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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 18 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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,

Elizabeth M'Cormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioners seek to employ the beneficiary permanently in the United States as a housekeeper. 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 submitted sufficient evidence to establish the petitioner has the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continually through the present. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 December 11, 2008 denial, the 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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).

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. Its fiscal year is based on a calendar year. The Form ETA 750 was accepted on September 3, 2003. The proffered wage as stated on the Form ETA 750 is $12.50 per hour which equates to $26,000 per year based on a 40-hour week.[2]

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. On the Form ETA 750B signed by the beneficiary on August 20, 2003, the beneficiary does not claim to have worked for the petitioner. The record does not reflect that the petitioner has paid the beneficiary wages at any time.

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. 813, 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.

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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).

[2] The petitioner lists an overtime rate of one and one-half times the regular rate on the labor certification but does not state that overtime is regularly required.

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). 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, *supra* (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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.

The record before the director closed on November 12, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2007 federal income tax return was the most recent return available. The sole proprietors submitted copies of their birth certificates, the biographic page of his/her passport and their naturalization certificates, their individual income tax returns for the years 2004 through 2007, a statement regarding their monthly household expenses, bank statements for the period November 23, 2007 to December 23, 2008, a money market fund statement showing the current redemption amount as $12,564.51, life insurance policies, and statements of various savings and retirement portfolios of [redacted]. In the instant case, the sole proprietors' Forms 1040, U.S. Individual Income Tax Returns show that they filed as married filing jointly for each year from 2003-2007. They claimed three dependents in 2003, two dependents in 2004, one dependent in 2005 and no dependents in 2006 and 2007. The proprietors' tax returns reflect the following information:

- In 2003, the proprietor's Form 1040 stated adjusted gross income on line 34 of $77,900.55.
- In 2004, the proprietor's Form 1040 stated adjusted gross income on line 36 of $51,355.21
- In 2005, the proprietor's Form 1040 stated adjusted gross income on line 37 of $47,753.50.

- In 2006, the proprietor's Form 1040 stated adjusted gross income on line 37 of $43,988.54.
- In 2007, the proprietor's Form 1040 stated adjusted gross income on line 37 of $45,743.00.

The petitioner submitted a list of monthly household expenses with the initial evidence and a second list in response to the RFE. The first list of monthly household expenses totals $2,800 per month or $33,600 annually. This list is neither signed nor dated. The second list of monthly household expenses totals $3,500 per month or $42,000 annually. This list is dated October 28, 2008 and is signed by both of the individual petitioners. Except for 2003, the petitioners have not shown sufficient income to pay the beneficiary's proffered wage of $26,000 per year on the monies that remain after reducing the adjusted gross income by the amount required for their annual household expenses.

The petitioner submitted a copy of the Certificate of a Title for a Vehicle for his 1993 Mercedes Benz and 2003 Toyota Highlander SUV; a photocopy of what he claims is a Yamaha Baby Grand piano; and evidence of a parcel of land they own in Cebu, Philippines with a claimed value of $20,000. The petitioner claims that the automobiles are valued at $5,000 and $20,000, respectively, and that the baby grand is valued at $7,000. The petitioners have not provided evidence of the blue book value of the automobiles to substantiate their claimed value nor submitted an appraisal of the land and the piano. Further, these assets are not readily liquefiable, and the petitioners have not provided evidence that these assets could be readily utilized to pay the proffered wage.

The petitioner submitted copies of personal bank statements from November 23, 2007 to December 23, 2008 (My Access Checking). This evidence is insufficient to show the petitioner's ability to pay the beneficiary the proffered wage since the priority date. Further, the amount remaining after deducting the $3,500 in monthly expenses does not show that sufficient funds remain to pay the beneficiary's salary during the course of the year.

The petitioners have also submitted other bank statements and various savings/retirement portfolios of [redacted] for the years 2007, 2008 and 2009. As of January 9, 2009, the petitioners' Fidelity Savings and Retirement Pension Plan totaled $35,202.75. The money market statement of [redacted] shows a current redemption balance as of January 12, 2009 of $12,602.88. Her Inova 401(k) savings plan account shows an ending balance as of December 31, 2008 of $15,759.62. Her TIAA-CREF portfolio as of January 13, 2009 totals $17,898.85, her [redacted] Retirement Plan as of December 31, 2007 totals $41,251.08 and her [redacted] Savings Plan balance as of December 31, 2008 totals $13,674.09. The petitioner's Citibank checking and savings account statement as of December 3, 2008 shows a balance of $445.58. The petitioners have not indicated their willingness to cash in their retirement portfolio, and pay the penalties for early withdrawal, to pay the beneficiary's wage. The money market statement totaling $12,602.88 has insufficient funds to pay the wage in 2009. Further, even if the retirement funds are considered, the petitioner has not shown any funds available in savings on other such accounts from the priority date through 2006.

The petitioners provided their Life Insurance policy for themselves and their two children valued at $71,193.15. However, the petitioners have not stated that the cashing in their life insurance policies is an available option to pay the beneficiary's proffered wage.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 petitioners have not provided sufficient financial evidence to establish their ability to pay the proffered wage from 2004 and onwards. Similarly, the petitioners have not established that their inability to pay the wage from their net income is due to unusual or extenuating circumstances from 2004-2007. They have not established their historical growth, their reputation within the industry, or submitted a prospectus of their future business ventures.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from 2004 through 2008 and onwards. See 8 C.F.R. § 204.5(g)(2).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C.§ 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.