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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 28 2011

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual residing in a household. He seeks to employ the beneficiary permanently in the United States as a live-in home care attendant. 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 (the DOL). The director determined that the petitioner had not established that he 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 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)(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 unavailable.

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 March 29, 2004. The proffered wage as stated on the Form ETA 750 is $13.00 per hour ($27,040.00 per year). The Form ETA 750 states that the position requires six months experience or six months experience in a related occupation in home health care or practical nursing.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Accompanying the petition and the labor certification, counsel submitted, *inter alia,* copies of the petitioner's federal income tax returns (Forms 1040) for 2004 and 2005.

On October 10, 2008, the director requested, *inter alia,* that the petitioner submit evidence of its ability to pay the proffered wage from the priority date. The director requested complete tax returns from 2005, 2006,and 2007 as well as the petitioner's monthly expenses for the petitioner's family including but not limited to the following items: housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses, and stated that all items may be subject to verification.

The director instructed that if the petitioner will use personal assets to pay the proffered wage, evidence must be submitted to verify that he is in possession of sufficient assets[2] to pay the proffered wage.

Regarding the beneficiary, the director requested evidence of any wages the petitioner paid the beneficiary as of the priority date.

It is not clear from the record if the cancelled checks or the "Fairfield County Bank Corp. Domestic Outgoing" statements, mentioned below, are evidence of wage payments and receipts of payments to the beneficiary by the petitioner.

In response on November 10, 2008, counsel submitted, *inter alia*: an affidavit November 7, 2008; a listing of the petitioner's monthly expenses, income and assets dated November 4, 2008; documents evidencing a long term care insurance policy between [redacted] and the petitioner, noted as the insured; the petitioner's federal income tax returns (Forms 1040) for 2005, 2006 and 2007; copies of cancelled checks in 2003-two checks ($3,160.00); 2004-18 checks ($31,099.00), 2005-12 checks ($13,968.00), 2006-seven checks ($23,750.00), payable to the beneficiary by the petitioner; a summary of the petitioner's checking account dated February 5, 2004; and approximately 21 copies of [redacted] statements in 2006, 2007 and 2008.

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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 director provided the following examples of personal assets: bank statements, checking account statements, or stock account statements.

On appeal, counsel submitted a legal brief; a statement from [redacted], certified residential specialist, dated January 14, 2009; a letter from [redacted] property information report for [redacted], with a descriptive page of "Improvement Data and Computations;" a deed to [redacted], dated August 21, 2002; a listing of the petitioner's monthly expenses, income and assets dated November 4, 2008; and an explanation of benefits to a long term care insurance policy between [redacted] and the petitioner, noted as the insured.

The evidence in the record of proceeding shows that the petitioner resides in a household. On the Form ETA 750B, signed by the beneficiary on March 24, 2009, the beneficiary did claim to have worked for the petitioner since December 2002.

Counsel states that the sole proprietor is not required to pay the proffered wage until the beneficiary adjusts to permanent residency. However, 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).

There are no W-2, 1099-MISC Statements, cash receipts, payroll, time sheets, or any documentary evidence in the record to substantiate the beneficiary's reputed employment or wages. There are no "memos" on the checks to indicate their purpose for tender, and the yearly totals range from $3,160.00 in 2003 to $23,750.00 in 2006. As noted above, there are approximately 21 copies of [redacted]" statements in 2006, 2007 and 2008 in the record. These may be receipts of wire transfer orders from the proprietor to a third party. These documents were not explained in the record. Assuming these are wage payments, the petitioner failed to demonstrate that he paid the beneficiary the proffered wage from the priority date.

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). 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.

The petitioner resides in a household. Unlike a corporation, a household does not exist as an entity apart from individuals in the household. *See generally Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the petitioner's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their individual (Form 1040) federal tax return each year. In addition, individual petitioners 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 proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

	2004	2005
Proprietor's adjusted gross income (Form 1040)	<$29,329.00>	<$37,884.00>
	2006	2007
Proprietor's adjusted gross income (Form 1040)	<$29,410.00>	<$56,114.00>

In 2004, 2005, 2005 and 2007, the sole proprietor's adjusted gross income losses fail to cover the proffered wage of $27,040.00.

Additionally, the petitioner stated that his yearly personal expenses are $16,095.96. The AAO notes that the petitioner's Forms 1040, Schedules A state the following total deductions: 2004-$58,077.00; 2005-$78,494.00; 2006-$36,819.00; and 2007-$40,681.00.[3] It appears that the petitioner has under-estimated his yearly personal expenses. Since the petitioner stated an adjusted gross income "deficit" in each year, either the addition of the yearly personal expenses of $16,095.96 submitted by the proprietor, or the totals found on Schedule A of each year, would further reduce the proprietor's ability to support himself and his spouse when combined with the yearly deficits.

[3] Itemized deductions stated on the Schedules A for the four years are, medical and dental; real estate taxes; home mortgage interest and points; and "other" expenses.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the proprietor has a long-term care insurance policy issued [redacted] that, according to counsel, pays the proprietor and his spouse $36,800.00 as compensation for the beneficiary's services.[4] According to an explanation of benefits provided by the insurance company dated December 15, 2008, as of that date "$28,084.00 remains of your $292,000.00 policy limit." Therefore, assuming the benefits continued to draw down from December 15, 2008 at the rate of $100.00 per day as shown on the explanation of benefits, they would be exhausted in approximately 281 days from that date. Therefore, based on the evidence submitted, the long-term care insurance policy is no longer a source of income.

According to counsel, both the proprietor and his spouse receive social security benefits of "$25,000.00+" not shown on the proprietor's income tax returns. Although counsel has not substantiated these payments by documentary evidence, assuming for the sake of argument that such benefits are received on an annual basis, "$25,000.00+" would not off-set the adjusted gross income deficits from 2004 through 2007 as stated on the tax returns.

Counsel also states in an exhibit dated November 4, 2005, that the proprietor and his spouse receive yearly rental income in the amount of $6,750.00. Counsel's assertion is not supported by the tax returns submitted which show on Forms 1040, Line 17, a rental income/loss of 2004-<$9,307.00>; 2005-<$20,257.00>; 2006-$0.00; and in 2007-$0.00.

According to counsel, the petitioner's own real estate that "could be either sold or immediately turned into liquid assets to pay the {proffered wage] by use of a reverse mortgage." As already stated, counsel submitted: a statement from [redacted], certified residential specialist, dated January 14, 2009; a letter from [redacted] and a copy of [redacted] property information report for 234 [redacted] with a descriptive page of "Improvement Data and Computations;" and a deed to [redacted], dated August 21, 2002. According to the record, [redacted] is the petitioner's residence. Regarding the petitioner'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).

Counsel contends that the petitioner through the use of a reverse mortgage transaction demonstrates the ability to pay the proffered wage. Counsel statement must be qualified. A reverse mortgage in its various forms is similar to a line of credit or bank lines.

[4] It is not clear if this is a yearly amount.

> [A reverse mortgage is a] mortgage in which the borrower receives periodic payments from the lender, based on the accumulated equity in the underlying property. A reverse mortgage provides retirement income to older borrowers whose mortgages are paid in full, or who have substantial equity. There are several types of reverse mortgages, although these are not widely available due to special problems in underwriting these loans and uncertainty about how the loans will be repaid. The ultimate source of repayment is the borrower's estate. Reverse mortgages may be structured as rising debt loans with periodic advances to the borrower, or disbursed in a lump sum payment. If the mortgage loan is structured as a life annuity, it commonly is referred to as a *reverse annuity mortgage* or RAM. In a RAM, the borrower purchases a single premium annuity and receives a monthly distribution; the mortgage lender takes title to the mortgaged property at the death of the mortgagor. A second type of reverse mortgage is the life estate transaction in which the home owner sells a house but is granted a life estate and receives immediate cash. A third variation is the Sale and Leaseback transaction.[5]

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment T*erms, 45 (1998). Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence to demonstrate that the line of credit will augment and not weaken his overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase liabilities and will not improve his overall financial position. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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,

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[redacted]

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, although noted the petitioner is noted as an individual residing in a household, he also is a proprietor and files Schedules C with his Forms 1040 tax returns. The business identified as an "import sales" business is operated from the proprietor's residence with gross receipts in 2004-$3,600.00; 2005-$3,300.00; 2006-$2,667.00; and 2007-$1,367.00. The business operated at a loss in all years: 2004-<$2,610.00>; 2005-<$5,391.00>; 2006-<$746.00>; and <$1,957.00>, and contributed to the petitioner's deficits. Only a limited analysis following the case of *Matter of Sonegawa* can be accomplished under the circumstances of this case. There is a paucity of information concerning the business, its financial prospects, or the occurrence of any uncharacteristic business expenditures or losses. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he 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.