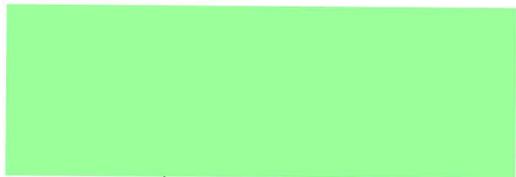


(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **SEP 25 2012** OFFICE: TEXAS SERVICE CENTER



IN RE: Petitioner: [Redacted]
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,

Kellan Forlos for

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 describes itself as a "gold manufacturer". It seeks to employ the beneficiary permanently in the United States as a jewelry designer. 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 June 19, 2009 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. The director also noted that it was not evident whether the submitted tax returns related to the petitioner.¹

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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

¹ For each of the tax years submitted, 2001 through 2008, the taxpayer's federal employer identification number (EIN) is not listed in block D of Schedule C, Profit or Loss from Business (Sole Proprietorship.) In 2001 and 2002, the name and address of the sole proprietor's business is listed as [REDACTED]. In 2003, 2004, and 2005, it is listed as [REDACTED]. Finally, in 2006, 2007, and 2008 the business is listed as [REDACTED]. The petitioner has not established that [REDACTED] are the same business as the petitioner, or that they are successors-in-interest to the petitioner. Therefore, it has not established that the tax returns submitted to the record may be utilized to establish ability to pay in the instant case.

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 September 21, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year. The Form ETA 750 states that the position requires a four years of high school education, a bachelor's degree in art or design, and two years of experience as a jewelry designer.

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.²

The petitioner claims to be structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and to employ one worker, and to have been assigned [REDACTED]. On the Form ETA 750B, signed by the beneficiary on September 12, 2001, the beneficiary claimed to have worked for the petitioner since January of 2001.

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

² 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).

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.

The record contains IRS Forms W-2 issued to the beneficiary by [REDACTED] with [REDACTED] as reflected in the table below.

Tax Year	Wage Paid As Reflected on IRS Form W-2	Proffered Wage Less the Wage Paid
2001	\$31,140.00	\$13,860.00
2002	\$36,676.00	\$8,324.00
2003	\$35,984.00	\$9,016.00
2004	\$35,984.00	\$9,016.00
2005	\$37,960.00	\$7,040.00
2006	\$37,960.00	\$7,040.00
2007	\$37,960.00	\$7,040.00
2008	\$38,690.00	\$6,310.00

In the instant case, even if we assume that the Forms W-2 were issued by the petitioner, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the September 21, 2001 priority date onwards. Therefore, it must establish that it can pay the proffered wage less the wage paid referenced in the table above for each relevant year.

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, 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).

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The petitioner claims to be 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).

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.³ The record contains a May 26, 2009 statement from [REDACTED] indicating that his monthly expenses are \$3,032 per month (\$36,384 per year.) Submitted tax returns reflect the petitioner's adjusted gross income (AGI) as reflected in the table below.⁴

Tax Year	AGI	Household Expenses	AGI Less Household Expenses	Proffered Wage Less Wage Paid
2001	\$41,209.00	\$36,384.00	\$4,825	\$13,860.00
2002	\$35,599.00	\$36,384.00	-\$785	\$8,324.00
2003	\$35,711.00	\$36,384.00	-\$673	\$9,016.00
2004	\$37,900.00	\$36,384.00	\$1,516	\$9,016.00
2005	\$47,957.00	\$36,384.00	\$11,573	\$7,040.00
2006	\$51,178.00	\$36,384.00	\$14,794	\$7,040.00
2007	\$63,110.00	\$36,384.00	\$26,726	\$7,040.00
2008	\$57,764.00	\$36,384.00	\$21,380	\$6,310.00

³ The submitted tax returns indicate that the family had three members in 2001 and 2002, four members in 2004, and five members from 2005 onwards.

⁴ The AGI is taken from the first page of IRS Form 1040, U.S. Individual Income Tax Return from the following line items: line 33 in 2001, line 35 in 2002, line 34 in 2003, line 36 in 2004, and line 37 in 2005 through 2007.

In 2002 and 2003, the sole proprietor's adjusted gross income fails to cover his household expenses, or pay the difference between the proffered wage and what the beneficiary was paid. In 2001 and 2004 the sole proprietor's AGI covers his household expenses but falls short of covering the remainder of the proffered wage. In 2005 through 2008 the figures reflect sufficient AGI to cover both the household expenses and the remainder of the proffered wage.

On appeal, counsel asserts that the submitted tax returns do in fact, pertain to the petitioning entity and that the household expenses as reported by the sole proprietor for 2002, 2003, and 2004 were not correct. In support of the first assertion, counsel submits a July 17, 2009 letter from [REDACTED], Certified Public Accountant based in [REDACTED]. The letter states that she has prepared [REDACTED] tax returns for over ten years. This letter does not address the discrepancy between the petitioner's name [REDACTED] and the name on the 2001 and 2002 tax returns: [REDACTED]. However, [REDACTED] does state that [REDACTED] was formerly located on [REDACTED] but moved to the current location in July of 2003. [REDACTED] indicates that the fact that the change of address is not reflected on the tax returns is purely a clerical error. [REDACTED] also indicates that the sole proprietor used to run a business called [REDACTED] at the [REDACTED] location but closed the business 4 or 5 years ago and now runs [REDACTED] from that location. She states, "The schedule C filed under the name [REDACTED] actually reflects [REDACTED] business operations."

The explanation submitted on appeal further confuses the question of whether the submitted tax returns pertain to the petitioner. The 2003, 2004 and 2005 returns all list [REDACTED] as the business on Schedule C. There is no evidence to support the suggestion that this business is the same as [REDACTED]. Furthermore, there is no explanation for the fact that the 2006, 2007, and 2008 Schedule Cs reflect that the business is named [REDACTED] and that is located in [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies with independent objective evidence.

Regarding the issue of the sole proprietor's household expenses, counsel argues that the expenses were previously incorrectly reported. He submits evidence indicating that the sole proprietor purchased a property in 2006 and a vehicle in 2009. Also submitted are photocopies of a sampling of checks paid out from the sole proprietor and his wife's checking account for rent, car payment, groceries, and retail purchases. Counsel submits revised annual household expenses for 2002, 2003, and 2004. In the revised reports, household expenses decreased by \$10,584 in 2002; \$10,284 in 2003, and \$9,984 in 2004. The amended household expense reports are not persuasive. The expenses were decreased just enough for the AGI to cover both the remainder of the proffered wage

⁵ It is noted that counsel also submitted a 2008 [REDACTED] phone directory that lists [REDACTED] at the [REDACTED] address. However, this listing does not support a finding that the 2008 Schedule C for [REDACTED] actually pertains to [REDACTED]

and the household expenses. See *Matter of Ho, supra*, stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Even assuming the revised versions were reliable, it remains that the AGI does not cover the balance of the proffered wage and the household expenses as reported for tax year 2001. Furthermore, it is noted that none of the reports of household expenses lists health insurance or medical bills as an expense. It is not plausible that a household would have had absolutely no medical expenses whatsoever over a nine-year period. Given, all of the above, the submitted tax returns do not establish the petitioner's continuing ability 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry.

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 September 21, 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, regarding the experience requirement, the labor certification states that the offered position requires two years of experience as a jewelry designer.⁶ On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a jewelry designer for [REDACTED] from February 1988 through July 1991.

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 November 20, 2006 "employment certificate" and accompanying English translation from [REDACTED]. The certificate states that the beneficiary was an "Assistant Manager" in the "Jewelry Designer Department," from February 1988 through July 1991.

The submitted employment certificate does not include the name or title of the person preparing the certificate. It does not contain a description of the beneficiary's experience, and it states that he was an assistant manager, rather than a jewelry designer. Given 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.

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).

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.

⁶ The record contains evidence to establish that the beneficiary obtained the requisite education.