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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 § 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 a private household. It seeks to employ the beneficiary permanently in the United States as a live-in childcare provider. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (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 June 4, 2009 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 other 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on January 3, 2005. The proffered wage as stated on the ETA Form 9089 is $8.46 per hour which equates to $17,596 per year. The ETA Form 9089 states that the position requires three months of 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 evidence in the record of proceeding shows that the petitioner is a private household which, for ability to pay purposes, is analyzed like a sole proprietorship. On the ETA Form 9089, signed by the beneficiary on March 28, 2007, the beneficiary did not claim to work for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 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 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*

[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).

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 private household which is analyzed like 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 5. The petitioner's tax returns reflect the following information for the following years:

	2005	2006
Petitioner's adjusted gross income (Form 1040, line37)	$24,000	$14,830
	2007	2008
Petitioner's adjusted gross income (Form 1040, line 37)	$136,916	$46,635

In 2005, the petitioner's adjusted gross income covers the proffered wage of $17,596 and leaves $6,404 as remaining funds. However, the record of proceeding contains no evidence of the petitioner's household expenses. It is more likely than not that the petitioner would be unable to support himself and a family of five on $6,404.

In 2006, the petitioner's adjusted gross income of fails to cover the proffered wage of $17,596. It is improbable that the petitioner could support himself and his household on a deficit that year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

In 2007, the petitioner's adjusted gross income covers the proffered wage of $17,596 and leaves $119,320 as remaining funds. It is more likely than not that the petitioner could pay the proffered wage in this year.

In 2008, the petitioner's adjusted gross income covers the proffered wage of $17,596 and leaves $29,039 as remaining funds. However, the record of proceeding contains no evidence of the petitioner's household expenses. It seems unlikely that the petitioner would be unable to support himself and a family of five on $29,039.

For 2005, 2007, and 2008, the petitioner's adjusted gross income is greater than the proffered wage. However, the record of proceeding contains no evidence about the petitioner's household expenses to determine if the petitioner would have sufficient funds out of his adjusted gross income (AGI) to pay the proffered wage after reducing the AGI by his personal expenses.

On appeal, counsel asserts that the petitioner has stock that was valued at $200,000 as of December 6, 2007 and was valued at $8,000 at the time of appeal, July, 2009, but that the petitioner could have liquidated at any time and used those funds to pay the proffered wage. No other evidence of personal assets was submitted into the record of proceeding.

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 petitioner has presented tax returns for four years. The petitioner's adjusted gross income fluctuated but was nominal for most years. No household expenses were submitted into the record of proceeding to ascertain if the petitioner could support his five dependents along

with paying the proffered wage. The petitioner claims that one of the companies he owns as a sole shareholder [redacted], loaned $100,000 to another company, [redacted] in 2005. When that loan matured, the petitioner claims he received 400,000 shares in [redacted]. According to evidence submitted into the record of proceeding, [redacted] stock was valued at $200,000 in 2007 but declined soon thereafter significantly to minimal value now.[2] The petitioner's ownership of 400,000 shares of stock did not take place until 2007, well after the priority date, and soon thereafter, the stock lost more than half of its value. The AAO finds this asset to not be persuasive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date because the petitioner did not retain any sustained value from the stock acquisition and it is more likely than not that the petitioner lost significant value in the transaction. Thus, the asset is of nominal value. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Additionally, the petitioner claims he started a new job in January 2007 earning him $1,000 per week and submits a letter and paystubs from [redacted] in support. Those wages were properly factored into his adjusted gross income in 2007 and 2008 as analyzed above and do not address the deficiencies of 2005 and 2006. *See Katibgak* at 49. The petitioner also submits bank account statements from the California Coast Credit Union reflecting balances of $15,260.71 in March 2009 and a "Share and Loan List" computer excerpt as of June 24, 2009 from [redacted] reflecting a total of $15,324.11 in savings and Roth individual retirement funds. No evidence was submitted to reflect that those funds were available at an earlier time. While those assets could be liquefied to pay the proffered wage in this case, they would only apply towards 2009 and not cover 2005, 2007 and 2008, the other years for which the petitioner must establish his ability to pay the proffered wage.[4] *Id.*

The petitioner must demonstrate an ability to pay in 2005, 2006, 2007, 2008 and onwards but the record of proceeding does not demonstrate that it is more likely than not that the petitioner can pay the proffered wage. 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.

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[2] The AAO additionally notes that according to the Nevada Secretary of State's publicly accessible online corporate status database, [redacted] status is revoked. *See* http://nvsos.gov/sosentitysearch/CorpDetails.aspx?lx8nvq=gcBE7TYZwk3A22WqsSulog...(accessed January 13, 2011).

[3] This excerpt only reflects [redacted] as the name on the statement which is insufficient evidence that the account is held by the petitioner or that he is permitted to use those funds.

[4] The AAO also notes that Withdrawals from Roth IRAs that are taken before the individual is 59 1/2 *and* before the account has been open for 5 calendar years may be taxed as ordinary income and may also be subject to the additional 10% early withdrawal penalty, with certain exceptions. *See* 26 U.S.C. § 72(t); 26 U.S.C. § 408A. If the petitioner were to liquidate his individual retirement fund, the value would be significantly less after liquidation based on withdrawal penalties and taxes.

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.