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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

PUBLIC COPY

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[redacted]

JAN 14 2011

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

IN RE: Petitioner: [redacted]
Beneficiary:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility which seeks to employ the beneficiary permanently in the United States as a caregiver as a substitute employee.[1]

As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by USDOL. The director noted the petitioner had filed two more Forms I-140 for additional employees. The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.

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.

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[1] Substitution of beneficiaries was permitted by the United States Department of Labor (USDOL) when this petition was filed on July 16, 2007. USDOL had published an interim final rule, which limited the validity of an approved Form ETA 750, Parts A & B, Application for Alien Employment Certification, to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the United States District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, USDOL processed substitution requests pursuant to a May 4, 1995 USDOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). USDOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). USDOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of this Form I-140 was on the same date as the rule, substitution will be allowed for the present petition. A Form I-140 for a substituted beneficiary retains the same priority date as the original Form ETA 750.

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 above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on September 10, 2002. It lists the proffered wage as $1,988.16 per month based on a 40 hour work week, which equates to $23,857.92 per year. The position requires three months of experience.

The petitioner is a sole proprietorship, was established in 2000 and employed two workers when the Form I-140 was filed. The owner's IRS Forms 1040, U.S. Individual Income Tax Return, reflects he and his spouse operate the business on a calendar year basis.

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

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. In her letter dated November 7, 2008, counsel states that as the beneficiary was not currently employed by the petitioner, no pay vouchers, IRS Forms W-2, Wage and Tax Statement or IRS Forms 1099-MISC, U.S. Miscellaneous Income Tax Statement, would be submitted.

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the requisite period from the priority date of September 10, 2002 and 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 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 IRS Forms 1040 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*, *supra*, 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 this case, the sole proprietor and his spouse have no dependants. IRS Forms 1040 reflecting their adjusted gross income are listed in the table below:

2002	2003	2004	2005	2006	2007
Line 35	Line 34	Line 36	Line 37	Line 37	Line 37
$54,571	$75,653	$43,479	$39,029	$114,132	$116,497

On October 12, 2008, the director requested, in part, that the petitioner submit a list of recurring household expenses for 2002 through 2005. The response shows the estimated household expenses

to be $44,820 in 2002, $44,880 in 2003, $48,360 in 2004 and $48,912 in 2005. Adjusted gross income less household expenses would leave a residual of $9,751 in 2002, $30,773 in 2003, -$4,881 in 2004 and -$9,883 in 2005. Therefore, in 2002, 2004 and 2005, the sole proprietor's adjusted gross income less household expenses does not cover the proffered wage of $23,857.92. It is noted the director also found the petitioner's residual lacking in 2003 because the company sought to hire an additional employee during that year through the visa petition process and did not show enough generated income to support both Form I-140 beneficiaries. It is determined the petitioner did not establish its ability to pay the proffered wage in 2002 through 2005.

Counsel states that depreciation should be added back into the petitioner's net income in considering the petitioner's ability to pay the proffered wage. However, as discussed above, this approach has already been rejected by both USCIS and the federal courts. *See, e.g., River Street Donuts, LLC*, 558 F.3d at 116. Counsel further states that the petitioner's submitted bank statements show the company's ability to pay. Counsel submits bank statements for various accounts for [redacted] from 2001 through 2008 showing widely fluctuating monthly balances ranging from $56,127.93 for three accounts on February 22, 2001 to -$411.28 for one account on July 11, 2006. Counsel's reliance on the balances in the petitioner's bank account is misplaced. 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 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. The record provides no information to verify that, from the priority date onwards, the petitioner's account(s) maintained an average monthly balance sufficient to cover the instant wage or any portion of that wage remaining after the petitioner paid the beneficiary; to cover the wages of the proprietor's other workers, if any, and to cover the personal, household expenses of the proprietor during the relevant period of analysis. The assets described in the account statements account for only snapshots in time and need to be balanced against liabilities and other pressing expenses to be of any use in ascertaining the assets' availability to pay the proffered wage. Counsel argues that [redacted] is a registered nurse and is still actively working in a hospital and that her income can help financially with the household expense and the business expense if deemed necessary. This argument is without merit because Mrs. [redacted] salaries were included in the joint tax statements the petitioner provided for the record and were considered by both the director and the AAO.

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, supra.* The petitioning entity in *Sonegawa* had been in business for over 11 years. 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 case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets. Counsel explains that the company has been existent for a long time which parallels the 11 years of operation in *Sonegawa*. However, the petitioner has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses, its reputation within the industry, or whether the beneficiary is replacing a former employee or an outsourced service. It is also noted that the petitioner has filed multiple petitions for additional beneficiaries that were pending during the requisite period. The company's request that this petition be approved is weakened because petitioners must produce evidence that its job offers to each beneficiary are realistic and that it has the ability to pay the proffered wages to all of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall, supra*, (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). 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 beginning on the priority date.

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.