

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

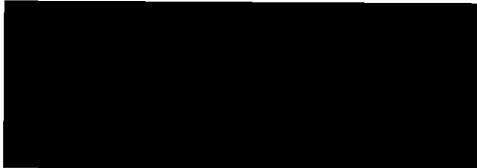
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



Date: NOV 14 2011

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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.

As set forth in the director's August 20, 2009 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.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, or \$24,960.00 annually.

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

Relevant evidence in the record includes the petitioner's owner's Forms 1040, U.S. Individual Income Tax Return, for 2001, 2002, 2004, 2005, 2006, and 2007, a Form 1065, U.S. Return of Partnership Income, of [REDACTED] for 2003 (the petitioner's owner is listed as one of two partners with an ownership interest in this domestic general partnership), a Form 1065 tax return of [REDACTED] and [REDACTED] Partners for 2003 (the petitioner's owner and spouse are listed as partners sharing the ownership interest in this domestic general partnership), assorted bank statements, and the petitioner's mortgage statement from the Home Mortgage division of [REDACTED] for January 3, 2006.

On appeal, counsel asserts that United States Citizen and Immigration Services (USCIS) should also consider the petitioner's owner's other businesses and assets in examining the totality of the circumstances to determine whether the petitioner possessed the continuing ability to pay the proffered wage since the priority date. Counsel includes copies of Forms W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2007 and 2008, the petitioner's owner's Form 1040 tax return for 2003, a real estate appraisal dated June 26, 2006 for a piece of real property and gas station convenience market located at 2241 [REDACTED], in [REDACTED] which listed the petitioner's owner and his spouse as owners, a loan agreement dated March 23, 2007, relating to this same property between the [REDACTED] Board and the petitioner's owner and his spouse, a title insurance policy dated September 14, 2007, for this same property listing only the petitioner's owner's spouse as the owner of the property, a statement of loan payments from the [REDACTED] to the petitioner's owner's spouse reflecting payments made on the loan in the 2008 tax year, a tax bill for this same property from [REDACTED], California to the petitioner's owner's spouse for 2008-2009, an income statement for the gas station convenience store located on this same property for 2008, a payroll register reflecting salaries paid to employees of the gas station convenience store located on this same property in December 2008, the petitioner's profit and loss statement for 2008, two dining reviews of the petitioner obtained from two different websites on September 18, 2009, bank statements for the petitioner's business checking account at [REDACTED] from June 2004 to May 2007, statements for a checking account held by the spouse of the petitioner's owner at [REDACTED] dated September 20, 2005, December 17, 2008, January 21, 2009, February 19, 2009, and March 18, 2009, a statement dated April 30, 2009, for a checking account, a savings account, and a home mortgage held by the spouse of the petitioner's owner at [REDACTED] statements for an investment account and checking account held by the spouse of the petitioner's owner at the San [REDACTED] dated December 31, 2008 and January 31, 2009, a statement dated January 31, 2009, for a checking account held jointly by the petitioner's owner and his spouse at [REDACTED]

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations 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).

Bank, statements dated January 14, 2009, February 11, 2009, March 16, 2009, and July 16, 2009, for a checking account held jointly by the petitioner's owner and his spouse at [REDACTED], statements for a checking account held by the petitioner's owner at Mission National Bank for February 29, 2008, March 31, 2008, April 30, 2008, December 31, 2008, January 30, 2009, February 27, 2009, June 30, 2009, and September 30, 2009, a real estate appraisal for the petitioner's owner's home at 417 [REDACTED] a tax bill from [REDACTED] for the property at 417 [REDACTED] for the fiscal year beginning July 1, 2008 and ending June 30, 2009, bank statements ranging in date from March 31, 1999 to September 30, 2004 from [REDACTED] for two different business checking accounts held by the petitioner's owner's spouse for the gas station convenience market located at 2241 [REDACTED] bank statements ranging in date from April 27, 1998 to December 26, 2006 from [REDACTED] for a business checking account for [REDACTED], and copies of previously submitted documents in support of the appeal.

The evidence in the record of proceeding indicates that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2000, to currently employ three employees, and to have \$150,294.00 in net annual income. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750, signed by the beneficiary on November 5, 2005, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 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. In the instant case, the evidence in the record reflects that the petitioner did not employ the beneficiary from the priority date of April 30, 2001 up through 2006. The record contains Form W-2 statements reflecting the petitioner's payment of wages paid to the beneficiary as follows:

- 2007 – \$12,000.00 (\$12,960.00 less than the proffered wage of \$24,960.00).
- 2008 – \$15,745.16 (\$9,214.84 less than the proffered wage of \$24,960.00).

Clearly, the petitioner failed to establish that the petitioner paid the beneficiary the full proffered wage of \$24,960.00 in 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008. Although the petitioner must demonstrate the ability to pay the full proffered wage in 2001 to 2006, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in 2007 and 2008.

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. 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

A review of the Form 1040 tax returns reveals that the sole proprietor supported himself, his spouse, and two dependents in 2001, 2002, 2003, 2004, 2005, 2006, and 2007. In response to the director's Request for Evidence (RFE) issued on April 17, 2009, in which the director specifically requested that the petitioner's owner provide a list of monthly recurring household expenses for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner provided only a mortgage statement in the amount of \$1029.00 from the Home Mortgage division of [REDACTED] for January 3, 2006 as evidence of reported annual living expenses. However, a single monthly mortgage statement cannot

be considered as sufficient to fulfill the director's specific request for evidence to determine the full amount of the petitioner's owner's annual living expenses. Although the director noted that the petitioner's owner had failed to provide any evidence to determine his annual living expenses in denying the petition, neither counsel nor the petitioner submit any documentation demonstrating the petitioner's annual household expenses on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Regardless, the proprietor's Form 1040 tax returns reflect the following:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was \$56,713.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was \$78,585.00.
- Proprietor's adjusted gross income (Form 1040, line 34) for 2003 was \$64,701.00.
- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was \$29,387.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was \$75,014.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was \$77,175.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2007 was <\$92,922.00.>²

The evidence in the record does not establish that the petitioner had sufficient net income to pay the difference between wages paid to the beneficiary in 2007 and the full proffered wage of \$24,960.00, even without consideration of the petitioner's owner's family living expenses in this year. Furthermore, it appears unlikely that the petitioner possessed sufficient net income to pay the proffered wage of \$24,960.00 plus family living expenses in 2004 as the petitioner would have had only \$4,427.00 (the difference between the proprietors' adjusted gross income in 2004 and the proffered salary) to support himself, his spouse, and two dependents in that year. The petitioner's home mortgage interest alone in 2004 exceeded this amount, as indicated on his Schedule A to the Form 1040. While it appears that the petitioner had sufficient net income to pay the full proffered wage of \$24,960.00 in 2001, 2002, 2003, 2005, and 2006, the record is absent evidence demonstrating the petitioner's owner's family living expenses and, therefore, it cannot be determined whether or not the petitioner's owner could pay the proffered wage plus family living expenses in these years. Finally, no determination can be made as to whether the petitioner possessed sufficient net income in 2008 to pay the difference between the proffered wage and wages paid to the beneficiary through his adjusted gross income minus household expenses as the record is absent the petitioner's owner's tax return for this year (as well as evidence of household expenses).

Counsel is correct in asserting that as a sole proprietor, the petitioner's ownership of personal assets should be taken into account when considering his ability to pay the beneficiary the proffered wage. The petitioner provided an appraisal and a tax bill for his home at [REDACTED]. Nevertheless, it is improbable that the petitioner would liquidate this asset as it appears to

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

be the primary residence of the petitioner and his family. In addition, the petitioner has failed to provide evidence demonstrating that any liens or encumbrances on this asset would not exceed its value.

Counsel provides statements for a checking account held by the spouse of the petitioner's owner at [REDACTED] dated September 20, 2005, December 17, 2008, January 21, 2009, February 19, 2009, and March 18, 2009, a statement dated April 30, 2009, for a checking account, a savings account, and a home mortgage held by the spouse of the petitioner's owner at [REDACTED], statements for an investment account and checking account held by the spouse of the petitioner's owner at the [REDACTED] Credit Union dated December 31, 2008 and January 31, 2009, a statement dated January 31, 2009, for a checking account held jointly by the petitioner's owner and his spouse at [REDACTED] Bank, statements dated January 14, 2009, February 11, 2009, March 16, 2009, and July 16, 2009, for a checking account held jointly by the petitioner's owner and his spouse at [REDACTED] Bank, statements for a checking account held by the petitioner's owner at Mission National Bank for February 29, 2008, March 31, 2008, April 30, 2008, December 31, 2008, January 30, 2009, February 27, 2009, June 30, 2009, and September 30, 2009. However, counsel fails to provide any evidence that the spouse of the petitioner's owner has agreed to the liquidation of assets contained in bank accounts held solely by her or jointly with the petitioner's owner. Additionally, with the single exception of a bank statement dated September 20, 2005, the remaining statements are from 2008 and 2009 and do not appear to be complete as many intervening months have been omitted. Although the combined total assets in these accounts is substantial in 2008 and 2009, the record contains no evidence to demonstrate that the petitioner's owner or his spouse held the assets contained in these bank accounts in the period since the priority date of April 30, 2001. As such, these incomplete bank statements cannot be considered as sufficient evidence to establish that the petitioner had the continuing ability to pay the proffered to the beneficiary since the priority date.

Counsel includes copies of bank statements for the petitioner's business checking account at [REDACTED] Bank from June 2004 to May 2007. Nevertheless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage including a negative balance in some months. Finally, it cannot be determined whether the bank records are complete, and there are many intervening months which are omitted. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

The record contains a copy of the petitioner's unaudited profit and loss statement for 2008. However, this unsubstantiated statement appears to have been compiled by the petitioner rather than an accountant using accepted accounting methods. The statement has not been presented in the context of an audited financial statement. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services

(SSARS) No.1., and accountants only express limited assurances in reviews. The petitioner's unaudited profit and loss statement for 2008 is not persuasive evidence as this document is the representation of the petitioner/sole proprietor and is insufficient to demonstrate the ability to pay the proffered wage.

The petitioner submitted tax returns, bank statements, and other documents relating to [REDACTED] (the petitioner's owner is listed as one of two partners with a fifty percent ownership interest in this domestic general partnership) and [REDACTED] (the petitioner's owner and spouse are listed as partners sharing the ownership interest in this domestic general partnership). However, the record is absent any evidence from the petitioner's partners in both [REDACTED] and [REDACTED] and [REDACTED] Partners reflecting their assent or agreement to the liquidation of these partnerships' assets to pay the proffered wage. Further, it is improbable that that the petitioner's owner would liquidate his fifty percent share of assets in either [REDACTED] and [REDACTED] Partners as these partnerships appear to be ongoing business concerns from which the petitioner's owner derived the majority, if not all, of his income. A review of the petitioner's owner's Form 1040 tax returns reveals the following information:

- In 2001, the petitioner's Form 1040 listed taxable income derived from partnerships³ as \$46,734.00 out of an adjusted gross income of \$56,713.00.
- In 2002, the petitioner's Form 1040 listed taxable income derived from partnerships as \$55,358.00 out of an adjusted gross income of \$78,585.00.
- In 2003, the petitioner's Form 1040 listed taxable income derived from partnerships as \$50,329.00 out of an adjusted gross income of \$64,701.00.
- In 2004, the petitioner's Form 1040 listed taxable income derived from partnerships as \$20,550.00 out of an adjusted gross income of \$29,387.00.
- In 2005, the petitioner's Form 1040 listed taxable income derived from partnerships as \$66,444.00 out of an adjusted gross income of \$75,014.00.
- In 2006, the petitioner's Form 1040 listed taxable income derived from partnerships as \$81,394.00 out of an adjusted gross income of \$77,175.00.
- In 2007, the petitioner's Form 1040 listed taxable income derived from partnerships as \$34,910.00 out of an adjusted gross income of <\$92,922.00.>

Therefore, since the petitioner's income generated by these other businesses is reflected on his Forms 1040, USCIS has taken them into consideration in evaluating the petitioner's ability to pay the proffered wage. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of his share of the claimed assets of both [REDACTED] Partners. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ Income derived from rental real estate, royalties, partnerships, S corporations, trusts, etc., is listed on line 17 of the Form 1040 tax return and Schedule E.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. 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 [REDACTED] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed [REDACTED] women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in [REDACTED]. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Counsel contends that losses suffered in 2004 and 2005, and large amounts of capital investment in 2006 and 2007 by the domestic general partnership, [REDACTED] were anomalies which negatively impacted the adjusted gross income of the petitioner's owner and his spouse in 2004 and 2007. However, these events occurred to a business entity that is separate and distinct from the petitioner and must be considered unrelated to the petitioner's business activities. In this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are present in this matter. The AAO cannot conclude that the petitioner has established that he had the continuing ability to pay the proffered wage of the beneficiary in the instant case in addition to his household expenses.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

Beyond the director's decision, the petition cannot be approved because a review of the websites at http://www.criis.com/webtemp/216.81.94.69/fbn_detail.html, <http://www.yelp.com/biz/raja-cuisine-of-india-san-francisco>, and <http://claypot.us> (accessed on August 10, 2011), reflected that the petitioner, [REDACTED] was closed and no longer operating as a business and that a new restaurant, [REDACTED] had opened and was conducting business at 500 [REDACTED] in San [REDACTED]. Consequently, the AAO issued a Notice of Derogatory Information (NDI), to the petitioner and counsel on August 22, 2011, informing the parties that if the petitioning business

was no longer an active business, the petition and its appeal to this office had become moot.⁴ In which case, the appeal shall be dismissed as moot. The AAO requested that the parties provide evidence such as invoices, most recent bank statement, most recent federal or [REDACTED] quarterly wage report, etc., demonstrating that the petitioner was not inactive and that it had current business activity for 2010 and 2011. The AAO also requested that the parties submit copies of any licenses or permits issued to the petitioner to operate the restaurant located at 500 [REDACTED], [REDACTED] by the state of [REDACTED] or municipal subdivision thereof, as applicable. In the NDI, the AAO specifically alerted the parties that failure to respond to the NDI would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

However, the record shows that the notice mailed to the petitioner at its most current address of record was returned by the United States Postal Service marked as “Not Deliverable as Addressed Unable to Forward.” Further, the record shows that as of the date of this decision, counsel has failed to submit a response to the AAO’s NDI dated August 22, 2011. Therefore, the record is considered complete. Because counsel and the petitioner failed to respond to the NDI and provide evidence that the petitioner is an active business, the AAO is also dismissing the appeal as moot. The job offer appears to no longer exist as the restaurant at which the beneficiary will work is no longer in operation.

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

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

ORDER: The appeal is dismissed.

⁴ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition’s approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer’s business in an employment-based preference case.