(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

[redacted]

DATE: FEB 28 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center on May 12, 2010. The petitioner filed a motion to reopen on June 15, 2010. The director granted the motion to reopen and reaffirmed the decision to deny the petition on September 28, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on November 1, 2010. The appeal will be dismissed.

The petitioner is a thoroughbred horse racing stable. It seeks to employ the beneficiary permanently in the United States as a thoroughbred racehorse groom. 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 the beneficiary had met the requirements of the labor certification, and also 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.

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]

As set forth in the director's decisions, at issue in this case is whether or not the beneficiary possessed the minimum experience required to perform the offered position by the priority date, and 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.

Evidence of the Beneficiary's Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (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).

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[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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 has the following minimum requirements:

EDUCATION
Grade School: 6 years
High School: 0 years
College: 0 years
College Degree Required: None Required.
Major Field of Study: Not applicable
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered.
OTHER SPECIAL REQUIREMENTS: [Eligibility] for state groom license.

The labor certification also states that the beneficiary qualifies for the offered position based on the following experience as a thoroughbred race horse groom:

- **October 1991 through May 1992**
  [redacted]
- **June 1992 through June 1993**
  [redacted]
- **July 1993 through July 1994**
  [redacted]
- **August 1994 through "present" [August 1997]**
  [redacted]

No other experience is listed. The beneficiary signed the labor certification on August 27, 1997 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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 record contains two Spanish-language, notarized affidavits from , both carrying "certification number 5097" and dated April 7, 2010. Both affidavits are accompanied by English translations, one which is certified as accurate and dated June 11, 2010, and one with no annotations. In his affidavits, indicates that he has been the ranch manager at for more than 20 years. He also indicates that he is acquainted with the beneficiary , as well as with his brothers and his now-deceased father. The affidavits indicate that the beneficiary worked with horses from an early age, both at the beneficiary's father's ranch, and at The affidavits indicate that the beneficiary maintained stalls, cleaned and brushed horses, and also rode horses. The affidavits indicate that the beneficiary worked intermittently with the affiant when the beneficiary would return from working in the United States on a temporary work visa.

The affidavits are not from the beneficiary's employer, and do not give specific dates and hours worked by the beneficiary. Furthermore, on Part B of the Form ETA 750, the beneficiary does not claim to have worked at In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Thus, the affidavits from do not establish that the beneficiary had two years of full-time experience as a thoroughbred racehorse groom prior to the November 14, 1997 priority date. The record does not contain experience letters for any of the work experience claimed on the labor certification.

On appeal, counsel notes that the case involved a timely substitution of beneficiaries on the Form ETA 750. Counsel states the following in pertinent part on Form I-290B:

> It is understandable when an ETA 750 Part A and B are submitted together in the normal course of filing a labor certification and dealing with the Employment Development Department and Department of Labor, there would be plenty of time to correct any typos, missing information, etc. However, in this case, the EDD and DOL never looked at the ETA 750 Part B because this case was filed timely as a substitution case. The beneficiary's ETA 750 Part B was submitted along with an original ETA 750 Parts A and B . . . as a substitution case directly to the U.S.C.I.S.

It is not evident if counsel is asserting that the experience was not listed on Part B because there was not enough time to fill out the form properly, because it was filed with USCIS rather than with the DOL, or some other reason. Counsel indicates on appeal that she would submit further documentation within 30 days. However, more than two years later, the AAO has received nothing further from counsel.

It is also noted that the record does not contain evidence to establish that the beneficiary completed six years of primary school, or that he was eligible for licensure as a groom[2] as of the November 14, 1997 priority date.

Thus, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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:

> *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). Here, the Form ETA 750 was accepted on November 14, 1997. The proffered wage as stated on the Form ETA 750 is $327 per week ($17,004 per year.)

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner failed to indicate when the petitioner was established, how many workers it employs, or its gross and net annual income. On the Form ETA 750B, signed by the beneficiary on August 27, 1997, the beneficiary claimed to have worked for the petitioner since August 1994.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered

[2] The record does contain evidence that the beneficiary was licensed as a groom by the California Horse Racing Board in 2007 and 2008.

wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 by the petitioner to the beneficiary as reflected in the table below:

Tax Year	Wage Paid	Annual proffered wage minus wage paid
1997	Not submitted.	$17,004.00
1998	Not submitted.	$17,004.00
1999	Not submitted.	$17,004.00
2000	Not submitted.	$17,004.00
2001	Not submitted.	$17,004.00
2002	$12,072.90	$4,931.10
2003	$14,540.64	$2,463.36
2004	$13,163.60	$3,840.40
2005	$8,959.83	$8,044.17
2006	$21,825.80	$0.00
2007	$28,263.43	$0.00
2008	$31,373.00	$0.00
2009	$30,900.00	$0.00

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 1997 through 2005. Therefore, it must establish that it can pay the difference between the proffered wage and the wage paid for those years. The petitioner has established that it paid the beneficiary the full proffered wage in 2006, 2007, 2008 and 2009.

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).

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).

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

Tax Year	Annual proffered wage minus wage paid	Sole Proprietor's Adjusted Gross Income
1997	$17,004.00	Not submitted.
1998	$17,004.00	$416,796.00
1999	$17,004.00	$516,957.00
2000	$17,004.00	$397,867.00
2001	$17,004.00	$1,442,788.00
2002	$4,931.10	$194,910.00
2003	$2,463.36	Not submitted.
2004	$3,840.40	-$543,026.00
2005	$8,044.17	-$830,803.00

In 1997, the record contains only Schedule C of the sole proprietor's IRS Form 1040, and does not include page one showing the proprietor's adjusted gross income. The record contains no IRS Form 1040 for the proprietor for 2003. The petitioner's adjusted gross income was negative in 2004 and 2005. Thus, in 1997, 2003, 2004 and 2005, the petitioner has not established that the sole

proprietor's adjusted gross income covers the difference between the proffered wage and the wage paid to the beneficiary in those years. Furthermore, because the record does not contain an accounting of the petitioner's monthly expenses,[3] it has not been established that the proprietor's adjusted gross income covers the difference between the proffered wage and the wage paid and leaves enough to support his household for the years 1997 through 2005.

On appeal, counsel does not mention the petitioner's 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's tax returns establish the historical growth of its business with the exception of 2003, as no tax return was provided for that year. The record also contains evidence of the proprietor's reputation as a horse trainer. However, USCIS records indicate that the petitioner

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[3] In a March 17, 2010 Request for Evidence (RFE), the director requested that the petitioner submit evidence regarding the proprietor's monthly household expenses, including car loans, insurance, utility bills, food, clothing, house payments, etc. In an April 15, 2010 response, counsel stated that the sole proprietor's personal monthly expenses are approximately $5,000 ($60,000 per year) but submitted no evidence to verify the expenses claimed. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO notes that the proprietor's Schedule A to his IRS Forms 1040 show annual itemized expenses including medical expenses, taxes, home mortgage interest and gifts greater than $60,000 in 1999, 2000 and 2002.

has filed immigrant visa petitions on behalf of at least 15 other beneficiaries. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner failed to submit previously requested[4] information regarding the proffered wages, relevant dates, and wages paid to the other beneficiaries of the other immigrant visa petitions. 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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[4] Detailed information regarding the other beneficiaries was requested by the director in the previously referenced March 17, 2010 RFE. 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).