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



U.S. Citizenship
and Immigration
Services

B6



Date:

JAN 04 2012

Office: NEBRASKA 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,

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 a trucking business. It seeks to employ the beneficiary permanently in the United States as a diesel auto mechanic. 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 denial, the 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$37,440 per year. The Form ETA 750 states that the position requires two years of experience as a diesel auto mechanic, as well as a Class A license and the ability to speak English.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner does not provide any information regarding the date the company was established, nor the number of workers it currently employs as required by Form I-140. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary does not claim to work for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to 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, although the beneficiary did not claim employment with the petitioner on Form ETA 750B, the petitioner submitted W-2 forms, which suggest that it has employed the beneficiary in 2000, 2001, and 2003 through 2008.² The beneficiary's Forms W-2 demonstrate wage payment as shown in the table below.

- In 2001, the Form W-2 stated compensation in the amount of \$35,770 from the current petitioner's owner, initials [REDACTED]

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² W-2 forms issued to the beneficiary by the asserted petitioner and/or the petitioner's representative have been provided for these years.

- 2002 – no Form W-2 submitted.
- In 2003, the Form W-2 stated compensation in the amount of \$23,270 from EIN [REDACTED]
- In 2004, the Form W-2 stated compensation in the amount of \$34,405 from EIN [REDACTED]
- In 2005, the Form W-2s stated compensation in the amount of \$8,755 from EIN [REDACTED] and \$28,035 from EIN [REDACTED] (total \$36,790).
- In 2006, the Form W-2 stated compensation in the amount of \$34,530 from [REDACTED], EIN [REDACTED]
- In 2007, the Form W-2 stated compensation in the amount of \$37,550 from EIN [REDACTED]
- In 2008, the Form W-2 stated compensation in the amount of \$30,050 from EIN [REDACTED]
- In 2009, the Form W-2 stated compensation in the amount of \$31,740 from EIN [REDACTED]

The petitioner did not list its federal employer identification number (EIN) on Form I-140. The original Form ETA 750A shows that a correction was made to the name and address of the employer. The old name and address was covered with correction fluid and the name [REDACTED] and the petitioner's address were typed in over the correction fluid. The correction was authorized by the DOL and is dated July 24, 2006. The record includes a letter from the petitioner addressed to the DOL dated May 31, 2006, which states that "in December 2005, [REDACTED] began fleet maintenance for [REDACTED] and in order to facilitate this transition the mechanics from [REDACTED] transferred employment to [REDACTED]" Although the letter is vague, it appears that the petitioner notified the DOL in May 2006 that it wished to take over and continue the alien labor certification filed by [REDACTED] on behalf of the beneficiary, and that this change was approved by the DOL in July 2006.³

When the present Form ETA 750 was filed and accepted by the DOL, the DOL would permit the substitution of a successor employer⁴ if it occurred before a final determination where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.30(c)(2). See *Horizon Science Academy*, 06-INA-46 (BALCA Mar.8, 2007) [when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages]; See also *American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991) [substitution made before final rebuttal to CO]; *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June 13, 1990). DOL would also allow a new employer to substitute where it was the same job opportunity in the same area of intended employment.

³ Evidence of pay from 2000, 2001, 2003, 2004 and 2005 was not from an entity identified as [REDACTED]

⁴ Substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although the regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." 20 C.F.R. § 656.11(b).

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), a binding, legacy Immigration and Naturalization Service (“INS”) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary’s former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner’s decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner’s claim of having assumed all of Elvira Auto Body’s rights, duties, obligations, etc.,* is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-83 (emphasis added).

The Commissioner’s decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer’s rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner’s claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: “if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved” *Id.* (emphasis added).

The Commissioner clearly considered the petitioner’s claim that it had assumed all of the original employer’s rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the “manner by which the petitioner took over the business” and seeing a copy of “the contract or agreement between the two entities” in order to verify the petitioner’s claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of “all” or a totality of a predecessor entity’s rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: “One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009) (defining “successor in interest”).

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.⁵ *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁶

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁷

⁵ Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

⁶ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

⁷ The mere assumption of immigration obligations, or the transfer of immigration benefits derived

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

From the record it is unclear whether a labor certification substitution took place between the petitioner and [REDACTED] or whether a successorship occurred between the petitioner's current company and a prior company of the petitioner's owner. The petitioner must resolve this issue in any further filings. The initial entity must establish its ability to pay the proffered wage from the priority date until successorship or substitution. *Id.* at 482. Therefore, it is not clear that all of the W-2 statements submitted can be accepted in support of the petitioner's ability to pay the proffered wage.

With the appeal, the petitioner has submitted a copy of Schedule C of the federal income tax return for the years 2001 through 2008. The copy of Schedule C provided for 2005 lists the business name as [REDACTED] with EIN [REDACTED]. All other copies of Schedule C for all other years reflect the business name as [REDACTED] with EIN [REDACTED]. From the record, the basis for the varying business name and EIN is unclear and without clarification, we cannot consider

from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

the W-2 statements⁸ in all the foregoing years as wages paid by the petitioner to the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

This evidence does not establish that the beneficiary was paid the full proffered wage during the relevant timeframe, including the period from the priority date in 2001 through 2006, or 2008 to the present. While the W-2 submitted in 2007 would establish the petitioner's ability to pay in this year only, we cannot adequately conclude this without resolution of the conflicting EINs set forth above.

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).

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 (7th Cir. 1983).

⁸ Additionally, it is unclear that we can consider all the tax returns and Schedule C's submitted as attributable to the petitioner as set forth above. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

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.⁹ The proprietor's tax returns reflect the following information for the following years:

	<u>2005</u>	<u>2006</u>
Proprietor's adjusted gross income (Form 1040, line 37)	\$68,498	\$69,768

In 2005 and 2006, the sole proprietor's adjusted gross income should be sufficient to cover the difference between the proffered wage of \$37,440 and the wages paid to the beneficiary, if any.¹⁰ However, the sole proprietor did not submit any evidence regarding his personal expenses as requested by the director. No information regarding the sole proprietor's adjusted gross income for 2001, 2002, 2003, 2004, 2007, or 2008 continuing to the present was provided.¹¹ While it is possible that the sole proprietor could support himself and four dependents on the adjusted gross income in 2005 and 2006, after reducing the adjusted gross income by the amount required to pay the balance of the proffered wage, we cannot conclude this definitively without the sole proprietor's personal expenses and resolution of the tax identification issue. Additionally, the petitioner has failed to provide evidence to establish the ability to pay the proffered wage for all years from the date of the filing of Form ETA 750 continuing to the present.

USCIS requested exactly such information to establish the petitioner's ability to pay the proffered wage in its Request for Evidence (RFE) dated November 3, 2008. In response to this request, counsel for the petitioner submitted the beneficiary's individual income tax returns and Forms W-2. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioning sole proprietor declined to provide copies of its tax returns, household expenses, to include mortgage or

⁹ This information was listed on the sole proprietor's 2005 and 2006 Individual Income Tax Returns, under Exemption. No other complete Individual Income Tax Returns Forms 1040 were provided. The sole proprietor provided only Schedule C of his tax returns for 2001-2004 and 2007-2008. Additionally, in order to consider all the tax returns submitted, the issues regarding the tax identification numbers, what change was made to the labor certification, and whether the petitioner is a successor to the initial entity on the labor certification, must be resolved before all the Schedule C's submitted and tax forms can be considered as attributable to the petitioner's ability to pay the proffered wage.

¹⁰ As noted herein, the petitioner must resolve the discrepancy in the EIN before the W-2 evidence of wages paid to the beneficiary will be considered.

¹¹ The director noted the petitioner's failure to submit its tax returns in his decision. On appeal, the petitioner submitted only its Schedule Cs and not the sole proprietor's entire Form 1040 for these years.

rent payments, automobile payments, installment loans, credit card payments, or checking and savings accounts 2001 through 2007. This evidence would have demonstrated the amount of taxable income the petitioner reported to the IRS, as well as the petitioner's household expenses, and further revealed its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. 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).

On appeal, counsel asserts that the petitioner's Schedule C Profit or Loss from Business Income statement, combined with the wages paid to the beneficiary as reported on Forms W-2, would establish the petitioner's ability to pay the proffered wage for the years 2001 through 2008. In 2001, counsel suggests that the proffered wage should be prorated. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Additionally, the petitioner must resolve the EIN discrepancies as set forth above for the W-2s to be properly accepted. In other years, counsel cites to the petitioner's "adjusted gross income" on Schedule C. Counsel misreads the sole proprietor's adjusted gross income. As noted above, adjusted gross income is properly found on IRS Form 1040, Page 1: (1998-2001) Line 33; (2002) Line 35; (2003) Line 34; (2004) Line 36; (2005-2010) Line 37 (<http://www.irs.gov/irs/article/0,,id=234371,00.html>, accessed November 16, 2011).

As stated above, 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). The sole proprietor's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay. 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 (7th Cir. 1983).

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 tax returns submitted report low gross receipts from its business (\$43,678 in 2001, \$39,942 in 2002, \$44,370 in 2003). The total salary paid by the petitioner to the beneficiary has decreased in 2008 and 2009. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. The petitioner has not established a record of sustained growth and profitability during the petitioner's business history, or that unusual factors existed which adversely affected the petitioner's profitability. The petitioner must also resolve the inconsistencies in its federal EIN as discussed above.¹² 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 beginning on the priority date of April 30, 2001.

Beyond the director's decision, the petitioner has not established that the beneficiary had all the required experience by the time of the priority date. The AAO conducts appellate review on a *de novo* basis. 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*, 229 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) (noting that the AAO conducts appellate review on a *de novo* basis).

At the outset, the Department of Labor's certification of the Form ETA 750 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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

¹² *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), "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."

of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).¹³

The job qualifications for the certified position of diesel auto-mechanic are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

To repair and maintain according to type of engines in cars and trucks, dismantle carburetor, distributors, etc. Replace parts such as pistons, valves and fix, replace parts in all units in the car.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	(blank)
High school	(blank)
College	(blank)
College Degree Required	(blank)
Major Field of Study	(blank)

Experience:

Job Offered	2 years
(or)	
Related Occupation	2 years (auto diesel-mechanic)

¹³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Block 15:

Other Special Requirements Have Class A License, Speak good English.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petition is for a skilled worker and the job requires two years of experience in the proffered position (or, in the alternative, two years of experience as an auto diesel-mechanic), yet the record of proceeding does not contain evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(1)(3)(ii)(A) by the priority date. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As set forth above, the proffered position requires two years of experience in the job offered and that the applicant have a Class A license and speak good English. The record does not contain any evidence that the beneficiary possessed a Class A license as of the petition's priority date (April 30, 2001). Therefore, the petitioner has failed to demonstrate that the beneficiary had all the experience, to include two years of experience in the job offered (or, in the alternative, two years of experience as an auto diesel-mechanic), and a Class A license, by the priority date.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, the petitioner has not established that the beneficiary has the required experience for the position offered.



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.