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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

[redacted]

B6

Date: JUL 26 2011 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL). The director determined that the petition was not submitted with required initial evidence to establish the qualifications for the benefit sought. The director denied the petition accordingly.

On November 16, 2010, the AAO dismissed the subsequent appeal denying the petition because the petitioner failed to establish on appeal that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The AAO noted that while the record contains the sole proprietor's individual income tax return for 2007, counsel did not submit the sole proprietor's individual income tax returns for 2008, the year of the priority date, onwards, and that no statement of monthly personal recurring expenses was submitted for 2008 onwards to establish the ability to pay the proffered wage.

The record shows that the motion is properly filed and timely and provides new evidence, such as the beneficiary's W-2 form for 2009, the sole proprietor's personal portfolio statements for 2008 through 2010, and the sole proprietor's retirement plan statements for 2008 through 2010, to establish the petitioner's ability to pay the proffered wage. The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The instant motion is granted and the AAO will consider it as a motion to reopen. 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 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 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 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 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 25, 2008. The proffered wage as stated on the ETA Form 9089 is $7.66 per hour ($15,932.80 per year). The ETA Form 9089 states that the position does not require any experience.

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 2002 and to currently employ two workers. On the ETA Form 9089, signed by the beneficiary on March 1, 2008, the beneficiary did not claim to have worked 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 did not submit any documentary evidence showing that it employed and paid the beneficiary during the relevant years. On motion, counsel submits the beneficiary's W-2 form for 2009 showing that the petitioner paid the beneficiary $8,280 in 2009. It is noted that the beneficiary's W-2 form identifies the beneficiary by Social Security Number [redacted] SSNs that begin with [redacted] are not valid SSNs and the Social Security Administration claims that no numbers above [redacted] have ever been issued.[1] In

[redacted]

light of this potentially invalid SSN and significant inconsistency, it is unclear whether the petitioner actually paid the instant beneficiary in 2009.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent, objective evidence to resolve the inconsistency regarding the beneficiary's identity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* The AAO cannot accept the W-2 form as evidence to establish that the petitioner paid the beneficiary a partial proffered wage in 2009. Therefore, the petitioner failed to demonstrate that it employed and paid the beneficiary during any period of the relevant years. The petitioner must demonstrate that it had sufficient adjusted gross income or other liquefiable assets and personal liabilities to pay the instant beneficiary the full proffered wage of $15,932.80 per year for 2008 through the present as well as to cover her family's living expenses for these years.

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 (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. *See 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 petitioner 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.

On appeal, counsel submits the sole proprietor's individual income tax return for 2007 as evidence to establish the petitioner's ability to pay the proffered wage and also cover her family's living expenses since the priority date. However, the sole proprietor's 2007 tax return is not necessarily dispostive because the priority date in this matter falls on January 25, 2008. On motion, counsel asserts on the Form I-290B that she is submitting the 2008 and 2009 tax returns. However, counsel did not provide the sole proprietor's individual income tax returns for 2008 and 2009. Without the tax returns, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income in 2008 and the subsequent years to pay the instant beneficiary the full proffered wage. Therefore, the petitioner failed to establish the ability to pay the proffered wage for the year of the priority date and subsequent years because the petitioner did not submit regulatory-prescribed evidence for these years.

In addition, the sole proprietor's 2007 tax return in the record shows that the sole proprietor supports a family of four. However, the petitioner did not submit any statements of the sole proprietor family's living expenses for 2008 and subsequent years. Without such statements, the AAO cannot determine whether the sole proprietor had sufficient income or funds to pay the proffered wage as well as to cover her family's living expenses for each year from the priority date to the present. Therefore, the petitioner failed to establish the continuing ability to pay the proffered wage and the family's living expenses for 2008 through the present because it failed to submit a statement of the sole proprietor's family's living expenses for the relevant years.

The AAO notes that the sole proprietor's family reported itemized deductions of $52,296 on their 2007 tax return. While actual living expenses are usually more than the allowed itemized deductions, the itemized deductions reflect the family's minimum expenses for the year. Assuming the sole proprietor's family expends the same amounts in 2008 as they did in 2007, the sole proprietor must show at least $68,228.80 per year in order to pay the beneficiary the proffered wage as well as to cover the family's living expenses.

The petitioner also failed to demonstrate the ability to pay the proffered wage for the additional Forms I-140 filed on behalf of additional beneficiaries. As noted in the AAO's November 16, 2010 decision, the petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

USCIS considers the sole proprietor's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. On motion, counsel submitted statements of the sole proprietor's personal portfolio for her investment account. These statements show that the sole proprietor had a balance of $47,457.48 at the end of 2008, $74,823.19 at the end of 2009 and $44,814.30 on October 29,

2010. Where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The sole proprietor did not have sufficient liquefiable assets in her personal portfolio to pay the beneficiary the proffered wage as well as to cover her family's living expenses in 2008 and 2010. While the balance of $74,823.19 at the end of 2009 appears to be sufficient to pay both that year, if the sole proprietor had used some balance at the end of 2008 to pay the proffered wage, the sole proprietor's personal portfolio would have had only the balance of $58,890.39 which would not be sufficient to cover both the proffered wage and living expenses for 2009. Therefore, the petitioner failed to demonstrate that the sole proprietor had sufficient funds to pay the beneficiary the proffered wage for 2008 through 2010.

On motion, counsel also submits the sole proprietor's 401K retirement plan statements for 2008 through 2010. However, the sole proprietor did not document that she would be willing to take withdrawals from the 401K retirement account to pay the proffered wage as well as to cover her family's living expenses. She did not provide information about her age, her retirement plan or any limitation on early withdrawals from a 401K retirement account, such as penalty fees. Without the documentation, the AAO cannot consider the balance in the sole proprietor's retirement account as the petitioner's extra liquefiable assets in determining the petitioner's ability to pay the proffered wage in this matter and cannot determine whether the sole proprietor had sufficient liquefiable funds in her retirement account available to forego to pay the beneficiary the proffered wage as well as to support her family of four.

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 (Reg. Comm. 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 did not submit the sole proprietor's tax returns for any relevant years, and failed to provide statements of the sole proprietor's household living expenses. The record does not contain any evidence to support that the petitioner had sufficient other liquefiable assets to pay the proffered wage and to cover the family's living expenses. Counsel failed to submit the petitioner's federal income tax returns for the year of the priority date and subsequent years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all these years were uncharacteristically unprofitable years for the petitioner. 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.

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 motion to reopen is granted and the decision of the AAO dated November 16, 2010 is affirmed. The petition is denied.