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

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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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 $585. 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 an individual who owns a Mexican restaurant located in Los Angeles, California. It seeks to employ the beneficiary permanently in the United States as a chef. 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 November 8, 2007 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 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 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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is $15.25 per hour or $31,720 per year. The Form ETA 750 states that the position requires two years of work experience.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition filed in 2007, the sole proprietor claims to have established the business – the Mexican restaurant – in January 1997 and to currently employ 17 workers. Further, she claims that the business currently has a gross annual income and a net profit of $337,728 and $56,371, respectively. To support her claim that she has the ability to pay the proffered wage, the sole proprietor or the petitioner submitted the following evidence:

- Photocopies of IRS Forms 1040 for the years 2001 through 2006;
- Photocopies of various bank statements from January 2001 through January 2007; and
- A signed statement showing recurring monthly rents and other business and personal expenses.

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 April 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

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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).

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). 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. 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.

In the instant case, the petitioner supports a family of five – her spouse and four children. In a letter dated September 5, 2007, the petitioner lists her monthly household expenses as $1,875.00. These expenses amount to a yearly total of $22,500.00. The petitioner's tax returns reflect the following information for the following years:

Tax Year	The Petitioner's Adjusted Gross Income (AGI) ($)	Proffered Wage (PW) ($)	Household Expenses ($)	Gross Income less Household Expenses ($)
2001 (Form 1040, line 33)	36,212	31,720	22,500	13,712
2002 (Form 1040, line 35)	29,100	31,720	22,500	6,600
2003 (Form 1040, line 34)	55,036	31,720	22,500	32,536
2004 (Form 1040, line 36)	44,943	31,720	22,500	22,443

2005 (Form 1040, line 37)	44,373	31,720	22,500	21,873
2006 (Form 1040, line 37)	112,190	31,720	22,500	89,690

In 2002, the petitioner's gross income is less than the proffered wage. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2001, 2004, and 2005, the amount left after deducting household expenses from the petitioner's AGI is not sufficient to pay the beneficiary's proposed salary of $31,720.00, as shown above. In these years, as in *Ubeda*, the AAO concludes that it is highly unlikely that the petitioner could support herself, her spouse and four dependents and, at the same time, pay the beneficiary's proposed salary of $31,720 where that proposed salary constituted over half of the petitioner's AGI.

In 2003 and 2006, the petitioner arguably could pay the beneficiary's proffered wage of $31,720 since she made $32,536 and $89,690, respectively, after deducting all of her household expenses. Nevertheless, no evidence has been presented to show that the petitioner was willing and able to forego her income to pay the beneficiary's proffered wage for those years.

On appeal, counsel for the petitioner asserts that the director committed a serious error when he included business expenditures in calculating the petitioner's monthly recurring expenses. Counsel states that these business expenditures have been included in the petitioner's tax returns, and thus, they should not have been added to the petitioner's monthly expenses for the second time. The AAO finds that the director erred in concluding that the petitioner's household expenses were $167,052 annually, and consequently, withdraws this finding of the director.

On appeal, counsel states that the petitioner's household expenses were:

- $6,703 in 2001,
- $24,287 in 2002,
- $22,018 in 2003,
- $20,578 in 2004,
- ($16,884) in 2005, and
- ($10,122) in 2006.

The AAO observes that the amounts between 2001 and 2004 are taken from the petitioner's Form 1040 Schedule A, line 14, Home Mortgage Interests and Points. The 2005 and 2006 figures are from Schedule E of the Form 1040, Supplemental Income and Loss from Real Estate. These expenses, contrary to counsel's statement, have been included in the calculation of the petitioner's adjusted gross income and are not reflective of the petitioner's household expenses. USCIS will not consider these amounts separately in determining whether the petitioner has the ability to pay the proffered wage.

Counsel further notes that the petitioner has multiple properties in California and that these properties have significant equities, indicative of her ability to pay the proffered wage.

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 that 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). In the instant proceeding, neither counsel nor the petitioner has submitted any evidence indicating the petitioner's intention or willingness to sell her properties to pay the beneficiary's proffered wage.

Additionally, for a sole proprietorship, USCIS considers net current assets of the sole proprietor to be the figure shown on his or her audited balance sheet since the proprietor individual's tax return will not show these figures. In the instant case, since the record contains no audited balance sheet showing the petitioner's assets and liabilities during any time period between 2001 and 2006, no conclusion can be reached whether the petitioner has sufficient net current assets to pay the proffered wage.

The petitioner also submits various bank statements intended to show funds available in her checking and savings accounts to pay the proffered wage.

If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. If the accounts represent what appears to be the sole proprietor's business checking accounts, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Here, the bank statements submitted appear to be the business' checking accounts. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the Schedule C of her individual tax returns.

Although not raised 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 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, the proprietor claims on the Form I-140 that she started the restaurant business in 1997, and that she currently employs 17 workers. Based on the tax returns submitted, the AAO further observes that the proprietor had income from multiple business ventures between 2001 and 2006. Upon review of the tax records, the AAO finds that although the petitioner derives most of her income from the Mexican restaurant, no evidence or information has been submitted to show that the restaurant has significant potential to grow beyond its current profitability, or that it will generate sufficient income for the petitioner to be able to pay the proffered wage from 2001. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor does it include any evidence or detailed explanation of its milestone achievements. 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.