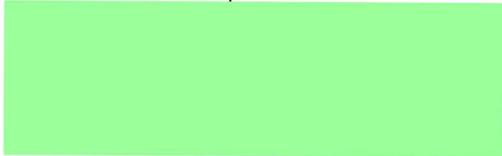


(b)(6)

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



DATE: NOV 27 2012

OFFICE: NEBRASKA SERVICE CENTER

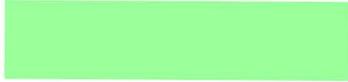
FILE:



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 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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 show horses business. It seeks to employ the beneficiary permanently in the United States as a ranch manager. 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, 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 July 25, 2009 denial, an 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 \$45,200.00 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of ranch manager or two years of experience in the related occupation of horse ranch management.

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 claimed to have been established in 1999 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to work for the petitioner since January 1996.

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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. No Forms W-2 or 1099 demonstrating payments made to the beneficiary were submitted.

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

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).

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 in this case are reported on Schedule F 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).

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.

The director issued a request for evidence (RFE) on February 11, 2009, which included a request for copies of the petitioner's annual reports, federal tax returns, or audited financial statements for 2001 to 2007. The petitioner's response included copies of the proprietor's tax returns for 2001 to 2006.² The director issued a second RFE on April 3, 2009, which included a request for legible copies of certain documents already submitted. The record before the director closed on April 14, 2009, with the receipt of the proprietor's submissions in response to the director's second RFE. The petitioner's 2008 Form 1040 was not yet due. The 2006 Form 1040 was the most recent return submitted. The proprietor did not submit a tax return or other regulatory-prescribed evidence for 2007. In the instant case, the sole proprietor supports a family of four. The proprietor's tax returns submitted reflect the following information for the following years:

² The AAO notes that the director properly included the years 2001 through 2006 in his analysis of the petitioner's ability to pay the proffered wage in the denial notice, but that the director misstated in the denial that the petitioner's U.S. individual income tax return for 2007 was submitted. The letter submitted by the petitioner from I [REDACTED] CPA states that the petitioner's show horse business was structured as a Subchapter S corporation in 2007; however, the AAO notes that neither a Form 1040 nor a Form 1120S for 2007 was submitted into the record of proceeding.

- In 2001, the Form 1040 stated adjusted gross income³ of \$23,432.01.
- In 2002, the Form 1040 stated adjusted gross income of \$37,575.51.
- In 2003, the Form 1040 stated adjusted gross income of \$33,758.00.
- In 2004, the Form 1040 stated adjusted gross income of \$85,032.89.
- In 2005, the Form 1040 stated adjusted gross income of \$60,638.00.
- In 2006, the Form 1040 stated adjusted gross income of \$82,905.00.

In 2001, 2002, and 2003, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$45,200.00. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains in those years after reducing the adjusted gross income by the amount required to pay the proffered wage. The proprietor's monthly household expenses must be also considered in determining whether or not the proprietor has the ability to pay the proffered wage. The proprietor provided a list of recurring monthly household expenses according to the table below.

Year	Adjusted Gross Income	Household Expenses	Balance Available to Pay Proffered Wage
2001	\$23,432.01	\$54,024.00	\$0
2002	\$37,575.51	\$54,024.00	\$0
2003	\$33,758.00	\$54,024.00	\$0
2004	\$85,032.89	\$54,024.00	\$31,008.89
2005	\$60,638.00	\$54,024.00	\$6,614.00
2006	\$82,905.00	\$54,024.00	\$28,881.00
2007	not provided	\$54,024.00	\$0

The proprietor's adjusted gross income remaining after the payment of household expenses is not sufficient to pay the proffered wage of \$45,200.00 in 2001, 2002, 2003, 2004, 2005, and 2006. The proprietor has not submitted the 2007 tax return, and thus has not demonstrated sufficient funds available to pay the proffered wage after paying for household expenses in 2007.

On appeal, counsel asserts that the documentation in the record of proceeding is sufficient to establish the petitioner's ability to pay the proffered wage. Counsel further states that USCIS should consider the bank statements, the investment brokerage account statements, the income analysis of the petitioner's CPA, and the appraisal of one of the petitioner's horses in determining the ability to pay the proffered wage. Counsel also cites several AAO decisions as well as a 2004 memo from William Yates and a 2006 memo from Michael Aytes.

The record contains several bank statements from First State Bank, account number [REDACTED], in the name of [REDACTED]. The funds in this account are located in the

³ The adjusted gross income on the proprietor's Forms 1040 is found on line 33 in 2001, line 35 in 2002, line 34 in 2003, line 36 in 2004, and line 37 in 2005 and 2006.

sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule F of the sole proprietor's tax returns as gross income and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record also contains an investment account statement from Smith Barney for the period ending December 31, 2007. The AAO notes that this account statement reflects account balances at the end of 2007, a period for which the proprietor has failed to submit a tax return or other regulatory-prescribed evidence. Absent the tax return for 2007, this statement is of little evidentiary value and does not suffice to demonstrate the amount of funds available to the proprietor in 2007 to pay the proffered wage. Further, the evidence does not include the balances in the other years under consideration. In addition, the two accounts with the largest balances listed are accounts which name the proprietor's children as the owners and appear to have been created to conform with the Texas Uniform Transfers to Minors Act (UTMA). Account [REDACTED] in the name of [REDACTED] and account [REDACTED] in the name of [REDACTED] appear to be UTMA accounts. According to the Texas Uniform Transfers to Minors Act, Sec. 141.012. (b),

A transfer made under Section 141.010 is irrevocable, and the custodial property is indefeasibly vested in the minor. The custodian has all the rights, powers, duties, and authority provided in this chapter, and the minor or the minor's legal representative does not have any right, power, duty, or authority with respect to the custodial property except as provided by this chapter.⁴

Thus, these two accounts reflect funds which have been given to the minor children of the proprietor and which are not available to pay the proffered wage. Two other accounts listed on the statement are Individual Retirement (IRA) accounts with balances of \$5,530.14 and \$5,430.42, respectively. The sole proprietor has asserted that these are funds available to pay the proffered wage. However, withdrawals from a traditional IRA before age 59 ½ are considered early withdrawals. The record does not reflect whether the sole proprietor and his spouse were under age 59 ½ in each relevant year. If an individual takes an early withdrawal from a traditional IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408. Savings Incentive Match Plans for Employees (SIMPLE) IRAs follow the same withdrawal rules that apply to traditional IRAs, except that if an individual takes a distribution within the two-year period beginning on the date on which he first participated in any SIMPLE IRA plan maintained by his employer, then the additional tax penalty is raised from 10% to 25%, with certain exceptions. *Id.* Withdrawals from Roth IRAs that are taken before the individual is 59 ½ and before the account

⁴ *See* Texas Uniform Transfers to Minors Act. Amended by Acts 1995, 74th Leg., ch. 1043, § 1, eff. Sept. 1, 1995.

has been open for 5 calendar years may be taxed as ordinary income and may also be subject to the additional 10% early withdrawal penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408A. Absent evidence of the petitioner's age and the possible additional cost in prematurely withdrawing an IRA, the AAO does not find that the funds in these IRA accounts are funds which would be made available to pay the proffered wage. The only remaining account reflected on the statement is a joint account with a balance of \$1,296.50, which is insufficient to cover the proffered wage.

The record also includes various pages from several investment brokerage account statements from

The record also includes a statement without a visible account number for the period of January 1, 2004 to January 30, 2004, as well as a consolidated statement as of January 30, 2004, containing accounts

The AAO notes that account number are listed as IRA accounts, and thus are subject to the same early withdrawal penalties discussed above. Again, absent evidence of the petitioner's age and the possible additional cost in prematurely withdrawing an IRA, the AAO does not find that the funds in these IRA accounts are funds which would be made available to pay the proffered wage. Furthermore, the account balance on December 31, 2001, of account number which is insufficient to pay the proffered wage in 2001. The statement for account number is for the period of October 26, 2002 to December 31, 2002, and reflects a balance of \$2,951.14, which is insufficient to pay the proffered wage in 2002. Thus the evidence is not persuasive that the IRA funds in these accounts would have been used to pay the proffered wage or that they would have been sufficient to pay the proffered wage.

The statements for account include those for December 31, 2001, with a balance of \$58,302.00; December 31, 2002, with a balance of \$71,156.38; and December 31, 2003, with a balance of \$2,700.27. The record does not contain all of the yearly statements for these accounts from which the average annual balances may be determined. Where the proprietor has not established his ability to pay the proffered in the priority date year or in any subsequent year based on his adjusted gross income, the proprietor's statements should show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. In the instant case, the average annual balances cannot be determined from the evidence in the record. The above statements reflect the balances in these accounts at the end of the year and fail to include the balances for each month during the year from which an average can be obtained. The end-of-year statements do not reflect months in which the accounts could have suffered losses. However, even using the end-of-year balances reflected above, the AAO notes that the balances do not increase by an amount exceeding \$45,200.00, the proffered

⁵ The AAO notes that the statement for account number contains a printed notation from that the account number was changed and that the prior account number was :

wage in this case, thus it is not clear how they could have been used to pay the proffered wage in each year beginning on the priority date. In 2001, the year in which the priority date falls, the proprietor had an end-of-year balance in this account of \$58,302.00. The next year reflected an increase of \$12,854.38 (\$71,156.38 - 58,302.00), which is not sufficient to pay the proffered wage. In the following year, 2003, the account reflected a decrease. Therefore, it does not appear that these accounts were sufficient to pay the proffered wage beginning on the priority date.

The record contains a brokerage statement for account number [REDACTED] for the period of November 1, 2005 to December 31, 2005 and a statement which is a summary as of December 31, 2005. The summary indicates that the portfolio consists of two IRA accounts: number [REDACTED] in the name of [REDACTED] with a balance of \$4,384.83 and number [REDACTED] in the name of J [REDACTED] with a balance of \$4,342.09. As previously noted, premature withdrawals from IRA accounts are subject to the early withdrawal penalties discussed above. Absent evidence of the petitioner's age and the possible additional cost in prematurely withdrawing an IRA, the AAO does not find that the funds in these IRA accounts are funds which would be made available to pay the proffered wage. In addition, the balances in these two IRA accounts are not sufficient to pay the proffered wage.

The statement without a visible account number for the period of January 1, 2004 to January 30, 2004 and the consolidated statement as of January 30, 2004, containing accounts [REDACTED] and [REDACTED] fail to demonstrate the proprietor's balances in the accounts throughout 2004 or at the end of 2004. In addition, the 2004 consolidated statement indicates that accounts [REDACTED] and [REDACTED] are also accounts which name the proprietor's children as the owners and appear to have been created to conform to the Texas UTMA. Both accounts contain the children's names and the notation "UNDER THE TX UNIF GIFTS TO MINORS ACT."

The record contains a letter from [REDACTED] CPA which states that he analyzed the proprietor's income for the years 2001 through 2007 and determined that the proprietor had funds on hand to pay the proffered wage for the period of 2001 through 2008, and that he currently has the ability to pay the proffered wage in 2009. The letter includes a listing of cash, money market accounts, and marketable securities for 2001 through 2007 as well as an income summary for 2001 through 2007 containing the amount of income earned from each of the proprietor and his wife's activities. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the account statements submitted into evidence by the proprietor have been analyzed above, and it has been determined that much of the funds claimed to be available to pay the proffered wage are unlikely to be used to pay the beneficiary because they are IRA funds subject to a penalty for early withdrawal or are funds which have been gifted to the proprietor's children in accordance with the Texas Uniform Transfers to Minors Act. In addition, the record of proceeding does not contain a copy of the 2007 Form 1120S upon which [REDACTED]

relies for his conclusions regarding the proprietor's ability to pay the proffered wage in 2007, nor a copy of a tax return or other regulatory-prescribed evidence in support of his claim that the proprietor had the ability to pay the proffered wage in 2008 and 2009.

The record contains a letter from [REDACTED] dated July 27, 2007 on [REDACTED] letterhead in which [REDACTED] declares the value of one of the proprietor's horses, [REDACTED] to be valued at \$172,500.00. This appraisal of the proprietor's claimed asset asserts that the horse is one of the top breeding stallions in the nation; has earned points in competition; and has provided breeding resulting in a number of foals who have also won points and approximately \$50,000.00. However, the record does not include evidence of [REDACTED] expertise in the field or his credentials in regard to appraising the value of horses. No other corroborating appraisals or similar evidence of the asset's value such as an insurance policy or bill of sale were submitted. In regard to the proprietor's claimed equity in the horse, the AAO notes that the record of proceeding does not include sufficient evidence of the existence of the asset, its value, the petitioner's equity, or the likelihood that the petitioner would or could sell the asset. If the horse is one of the top breeding stallions in the nation as [REDACTED] asserts, then it appears unlikely that the proprietor would sell or encumber such a significant asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel states that USCIS should consider the financial picture of the proprietor in its totality and refers to several decisions issued by the AAO, but does not provide their published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also asserts on appeal that USCIS is following an incorrect standard of proof set forth in a 2004 memo by William Yates based on whether evidence "clearly" establishes a petitioner's ability to pay the proffered wage as opposed to a more correct standard using the terms "more likely than not" as outlined in a 2006 memo by Michael Aytes. The first memo to which counsel refers is a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), *See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, Determination of Ability to Pay under 8 CFR 204.5(g)(2), at 2, (May 4, 2004)*. The second memo to which counsel refers is the Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, *Alternative Definition of "American [F]irm or [C]orporation" for [P]urposes of section 316(b) of the Immigration and National Act, 8 U[.]S[.]C[.] 1427(b), and the [S]tandard of [P]roof [A]pplicable in [M]ost [A]dministrative [I]mmigration [P]roceedings., HQ 70/33.1 AD06-12, January 11, 2006*.

The AAO consistently adjudicates appeals in accordance with both memoranda. In the instant case, the proprietor has failed to meet his burden of proof, and the evidence does not indicate that the

proprietor's claims regarding his ability to pay the proffered wage are "probably true" or "more likely than not" true. The proprietor must demonstrate his *continuing* ability to pay the proffered wage beginning on the priority date, and in this case, the evidence in the record of proceeding has failed to demonstrate that the proprietor had sufficient funds available to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the proprietor's gross receipts during the relevant years varied. The proprietor indicated on the Form I-140 that he employs only four people. However, the amount of labor costs reflected on the tax returns did not indicate that salaries for four full-time workers were being paid. Labor costs were not substantial. While the proprietor has been in business since 1999, he does not appear to earn substantial compensation from the business. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry.

The proprietor's bank account and brokerage account statements indicated funds held in business checking accounts, IRA accounts, UTMA accounts belonging to their children, and other accounts. The funds in the sole proprietorship's business bank account appear to be included on the Schedule F to IRS Form 1040, and the net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. The accounts held under the Texas UTMA are not accounts from which the proprietor would be able to pay the proffered wage. The funds held in IRA accounts were insubstantial and insufficient to pay the proffered wage.

Further, the evidence failed to demonstrate the age of the proprietor and his wife or the cost of premature withdrawal penalties which could have been incurred. Other funds held in the brokerage accounts did not appear to be sufficient to pay the proffered wage and did not increase by an amount exceeding the proffered wage from one year to the next. 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.

Beyond the decision of the director,⁶ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'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).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered of ranch manager or two years of experience in the related occupation of horse ranch management. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a ranch and barn manager for [REDACTED] in [REDACTED] working 40 hours per week from January 1989 to March 1991; and as an assistant manager for [REDACTED] working 40 hours per week from March 1991 to December 1995. The Form ETA 750 also lists employment experience with the petitioner as a ranch manager working 40 hours per week from January 1996 to the present.

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 a letter from [REDACTED] dated July 31, 2007 in which [REDACTED] states that the beneficiary was employed on [REDACTED] ranch specializing in raising show horses from January 1989 to March 1991. However, the letter from [REDACTED] did not give the address and title of the employer or include any contact information. Further, the letter did not specify whether the employment was full or part-time.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

⁶ 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).

(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.

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.