 1997. In these amended tax returns, the beneficiary and her spouse indicated that the income in 1996 and 1997 should have been reported as the beneficiary's income, not the husband's and

that the name of the business should have been Service Tailor, instead of Service Management. The amended tax returns also stated that because of language difficulties the initial filings were erroneous.

Based on the evidence in the record, the AAO finds that the petitioner has not established the qualifications of the beneficiary to perform the duties of the position through her employment at [REDACTED]. The AAO cannot conclude that the employment certification from [REDACTED] is reliable as evidence of the beneficiary's qualification for the position offered, as there are numerous unresolved inconsistencies in the record pertaining to the beneficiary's employment history with the petitioner. The AAO agrees with counsel that the beneficiary is not required to be employed by or to work for the petitioner until after the beneficiary obtains lawful permanent residence. Nevertheless, the inconsistencies in the record pertaining to the beneficiary's employment history with the petitioner is critical in the instant case, as they cast doubt on other aspect of the petitioner's proof and lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

While copies of the cancelled checks made to the beneficiary from 1996 to 2000 demonstrate that the petitioner paid beneficiary during that period of time, the beneficiary did not report them as her income.⁷ None of the beneficiary's individual tax returns for the years 1995 through 2000 conclusively shows who worked during that period. The AAO will not speculate on who worked for the petitioner from 1995 to 2000. Nevertheless, as a result of series of inconsistencies concerning the beneficiary's employment with the petitioner from 1995, the AAO declines to accept these cancelled checks as evidence of the beneficiary's employment with the petitioner from 1996 to 2000. The AAO also declines to accept the amended tax returns as credible. The inconsistencies are unresolved through objective, independent evidence and raise questions about the credibility of the remainder of the petitioner's proof with respect to the beneficiary's employment history. As such, the letter from [REDACTED] stating that the beneficiary gained the requisite four years experience as a tailor is also suspect, and does not meet the petitioner's burden of proof that the beneficiary was qualified to perform the services of the position as of the priority date.

Beyond the decision of the director, the AAO further finds that the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date.

The regulation at 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

⁷ A review of the beneficiary's individual tax returns for 1995-2002 shows that the beneficiary's husband's occupation is Laundromat, and that on the schedule C the business was indicated as "Service Management," or "Management." If the beneficiary's husband was the employee running the Laundromat, it would not appear that the petitioner fairly recruited to fill the position with a U.S. worker, and the *bona fides* of the position would be, therefore, suspect

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.

Based on the regulation above, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted earlier, the Form ETA 750 was accepted on March 6, 1997. The rate of pay or the proffered wage specified on the Form ETA 750 is \$8.48 per hour or \$17,638.40 per year. To show that the petitioner has the continuing ability to pay \$8.48 per hour or \$17,638.40 per year from March 6, 1997, the petitioner submitted the following relevant evidence:

- Copies of U.S. Individual Income Tax Return, Forms 1040, of [REDACTED] and [REDACTED] for the years 1996, 1997, 1999, 2001 through 2002, 2005, and 2006;⁸ and
- Copies of Wage and Tax Statement, Forms W-2, issued by the petitioner [REDACTED] to the beneficiary for the years 2004 through 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship with [REDACTED] as the sole proprietor. On the Form I-140 petition, the petitioner claimed to have established her business in May 15, 1995, to currently employ one (1) worker, and to have gross annual income and net annual income of \$75,000 and \$15,500, respectively.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If

⁸ Since the petitioner is only required to establish the ability to pay from the priority date (March 6, 1997), the AAO will not consider any tax return for the years before 1997.

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.

Based on the evidence submitted, the beneficiary received the following wages from the petitioner:

Tax Year	Actual wage (AW) (Box 1, W-2) – in \$	Yearly Proffered Wage (PW) – in \$	AW less PW – in \$
1997 -2003 ⁹	0	17,638.40	17,638.40
2004	17,638.44	17,638.40	Exceeds the PW
2005	17,638.44	17,638.40	Exceeds the PW
2006	17,638.44	17,638.40	Exceeds the PW
2007	17,638.44	17,638.40	Exceeds the PW

Therefore, the petitioner has not established that it has the continuing ability to pay the proffered wage from the priority date, especially from 1997 to 2003. In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to show that it can pay the full proffered wage of \$17,638.40/year from 1997 to 2003.

When the petitioner does not establish that it employed or 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. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner, as noted above, 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

⁹ For the reasons already discussed earlier, the AAO will not accept any of the cancelled checks issued by the petitioner to the beneficiary as evidence of the petitioner's ability to pay.

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. *Uheda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *Uheda*, 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.

During the qualifying period, specifically between 1997 and 2003, [REDACTED] (the petitioner) filed joint tax returns and claimed no dependents. A review of the petitioner's tax returns reveals the following information about her adjusted gross income (AGI) and her ability to pay the beneficiary's wage, specifically in the years 1997 through 2003:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Annual Proffered Wage (PW)	Annual Household Expenses ¹⁰	AGI less Annual Household Expenses (Net Income)
1997 (line 32, Form 1040)	(\$72,143)	\$17,638.40	\$33,200.40	Less than PW
1998	Not Available	\$17,638.40	\$33,200.40	Unknown
1999 (line 33, Form 1040)	(\$124,791)	\$17,638.40	\$33,200.40	Less than PW
2000 (line 33, Form 1040)	(\$104,496)	\$17,638.40	\$33,200.40	Less than PW
2001 (line 33, Form 1040)	(\$104,366)	\$17,638.40	\$33,200.40	Less than PW
2002 (line 35, Form 1040)	(\$113,989)	\$17,638.40	\$33,200.40	Less than PW
2003	Not Available	\$17,638.40	\$33,200.40	Unknown

Based on the table above, the petitioner would not have available funds to pay the beneficiary's salary of \$17,638.40/year in any of the years from 1997 to 2003. In both 1998 and 2003, the AAO cannot conclude that the petitioner has the ability to pay the proffered wage since the record does not include any tax return of the petitioner in those years.

Therefore, the AAO finds that the petitioner has not established its ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence, specifically from 1997 to 2003.

¹⁰ The petitioner provided a list of her monthly recurring household expenses in 2007 (in response to the director's request for evidence dated October 11, 2007). The petitioner's monthly household expenses in 2007 would most likely be different from her 1997 expenses, had the petitioner been requested to provide such a list at that time. The amount of the expenses is not determinative in this case, as the petitioner's AGI without considering household expenses does not cover the proffered wage.

Finally, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*. Nor has it been established that the petitioner, especially between 1997 and 2003, had uncharacteristically substantial expenditures which prevented it from paying the beneficiary the proffered wage.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence in the record, the AAO concludes that the petitioner does not have the ability to pay the salary offered as of the priority date and continuing to present.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative 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.