



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

OFFICE: NEBRASKA SERVICE CENTER

FILE:

JAN 24 2013

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,

Rachel DiToro
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is an automobile and truck repair business. It seeks to employ the beneficiary permanently in the United States as an industrial truck 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 September 22, 2009 denial, the single 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 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 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 \$14.76 per hour (\$30,700.80 per year based upon a 40-hour workweek). The Form ETA 750 states that the position requires three years of experience in the job offered of industrial truck mechanic.

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

On appeal, counsel submits a brief; a document entitled, "Substitution of Trustee and Full Reconveyance;" a letter dated October 16, 2009 from [REDACTED] owner of the petitioning entity; a voided Internal Revenue Service (IRS) Form 1099 for 2008; and a listing for the petitioning business on manta.com.

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 1998 and currently to employ four workers. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in failing to consider the totality of the petitioner's financial circumstances; in failing to give proper consideration to the petitioner's assets and liabilities; in failing to consider such factors as the duration for which the petitioner had been operating, the petitioner's reputation, and the explanation for its financial situation; in failing to consider that the expenses which the petitioner identified were actually divided with [REDACTED] (the petitioner's wife); in failing to consider the petitioner's self-employment wages as being available to pay the beneficiary; in failing to consider the cash, which the petitioner paid the beneficiary from 2001 through the present; in failing to consider that the petitioner is only obligated to pay the beneficiary for 35 hours per week; in failing to consider additional income, which was available to pay the beneficiary; in failing to consider that, notwithstanding any shortfalls in income, assets, or wages paid, the petitioner is still a viable business enterprise; in failing to give proper consideration to the petitioner's bank statements; in failing to consider the uniqueness of the petitioner's situation; and in failing to consider the potential for future profitability.

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

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). With the exception of one document discussed below, the record in the instant case provides no reason to preclude consideration of most of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 beneficiary signed Form ETA 750B on April 24, 2001 and at that time did not claim to have worked for the petitioner. The initial petition submission contained no evidence of wages paid to the beneficiary at any time. On April 23, 2009, the director issued a request for evidence (RFE), asking the petitioner to submit, among other items, evidence of any wages paid to the beneficiary during 2005, 2006, 2007, and 2008 in the form of either IRS Form W-2 or 1099. The petitioner responded on June 4, 2009, but did not provide any IRS Forms W-2 or 1009 as requested by the director. Rather, with the response, the petitioner submitted an undated letter from [REDACTED] owner of the petitioning entity. In his letter, Mr. [REDACTED] states that the beneficiary has worked for the petitioning entity since 1998 and that he was paid in cash. The petitioner, however, provided no documentary evidence to substantiate these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel submits a voided IRS Form 1099, which was purportedly issued to the beneficiary by the petitioner in 2008. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Therefore, in the instant case, the petitioner has not established that it employed and paid the beneficiary any wages at any time from the priority date in 2001 onwards.

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 \$20,000.00 where the beneficiary's proposed salary was \$6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, from 2001 through 2005, the sole proprietor supported a family of five. From 2006 onwards, the sole proprietor has supported a family of four. The proprietor's tax returns reflect the following information for the following years:

- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$57,533.00.
- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of \$12,263.00.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of \$46,423.00.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of \$35,325.00.

- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$41,776.00.
- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$70,001.00.
- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$74,672.00.
- In 2008, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of \$78,693.00.

The sole proprietor must demonstrate not only the ability to pay the beneficiary the proffered wage from his adjusted gross income, but also the ability to support his household from his adjusted gross income. To that end, it is necessary for the sole proprietor to enumerate and document his recurring, monthly, household expenses. In the April 23, 2009 RFE, the director explained the requirement and asked the sole proprietor to submit a detailed list of his household expenses, including, but not limited to, "items such as mortgage payments, loan payments, credit card payments, vehicle payments, tax payments, utility costs, food costs, education costs, medical costs, insurance costs, and all other household costs" for each of the years between 2001 and 2008. In response, the petitioner submitted documents, which include household expenses for each year from 2001 through 2008. However, from 2001 through 2005, only two items appear on the list: mortgage payment and household expenses. The household expenses are not itemized, and there are no receipts, bills, or statements of any kind to substantiate the nature of the items included or the sums represented on the list. From 2006 through 2008, the petitioner included installment loans and credit card payments in addition to mortgage payments and household expenses. The petitioner did not account for taxes, utility costs, food costs, medical costs, insurance costs (e.g., homeowners, health, automobile, etc.), or clothing.

For 2001 and 2002, the sole proprietor asserted that he had \$18,000.00 in annual household expenses with a monthly rent or mortgage payment of \$1,000.00. For 2003 and 2004, the sole proprietor asserted that he had \$21,000.00 in annual household expenses with a monthly mortgage payment of \$1,250.00. However, according to the sole proprietor's 2003 IRS Form 1040, Schedule A, the sole proprietor claimed \$19,417.00 in home mortgage interest paid during that year.² In 2004, according to IRS Form 1040, Schedule A, the sole proprietor claimed \$15,104.00 in home mortgage interest paid during that year. Thus, in 2003, the sole proprietor would have paid \$1,618.00 per month in mortgage interest alone. When combining mortgage interest with the principal payment on the mortgage, the monthly payment would have been considerably higher than \$1,618.00. This conflicts with the sole proprietor's claim on his statement of expenses. Based upon the mortgage interest claimed on the petitioner's Form 1040, Schedule A for 2004, the sole proprietor would have paid \$1,258.00 in mortgage interest each month. This sum alone is higher than the total claimed by the sole proprietor in his statement of expenses. For 2005, the sole proprietor asserted that he had

² The sole proprietor's home address, as reported on IRS Form 1040, is consistent from 2001 through 2008. The petitioner provided Schedule A, identifying mortgage interest paid, for each year from 2003 through 2008. Schedule A was not provided for 2001 or 2002.

\$20,940.00 in annual household expenses, with a monthly mortgage payment of \$1,245.00. However, according to the sole proprietor's Schedule A for 2005, the sole proprietor paid \$14,935.00 in home mortgage interest alone, a sum which reflects a monthly payment of \$1,245.00, which is the total sum claimed by the sole proprietor on his list of expenses. For 2006, the sole proprietor asserted that he had \$34,500.00 in annual household expenses with a monthly mortgage payment of \$1,500.00. However, according to the sole proprietor's Schedule A for 2006, the sole proprietor claimed \$19,192.00 in mortgage interest paid, a sum which reflects a monthly payment of \$1,599.00 for interest alone. For 2007, the sole proprietor asserted that he had \$66,180.00 in annual household expenses with a monthly mortgage payment of \$4,265.00. According to the sole proprietor's Schedule A for 2007, he reported home mortgage interest of \$51,190.00, which amounts to \$4,266.00 per month. Thus, the figure reflected on the sole proprietor's list of expenses is mortgage interest alone. In 2008, the sole proprietor asserted that he had \$61,800.00 in annual expenses, with a monthly mortgage payment of \$4,000.00. According to the sole proprietor's Schedule A for 2008, he reported \$35,214.00 in mortgage interest paid or \$2,934.50 per month.

Therefore, with the exception of 2008, the figure which the sole proprietor claimed as a monthly mortgage payment on his list of expenses, either equates solely to the amount of mortgage interest, which he paid, or it is less than the amount of interest claimed on Schedule A. Additionally, the sole proprietor's claims do not include real estate or property tax for any of the years from 2001 through 2008. According to Schedule A, from 2001 through 2008, the sole proprietor's real estate and property taxes fluctuated between \$2,315.00 and \$2,689.00. Such expenses were not included in the sole proprietor's list of recurring expenses. However, these would normally be included in one's monthly mortgage payment and would be held in escrow until such taxes were due at the end of the year.

Since the figures which the sole proprietor identified as his mortgage payments on the list of expenses do not correspond with the figures reported to the IRS on Forms 1040, Schedule A, and the list does not include many items commonly associated with the operation of a household, such as taxes, insurance, food, clothing, and utilities, the amount of the petitioner's claimed expenses do not appear to be accurate.

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

Given the omissions and inconsistencies, the actual figure for the sole proprietor's recurring, monthly, household expenses is likely higher than claimed. The director found that, after deducting the figure for expenses provided by the petitioner, the petitioner might have demonstrated the ability to pay the beneficiary the proffered wage in 2001 and 2006. However, because the figures for the sole proprietor's recurring, monthly, household expenses do not appear to be accurate, the sole

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proprietor has not demonstrated sufficient adjusted gross income both to pay the beneficiary the proffered wage and to support his household for any of the years from 2001 through 2008.

On appeal, counsel notes an erroneous statement in the fourth paragraph of the director's decision and asserts that the director's decision should be reversed for that reason alone.

The evidence submitted with the petition did not clearly demonstrate that the beneficiary qualified as an *executive or manager* at the time the petition was filed. Therefore, on April 23, 2009, the United States Citizenship and Immigration Service (USCIS) issued a Request for Evidence ("RFE")...

[emphasis added].

Based upon the director's analysis as explained in the decision, the director's reference to the beneficiary as an "executive or manager" was clearly a scrivener's or clerical error. It did not form the basis of the denial, since the petition was denied for the petitioner's failure to demonstrate the ability to pay. Further, the issue was not the subject of the director's RFE. Rather, the director requested evidence related to the petitioner's ability to pay. Therefore, the AAO will not consider this to be a ground for reversing the director's decision as it had no bearing upon the decision itself or upon the director's analysis of the evidence presented.

On appeal, counsel asserts that the director erred in failing to consider the sole proprietor's assets and liabilities, which were not included on Form 1040. Counsel refers to evidence of assets previously presented, but does not specifically identify such assets and provides no evidence of such assets on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

In addition, counsel asserts that the petitioner owns a home and claims to substantiate this assertion with a copy of a document entitled, "Substitution of Trustee and Full Reconveyance."

Although the document makes reference to a "certain Deed of Trust dated 9/24/2003," the document does not identify the property associated with such deed. Further, the sole proprietor provided no documentary evidence wherein he claims that it is his intention to sell any property which he owns for the purposes of paying the beneficiary.

Further, regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal 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).

On appeal, counsel asserts that the director erred in his assessment of the evidence provided. First, counsel asserts that, when considering the amount which the petitioner identified for his recurring, monthly, household expenses, the director did not consider the petitioner's statement that the total amount for expenses is divided between the sole proprietor and his wife, [REDACTED].

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).

As a sole proprietor, the petitioner must demonstrate that he is able both to pay the beneficiary and support his family out of his adjusted gross income, which is reported on the first page of his IRS Form 1040. In each year from 2001 through 2008, the filing status which the sole proprietor claimed on IRS Form 1040 was "Married filing jointly." The sole proprietor identified himself and [REDACTED] as the joint filers of the income tax return for each year. Therefore, the adjusted gross income identified on Form 1040 is the adjusted gross income of both parties who filed the tax return. The sole proprietor also identified the names of the two or three minor dependents on the same tax return. All five individuals constitute the household. In the RFE, the director indicated that the sole proprietor would have to demonstrate the ability to support his household from his adjusted gross income. The director requested a list of all recurring, monthly, household expenses, which would include the expenses incurred by each and every individual member of the household, five members between 2001 and 2005, and four members between 2006 and 2008. The sole proprietor could have also supplied evidence of the income and assets held by the household. Since the sole proprietor and his wife file jointly, the income of each party would be reported on the same tax return. Likewise, the expenses for each would be derived from the income reported on the same tax return. The sole proprietor cannot claim the income and assets of the entire household for purposes of making a positive determination of the ability to pay and then exclude certain expenses if those expenses adversely affect the determination of the ability to pay. The expenses are incurred by the household. Therefore, all must be considered; just as the income generated by the household is considered in its totality.

Second, counsel asserts that the director failed to consider the sole proprietor's "self-employment wages" as reported on Schedule SE for each year.

However, "self-employment wages," as reported on Schedule SE, do not represent a source of funds, which is separate from the sole proprietor's adjusted gross income. According to Schedule SE, one

must file this form if one “had net earnings from self-employment from other than church employee income (line 4 of Short Schedule SE or line 4c of Long Schedule SE) of \$400 or more...” If one is required to file Schedule SE, whether or not one uses the Short Schedule SE or the Long Schedule SE is determined by the total amount of the individual’s income. In Section A of Schedule SE, the individual is directed to report, in line 2, the “net profit (or loss) from Schedule C, line 31...” Therefore, as a sole proprietor, the petitioner would report the net profit from his sole proprietorship, as indicated on line 31 of Schedule C, on the Schedule SE. The purpose of this Schedule is the determination of the amount of self-employment tax which the sole proprietor or self-employed individual must pay. The net profit, from line 31 of Schedule C, which is also reported on line 2 of Schedule SE is, in turn, reported on line 12 of the first page of Form 1040 as business income. The sole proprietor’s adjusted gross income is determined by considering this income. Therefore, in the instant circumstance, the sole proprietor’s adjusted gross income has already assumed his self-employment income. To consider self-employment income as a separate source of funds available to pay the beneficiary would be to consider the net profit from the sole proprietor’s business twice. Such an assertion is misplaced.

On appeal, counsel asserts that the director erred in failing to consider the petitioner’s statement that he paid the beneficiary in cash for “part time employment at a wage of \$14.76 for 32 hours per week” from 2001 to the present. The statement to which counsel refers is an undated letter, which the petitioner submitted in response to the director’s RFE. In the letter, Mr. [REDACTED] states:

This is to certify that [the beneficiary] has worked for our company since the year 1998. [The beneficiary] has worked as a permanent part time per week employee [sic] of 32 hours weekly as a [sic] [REDACTED] at the rate of \$14.76 per hour paid in cash.

Counsel notes that the petitioner “failed to maintain records of cash payment” but states that [the beneficiary’s] 2008 1099 is included with the appeal, as evidence of payment.

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). *See also* INA § 291.

If the petitioner claims that he paid the beneficiary and intends to demonstrate the ability to pay based having paid the beneficiary a portion or the whole of the proffered wage, he must provide evidence demonstrating the payment of such wages. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Further, neither the assertions of counsel nor those of the petitioner constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Additionally, the AAO will not consider the voided IRS Form 1099 provided as evidence for the first time on appeal. As explained above, where a petitioner has been put on notice of a deficiency

in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *Matter of Obaigbena*, 19 I&N Dec. at 533.

In response to the RFE, the petitioner supplied a letter from the beneficiary in which the beneficiary claims to have worked for the petitioner since 1998 and to have been paid in cash. Again, however, neither the petitioner nor the beneficiary provided evidence of any payments made to the beneficiary. Further, the beneficiary's statement is self-serving and does not satisfy the burden of proof in these proceedings. Moreover, the beneficiary signed Form ETA 750B on April 24, 2001, under penalty of perjury, and did not claim to have worked for the petitioner as of that date. 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. *See Matter of Ho*, 19 I&N Dec. at 591-592.

On appeal, counsel asserts that the director erred in failing to consider that the petitioner need only demonstrate the ability to pay the beneficiary the proffered hourly wage for a 35-hour work week. Counsel states that "full-time employment is defined in the INA and CFRs as a minimum of 35 hours per week. Indeed, according to the Immigration and Nationality Act (INA) § 203(b)(5)(D), full-time employment is defined as:

...employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

Therefore, according to the INA, a position is considered full-time employment if the position requires "at least 35 hours of service per week." Whether a position is full-time, however, is apart from the proffered wage, which the petitioner must pay.

According to 8 CFR § 204.5(g)(2):

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 offer of employment, in this case, refers to the individual labor certification, which is certified by DOL. The proffered wage is identified in Section 12 of Form ETA 750, and the number of hours per week which is required for the proffered position is identified in Section 10 of Form ETA 750.

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).

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According to Form ETA 750, the proffered position requires 40 hours of service per week, and the proffered rate of pay is \$14.76 per hour. Therefore, the petitioner must demonstrate the ability to pay \$30,700.80 per year, based upon a 40-hour work week, as stipulated on Form ETA 750.

On appeal, counsel asserts that the petitioner reported additional income, which was available to pay the beneficiary. Counsel asserts that, in 2002, the "petitioner paid 'non-cash' or 'claimed' wages totaling \$19,500 which could have been utilized to pay the beneficiary." Counsel states, "claimed wages increased each year and could have been utilized to pay the beneficiary."

On the petitioner's Schedule C for 2002, the sole proprietor identified \$19,500.00 in wages paid on line 26 of Part II (Expenses). According to the sole proprietor, he employs four workers. Wages identified as a business expense were already paid to existing employees and, as such, would not have been available to pay the beneficiary. Further, the petitioner at no time made the claim that he intended to replace an existing employee with the beneficiary.

Counsel asserts that the director erred in failing to exclude 13 state and/or federal holidays as well as 10 personal/sick days, which are permitted by California law, but for which the petitioner is not obligated to pay the beneficiary. Counsel asserts that, if the director had deducted the holidays and personal days in addition to considering that a full-time work week consists of only 35 hours, the proffered wage would be considerably lower than \$30,700.80.00.

The 35-hour work week has already been discussed above. With respect to holidays, however, only federal and state government buildings are required to be closed on federal and state holidays. Private businesses are not required to close. In fact, many businesses remain open at least for a portion of the holidays identified by counsel. Further, the petitioner provided no evidence or even a statement asserting that he closes his business for the 13 federal and state holidays identified by counsel.

Regarding the 10 sick/personal days, although the state of California might permit employees to take such days, and employers might not be required to compensate employees for such time off, counsel assumes that the beneficiary would be taking 10 days off each year for sickness or personal reasons. However, employees are not required to take such sick or personal days. The AAO would not base a calculation of the proffered wage upon an assumption that the beneficiary would take a specific number of sick days each year for all of the years under consideration.

On appeal counsel asserts that the director erred in failing to give proper consideration to the realistic nature of the job offered. Counsel makes reference to the petitioner's listing on [REDACTED] and states that [REDACTED] identifies the petitioner's annual sales as being between \$2.5 and \$5 million. However, [REDACTED] is an internet-based resource in which companies are able to advertise and market their businesses. The companies which choose to advertise on the website provide their own descriptions. In its Terms and Conditions Section, [REDACTED] includes the disclaimer:

THE CONTENT IS PROVIDED "AS IS" AND YOUR USE OR RELIANCE ON SUCH MATERIALS ARE SOLELY ARE YOUR OWN RISK. The Content is

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intended for general information, general discussion, education, and entertainment purposes only. Do not construe that all of the Content is either endorsed or verified by us or our Contributors.³

does not verify the accuracy of material provided by the companies which advertise on the site. Therefore, such information cannot serve as evidence either of the viability of the petitioner's business or of the sole proprietor's ability to pay. Further, against the claims which the petitioner might have made on the web site, the sole proprietor provided his tax returns, which present a different picture of his business operations. For example, rather than showing \$2.5 to \$5 million in net sales, the sole proprietor's Schedule C show net sales most recently of \$360,230.00.

Counsel asserts that the director neglected to consider a statement made by the petitioner's tax preparer in which states that the sole proprietor had sufficient income and assets to pay the proffered "salary of \$35,000" since 2001. The letter from is dated May 28, 2009 and was submitted in response to the director's RFE.

8 C.F.R. § 204.5(g)(2) identifies the three forms of evidence, which a petitioner may submit in an effort to demonstrate the ability to pay: annual reports, federal tax returns, or audited financial statements. Audited financial statements would be accompanied by a report by an accountant. In this case, the sole proprietor provided federal tax returns. He did not, however, provide audited financial statements or an auditor's report. The petitioner has provided no evidence demonstrating that has performed an audit of the petitioner's finances. Nor does claim to have done so. The assertions made by Ms. are unsupported and, therefore, are not demonstrative of the petitioner's ability to pay.

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

In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

In the instant case, the petitioner does not employ 100 or more workers and, there is no evidence in the record of proceeding demonstrating that even works for the petitioner. According to the Forms 1040 provided, the petitioner's taxes are prepared by

On appeal, counsel asserts that the director erred in failing to consider the petitioner's bank account statements. In response to the director's RFE, the sole proprietor submitted a portion (1 of 5 pages) of a single bank statement for December 2001; a portion (page 4 of 5) of a single bank statement for December 2002; a portion (page 1 of 6) of a single bank statement for December 2003; a portion

³ See (accessed December 6, 2012).

(page 1 of 8) of a single bank statement for December 2004; a portion (page 1 of 8) of a single bank statement for January 2006; a portion (page 1 of 9) of a single bank statement for December 2006; and a portion (page 1 of 8) of a single bank statement for December 2007. All of the bank statements represent a business checking account for [REDACTED]

The funds in the Bank of America account are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts 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).

Counsel asserts that, in addition to the funds in the petitioner's bank account, the sole proprietor "has maintained a minimum of \$20,000.00 in business property (machinery, vehicles and equipment)." However, counsel provided no documentary evidence to substantiate this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Further, such items are necessary for the operation of the sole proprietor's business. It is not reasonable to assume that he would liquidate essential equipment for purposes of paying the beneficiary. 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 at 1220 ; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10; *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.

Counsel asserts that the sole proprietor spent \$10,000.00 during all relevant years on expenses such as "truck wash" and "waste disposal" which were unnecessary expenses. First, counsel provided no documentary evidence to substantiate the claimed expenses. Second, such expenses constitute some of the costs of operating a business, and such funds had already been expended. Such funds, whether necessary or not, cannot now be reclaimed for purposes of demonstrating the petitioner's ability to pay.

On appeal, counsel asserts that the AAO must consider unique circumstances. As an example, counsel makes reference to personal service corporations. However, a personal service corporation is unique in the manner in which it pays taxes, at a flat 35 percent rate. Given the high rate of taxation, personal service corporations allocate their profits as income to the shareholders of the corporation so that those individuals might pay income tax at a personal rate. In turn, the corporation shows less income, which is susceptible to taxation. In the instant circumstance, the petitioner is a sole proprietor, which is taxed at a personal rate. The AAO has considered the uniqueness of the petitioner's circumstances in reviewing the sole proprietor's adjusted gross income, his personal assets and his personal expenses.

On appeal, counsel asserts that the petitioner has the potential to generate future profits. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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 \$100,000.00. 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, from 2001 through 2008, the sole proprietor did not demonstrate sufficient adjusted gross income to pay the beneficiary the proffered wage plus its household's monthly, recurring expenses. The petitioner only provided partial copies of individual bank statements for the petitioner's business checking account. Since the partial statements only represent a single month in each year, they do not reflect an annual average balance. The petitioner has not established the historical growth of his business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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.

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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.