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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 11 2011

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 machine shop. It seeks to employ the beneficiary permanently in the United States as a machine setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 9, 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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is $15.94 per hour ($33,155.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 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 1995 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on March 16, 2001, the beneficiary claimed to have worked for the petitioner since March, 1996.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 submitted Forms W-2, Wage and Tax Statement.

In this matter, the petitioner submitted IRS Forms W-2, Wage and Tax Statement, as evidence of wages paid to the beneficiary by the petitioner. However, information contained in these Forms W-2 are inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury and, therefore, the Forms W-2 are not persuasive evidence of wages having been paid to the beneficiary. The Forms W-2 state that the wages were paid to a person having social security number [redacted] The petitioner left blank its response to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, [redacted] is the beneficiary's social security number. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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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 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).

Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

However, assuming the Forms W-2 are persuasive evidence, they indicate that the petitioner paid the beneficiary as follows:

Year	Wages Paid	Difference Between Proffered Wage and Wages Paid
2001	$25,600.00	$7,555.20
2002	$11,440.00	$21,715.20
2003	$13,000.00	$18,555.20
2004	$27,560.00	$5,595.20
2005	$31,720.00	$1,435.20
2006	$32,920.00	$235.20
2007	$35,320.00	N/A

The petitioner claims to have paid the beneficiary in excess of the proffered wage in 2007. For all other years, the petitioner must establish that it had the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary. However, as the Forms W-2 are not persuasive given the inconsistency pertaining to the social security number, the petitioner has not established that it paid the beneficiary any wages in any year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (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).

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 (AGI), 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 sole proprietor supported a family of four in 2001, and a family of three from 2002 to 2006. The proprietor's tax returns for the years 2001 to 2006 reflect the following information:

- In 2001, the Form 1040 stated AGI of $40,222.00.
- In 2002, the Form 1040 stated AGI of $47,414.00.
- In 2003, the Form 1040 stated AGI of $27,163.00.
- In 2004, the Form 1040 stated AGI of $128,789.00.
- In 2005, the Form 1040 stated AGI of $23,978.00.
- In 2006, the Form 1040 stated AGI of $64,080.00.
- In 2007, the Form 1040 stated AGI of $89,077.00.

In each year, the sole proprietor's AGI exceeded the difference between the proffered wage and wages purportedly paid to the beneficiary. The table below shows the amount remaining after the sole proprietor's AGI is reduced by the amount required to pay the proffered wage for each year from 2001 to 2006, again assuming the persuasiveness of the Forms W-2:

Year	Remaining AGI
2001	$32,666.80
2002	$25,698.80
2003	$8,607.80
2004	$123,193.80
2005	$22,542.80
2006	$63,844.80

On January 3, 2008, the director issued a request for evidence which asked for a list of the sole proprietor's monthly household expenses, including mortgage payments, automobile payments, installment loans, credit card payments and household expenses. In response, prior counsel submitted partial copies of bills from 2007 and 2008 which showed the sole proprietor's expenses for mortgage, utilities and telephone. As noted by the director, these few bills provide an incomplete picture of the sole proprietor's household expenses as they fail to account for such things as food expenses or car payments. Further, these bills relate only to 2007 and 2008 and thus do not provide evidence of the sole proprietor's household expenses for the years 2001 to 2006.

The bills submitted by prior counsel total $2,540.85. Assuming these are monthly recurring expenses, the annual amount would be $30,490.20. As noted above, the sole proprietor's actual annual household expenses are likely greater than this amount. However, even if we are to assume that this amount if reflective of the sole proprietor's annual household expenses, this amount exceeds the sole proprietor's remaining AGI for 2002, 2003 and 2005, again assuming the persuasiveness of the Forms W-2. Therefore, the sole proprietor has not established that it had the ability to pay the proffered wage as of the priority date.

On appeal, counsel asserts that there is another way to establish the petitioner's ability to pay the proffered wage. Counsel states that the fact that the sole proprietor's AGI was insufficient to cover both the proffered wage and the sole proprietor's household expenses is irrelevant. Counsel states that this is because the expenses of the business, including salaries, are paid before personal expenses. However, it is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the household expenses and the amount required to pay the proffered wage.

Counsel further states that the petitioner's gross receipts increased from 2001 to 2007. Counsel also notes that the petitioner paid total wages in excess of the proffered wage from 2001 to 2007. However, reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Counsel also submitted copies of the petitioner's bank records for the period from September 1, 2007 to August 29, 2008. Counsel states that the average monthly bank balance for the period is over $7,000.00 and that this establishes the petitioner's ability to pay the proffered wage. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the bank statements cover only the period from September 1, 2007 to August 29, 2008 and thus do not provide evidence of the petitioner's ability to pay the proffered wage as of the priority date in 2001.

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. 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a pattern of profitable or successful years, that the years 2002, 2003 and 2005 were uncharacteristically unprofitable or difficult for some reason, or that it has a sound business reputation. Furthermore, as noted above, the record contains inconsistencies pertaining to the Forms W-2 and the purported income paid to the beneficiary, which undermines the credibility of the petitioner's financial evidence as a whole. Accordingly, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the 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.