U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 02 2010

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a retail painting business. It seeks to employ the beneficiary permanently in the United States as a painter. 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 April 19, 2008 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 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 27, 2004. The proffered wage as stated on the Form ETA 750 is $8.78 per hour ($18,262.40 per year). The Form ETA 750 states that the position requires two years experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The Form I-140 petition was filed by [redacted] The Form ETA 750 was filed by the same entity. In support of the petition, however, the petitioner submitted the 2004 and 2005 (Form 1040) tax returns of [redacted]t, and 2004, 2005, 2006 and 2007 Schedules C listing [redacted] as the proprietor. Also submitted in support of the petition were the 2004 and 2007 (Form 1040) tax returns of [redacted]. The Form I-140 was signed by Ronald Chabot. The Form I-140 and the 2004 W-2 Form of the beneficiary from [redacted] show a tax identification number of 59-3743593.

The petitioner in this instance is [redacted] (Tax [redacted] The name implies that the company is incorporated and should properly file tax returns as an incorporated business. Here, however, the petitioner submitted tax returns with a Schedule C to evidence a sole proprietorship which states the proprietor as [redacted] and the principal business as "painting." The petitioner submitted no evidence, of any nature, of the ability of [redacted] to pay the proffered wage from the priority date onward. The petition must accordingly, be denied. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).[2]

The record indicates that [redacted] employed the beneficiary in 2004, paying the beneficiary $11,299 under employer identification number 59-3743593. As previously noted, that is the same

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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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The petitioner must resolve this issue so that we may determine the proper tax return and financial resources to use to determine the petitioner's ability to pay the proffered wage.

IRS Tax Number listed on the Form I-140. As set forth below, even if the tax returns submitted by Leonard Chabot were considered, and the petitioner was deemed to be a sole proprietorship, the ability to pay the proffered wage from the priority date has not been established.[3]

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. Comm. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2004 onwards. The record does show that [redacted] employed the beneficiary in 2004 paying him $11,299. Thus, it would be necessary for [redacted], as a sole proprietor, to establish the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2004.[4] That sum is $6,963.40. On appeal, [redacted] submitted a letter, which stated that he employed the beneficiary from March 2004 to September 2004 "when I terminated his employment because the payroll company informed me that he did not have work authorization." The petitioner did not submit any W-2 statements for any other year. Therefore, the petitioner must establish its ability to pay the full proffered wage from 2004 onward.

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[3] The tax returns submitted by [redacted] and the information submitted relative to any equity that he may have in his principal residence, will not be considered and are of no evidentiary value. Nothing in the record, other than the unsupported statements of [redacted] and counsel, show that [redacted] was ever the employer of the petitioner or that [redacted] even operated a business. He submitted no Schedule Cs (Profit or Loss From Business) or any other evidence that he operated a business which could employ the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[4] The director specifically requested W-2 statements in his Request for Evidence. The petitioner, however, failed to submit this evidence until it filed the appeal. Further, to accept this W-2 statement, the petitioner must show that Leonard Chabot and Chabot Painting and Specialty Coating are the same entity. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

A sole proprietorship is 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. 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. *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 petitioning entity structured as a sole proprietorship 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.

As noted above, it is unclear from the record whether [redacted] exists as a corporate entity, and whether a corporate tax return should more properly have been submitted to determine the petitioner's ability to pay.[5] Even if we considered the tax returns in the record, and the petitioner as a sole proprietor, the petitioner cannot establish its ability to pay the proffered wage.

In the instant case, [redacted] did not submit his living expenses or those of any dependents. Thus, it cannot be determined whether or not he had the ability to pay the proffered wage from the priority date onward. The proprietor's tax returns reflect the following information for the following years:

[5] As noted above, assets of a different company cannot be used to establish the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530.

- [redacted] adjusted gross income (Form 1040, line 36) for 2004 was ($30,878).
- [redacted] adjusted gross income (Form 1040, line 37) for 2005 was $62,689.

In 2004, the sole proprietor's adjusted gross income of negative ($30,878) would be insufficient to pay the proffered wage plus his unspecified living expenses and those of any dependents. Although [redacted]s 2005 Form 1040 states an adjusted gross income that is sufficient to pay the proffered wage, as previously noted, it cannot be determined whether his $62,689 adjusted gross income is sufficient to pay the proffered wage plus his living expenses and those of any dependents. [redacted]did not submit his full 2006 and 2007 tax returns, but instead only submitted Schedule C for these years. This is insufficient as the Schedule Cs do not include page one Form 1040 adjusted gross income to determine the sole proprietor's ability to pay. Similarly as noted above, the petitioner did not submit tax returns for the stated petitioner [redacted] Thus, the petitioner has not established his ability to pay the proffered wage plus in any of the applicable years.

On appeal, counsel states that [redacted] is a partnership, which has been conducting business under the name [redacted] with the same two principals, [redacted] in the Amelia Island area of North Florida since February 1995." Partial evidence in the record implies that the petitioner operates as a sole proprietorship. Other evidence implies that the petitioner should file its return on Form 1065 (partnership) or Form 1120 or Form 1120S as an incorporated entity. The petitioner must resolve this inconsistency. Counsel states in his letter of June 18, 2008 that the beneficiary was employed by [redacted] in 2004 earning $11.00 per hour. The 2004 W-2 statement for the beneficiary, however, shows that the employer was [redacted] tax returns are filed on Form 1040 and contain no Schedule C, nor was a return filed on a partnership return Form 1065. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel cites to the petitioner's increased gross receipts and wages paid to other workers. However, this information is from [redacted]tax return and not that of [redacted] general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Ultimately, the petitioner must resolve the issue of its corporate status before we can definitively conclude the proper petitioner's ability to pay.

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 (BIA 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, no financial documentation was submitted for the petitioner, [redacted]. The financial documentation submitted by [redacted] (if he were considered to be a sole proprietor) is insufficient to establish the ability to pay the proffered wage plus applicable living expenses in any year from the priority date onward. 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 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.