



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **AUG 06 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a video production and distribution company. It seeks to employ the beneficiary permanently in the United States as a Bilingual Sales Person. 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 8, 2008 denial, at 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 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 \$15.21 per hour (\$31,636.80 per year). The Form ETA 750 states that the position requires two years of experience as a bilingual sales person.

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>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 5 workers. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner since June 1998.

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).

#### **Evidence of the Petitioner's Ability to Pay the Proffered Wage**

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.

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<sup>1</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).

Year	Wage Paid as Reflected on IRS Form W-2	Difference Between Proffered Wage and Wage Paid
2001	\$5,187.00	\$26,449.80
2002	\$6,459.81	\$25,176.99
2003	\$15,234.38	\$16,402.42
2004	\$12,676.50	\$18,960.30
2005	\$13,452.75	\$18,184.05
2006	\$11,087.35	\$20,549.45
2007	None submitted.	\$31,636.80

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the April 27, 2001 priority date onwards. Therefore, the petitioner must establish that it can pay the difference between the proffered wage and the wage paid in 2001, 2002, 2003, 2004, 2005 and 2006, and the full proffered wage in 2007.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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'r 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. *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 a 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.

In the instant case, the sole proprietor supports a family of five. The proprietor's tax returns reflect the following information for the following years:

Year	Line Item reflecting Adjusted Gross Income (AGI) on IRS Form 1040	AGI	Difference Between Proffered Wage and Wage Paid	AGI Less the Difference between the Wage Paid and the Proffered Wage
2001	Line 33	\$22,336.00	\$26,449.80	-\$4,113.80
2002	Line 35	\$21,943.00	\$25,176.99	-\$3,233.99
2003	Line 34	\$19,107.00	\$16,402.42	\$2,704.58
2004	Line 36	\$21,479.00	\$18,960.30	\$2,518.70
2005	Line 37	\$30,669.00	\$18,184.05	\$12,484.95
2006	Line 37	\$31,962.00	\$20,549.45	\$11,412.55
2007	Line 37	\$19,936.00	\$31,636.80	-\$11,700.80

In 2001, 2002 and 2007, the sole proprietor's AGI fails to cover the difference between what the beneficiary was paid and the proffered wage of \$31,636.80. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing her AGI by the amount required to pay the proffered wage. From 2003 through 2006, the difference between the sole proprietor's AGI and the amount required to pay the balance of the proffered wage is \$2,704.58, \$2,518.70, \$12,484.95, and \$11,412.55, respectively.

The record also contains statements regarding the petitioner's monthly expenses.<sup>2</sup> The statements are supported by a sampling of receipts. The household expenses as stated by the petitioner are summarized in the table below.

<sup>2</sup> It appears that in the director's December 8, 2008 decision, he failed to include the monthly expenses for December when calculating each year's total expenses. It is noted that the first eleven months were included in a table on one page, whereas December's expenses were listed on a separate page.

Year	Petitioner's Expenses (Summarized from Record)
2001	\$42,095
2002	\$44,099
2003	\$48,000.96
2004	\$56,326.46
2005	\$53,860.61
2006	\$33,619
2007	\$43,715

Given the above, the record does not establish that the petitioner had sufficient income to cover the difference between the proffered wage and wage paid, as well as the existing business and household expenses.

On appeal, counsel asserts that in his decision, the director erred in using the petitioner's net income as the sole factor in determining whether the petitioner has the ability to pay the proffered wage. Specifically, counsel states that the director misinterpreted *K.C.P. Food Co., Inc.* 623 F. Supp. 1080, and *Ubeda*, 539 F. Supp. at 647, in his consideration of adjusted gross income as the sole factor in its analysis of whether the petitioner has the ability to pay. Counsel points out that in *K.C.P. Food Co., Inc.* the court stated that alternative evidence need not be considered because it was first presented on appeal; not because there is no basis for its consideration whatsoever. Counsel draws a distinction with the instant case, as alternative evidence was submitted in response to a request for additional evidence (RFE). Counsel also points out that the petitioner in *Ubeda* failed to present other evidence outside of its tax return, whereas in the instant case, the petitioner submitted other evidence. Counsel correctly notes that the *Ubeda* court does not speak to whether information other than tax records should be considered. It does, however, state that a petitioner that is a sole-proprietorship must demonstrate the ability to cover existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, *Ubeda* does state that sole proprietors must show that they can sustain themselves and their dependents.

Counsel is correct in his assertion that 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 *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.

In the instant case, the petitioner claims to have been established in 1996 and to employ five people. There is no evidence to establish that the petitioner enjoys a favorable reputation within the industry. The record contains two items in addition to the petitioner's tax returns and statements of monthly expenses. The first is a July 6, 2007 letter from [REDACTED]. The letterhead indicates that [REDACTED] is a Certified Public Accountant based in [REDACTED]. However, the [REDACTED] Board of Accountancy's on-line database indicates that [REDACTED] CPA license is currently inactive.<sup>3</sup> The record also contains a July 13, 2007 letter from [REDACTED] CPA, from [REDACTED]. According to the letters, [REDACTED] has prepared the petitioner's tax returns for several years, and [REDACTED] was hired by the petitioner to provide an expert opinion as to the petitioner's ability to pay the proffered wage. [REDACTED] indicates that her opinion is based on analysis of Schedule C of the petitioner's tax returns for 2001 through 2006.

Both [REDACTED] assert that USCIS should add back depreciation as it is not actually an expense paid out in cash. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), 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

<sup>3</sup> See [www.dca.ca.gov](http://www.dca.ca.gov) (accessed June 22, 2012).

wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

also asserts that amounts paid out in commission and fees should be considered available to pay the beneficiary. She states: “pays commission and fees to increase its sales. Instead, could have as a full time Bilingual sales person on payroll and save the commission paid out.” However, according to the submitted IRS Forms W-2, the beneficiary was already employed by the petitioner between 2001 and 2006. Wages paid to the beneficiary were already considered in the analysis of whether the petitioner could pay the proffered wage. It is not evident how the beneficiary could replace other sales employees while currently employed with the petitioner herself.

indicates that it is his understanding the petitioner was involved in a legal dispute that resulted in increased legal fees in 2001, 2002, and 2003. Schedule C reflects that \$48,733 was paid in legal professional services in 2001; \$42,876 in 2002; \$46,630 in 2003; \$14,773 in 2004; \$27,412 in 2005; \$16,408 in 2006; and \$19,662 in 2007. also states that, “Since we have not audited, reviewed or otherwise verified the information provided by the client we are not in a position to make any conclusions or assurances regarding the accuracy of completeness of the information.” The record does not contain documentary evidence of a legal dispute, such as copies of a legal complaint against the petitioner, documentation relating to a lawsuit, or receipts for attorney fees. Because the nature of any legal dispute has not been established, it may not be determined that it would have been uncharacteristic. 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)).

Finally, [REDACTED] points to the petitioner's gross sales which were as follows:

Year	Gross Sales from Schedule C
2001	\$630,924
2002	\$847,233
2003	\$909,572
2004	\$282,447
2005	\$498,164
2006	\$519,013
2007 <sup>4</sup>	\$600,558

[REDACTED] attributes the petitioner's downturn in receipts in 2004 due to the technology change in the movie industry from the VHS to the DVD format. While that is a plausible reason for an increase in the cost of goods sold, it is not clear why that would affect the demand for video sales or rentals (in either format) as reflected in gross sales. Furthermore, there is no additional evidence to support this explanation. As noted above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici, supra*.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

### Evidence of the Beneficiary's Qualifications

Beyond the decision of the director, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the April 27, 2001 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In the instant case, the labor certification states that the offered position requires two years of experience as a bilingual sales person. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a sales executive at [REDACTED] from January 1996 to December 1997; and as a bilingual sales person with the petitioner since June 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an undated letter from [REDACTED] General Director of [REDACTED]. The letter states that the beneficiary worked as a sales executive of Mexican movies from January 1996 to December 1997. The letter does not specify what exact dates the employment began and ended. Thus, it could be referencing a period of time between 22 to

<sup>4</sup> 2007 was not included in [REDACTED] analysis, as it was not yet available when she wrote her opinion.

24 months. It does not specify whether the work was part- or full-time, or what specific duties were performed.

However, on Form G-325, Biographic Information signed by the beneficiary on July 11, 2007, the beneficiary claims that her last occupation abroad was as a sales manager at [REDACTED] from February 1992 to December 1995. The ostensibly more recent employment at [REDACTED] was not listed on the form. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

As noted above, Form ETA-750 states that the beneficiary began her employment with the petitioner in June 1998. However, the Form G-325 signed on July 11, 2007 states that she began employment with the petitioner in February 1998. The above-referenced letter from [REDACTED] indicates that the beneficiary began employment with the petitioner in 2001. Similarly, the above-referenced letter from [REDACTED], states that the petitioner has employed the beneficiary since 2001. Thus, the record contains several inconsistencies regarding when the beneficiary's employment with the petitioner actually began. *See Matter of Ho, supra*. Furthermore, the record does not contain a letter from the petitioner specifying the beneficiary's duties with the petitioner since her employment began.

Given all of the above, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.