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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

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 04 20[illegible]

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 McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an individual doing business as a residential care facility for the elderly. The business seeks to employ the beneficiary permanently in the United States as a caregiver. 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 15, 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 March 2, 2005. The proffered wage as stated on the Form ETA 750 is $10.57 per hour which equates to $21,985.60 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 February 15, 2005, 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 time and a half 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*, 696 F. Supp. 2d. at 881 (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 December 1, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). The sole proprietor submitted copies of her individual income tax returns for the years 2006 and 2007[3], her personal financial profile statement, her 2007 Form W-2, quarterly statements from [redacted]s and [redacted] for the period July 1 through September 30, 2008, her stock portfolio report showing the ending cash balances for the years 2005 through 2007, statements from the petitioner dated October 17, 2008 regarding her credit lines with [redacted] a list and values of her 23 real estate holdings, deeds for various properties owned and a list of her household expenses. As of the close date, the petitioner's 2007 federal income tax return was the most recent return available. In the instant case, the sole proprietor's Form 1040, U.S. Individual

[3] The petitioner had previously submitted tax returns for the years 2002 through 2005. The 2002-2004 tax returns are for the time period before the priority date and would not establish the petitioner's ability to pay from the March 2, 2005 priority date onward. The petitioner's 2002 through 2004 returns will be considered generally.

Income Tax Returns show that she filed head of household for each year from 2004-2007; in 2002 and 2003 she filed married filing jointly. The sole proprietor and her spouse claimed two dependents in 2002 and 2003 and she claimed one dependent in 2004, 2005, 2006 and 2007. The proprietor's tax returns for the relevant time period reflect the following information:

- In 2005, the proprietor's Form 1040 stated adjusted gross income on line 37 of -$91,996.
- In 2006, the proprietor's Form 1040 stated adjusted gross income on line 37 of -$16,271.
- In 2007, the proprietor's Form 1040 stated adjusted gross income on line 37 of -$184,622.

The proprietor listed her personal household expenses as $800 per month and a credit card payment of $1,600 per month totaling $2,400 monthly or $28,800 annually. She does not itemize the list, nor is it signed or dated. Accepting the list at face value, the proprietor has not shown sufficient income to pay the beneficiary's proffered wage of $21,985.60 per year on the monies that remain after reducing the adjusted gross income by the amount required for the annual household expenses and credit card payment.

The proprietor's ownership of personal assets will be taken into account when considering her ability to pay the beneficiary the proffered wage. The sole proprietor submitted a personal financial profile statement initialed and dated October 12, 2008 showing that she has real estate holdings, cash and stocks equaling an estimated amount of $9.4 million. The proprietor claims that her personal credit lines with Bank of America for $50,000 and Wells Fargo for $20,000 are still active. 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 the petitioner's credit limits, bank lines, or lines of credit. A bank line or a 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 Terms*, 45 (1998). Also, 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 these lines 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). Further, the sole proprietor's statements are self-serving as they were written by the sole proprietor and are not substantiated by evidence.

The proprietor has submitted evidence of owning 23 real estate properties. Counsel states that the equity in the real estate assets would be readily available to the petitioner as cash through an equity line of credit. The line of credit cannot be treated as cash or as a cash asset. However, if the proprietor wishes to rely on a line of credit as evidence of ability to pay, the proprietor must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, 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).

Counsel also states that the proprietor earns $15,000 per month from her rental properties that can be used to pay the proffered wage. However, these funds should be reflected in the individual tax returns and therefore, have already been taken into consideration. Counsel states that since the major portion of the petitioner's business is renting out real estate properties, a major portion of the petitioner's business expense is taken as depreciation expense. Counsel claims that depreciation is just an accounting entry that is entered to take advantage of an expense allowed by the Internal Revenue Service (IRS) and in reality is actual cash that is not spent by the petitioner but is available as a positive cash flow for the petitioner. This argument has been considered and rejected by the courts. Even though amounts deducted for depreciation and amortization do not represent the current use of cash, neither do they represent amounts available to pay wages. *See River Street Donuts* at 118. The AAO declines to add depreciation back into the petitioner's income. As noted above, depreciation reflects an actual cost of doing business

The proprietor submits reports as of December 31, 2005, December 31, 2006, and November 20, 2007 that refer to the market value of her stocks, money market accounts and rollover IRA. She states that the ending market values combined as of December 31, 2005, December 31, 2006 and November 20, 2007 are $197,399; $173,612; and $184,131, respectively. However, the report states that the information is based on sources believed to be accurate and not considered to be an official statement of the proprietor's account through AIG. It is noted that the sole proprietor did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets.

The petitioner has not submitted a copy of the year-end statements for her stocks and money market accounts for 2005, 2006, and 2007. Although she states that she has access to cash available to pay the beneficiary continuously the proffered wage, she does not submit corroborating evidence to establish her ability to pay since the priority date. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The proprietor provided a copy of her quarterly statement (July 1-September 30, 2008) from American Funds and MFS Investment Management (July 1- January 1, 2008) that reflect the value of her mutual fund portfolios as $92,714.49 and $9,984.20, respectively. The record does not contain a written consent from the proprietor's spouse to use the jointly owned mutual fund (MFS Investment Management) to pay the beneficiary's proffered wage.

Counsel states that cashing in the IRA account is an available option to the petitioner and should not excluded by the director because he feels it is not a desirable option. However, the record does not contain a written statement from the sole proprietor indicating her willingness to cash in her retirement portfolio, and suffer the penalties for early withdrawal, to pay the beneficiary's wage.

The copy of the sole proprietor's 2007 Form W-2 contained in the record reflects an annual salary in that year of $50,000 from the [redacted]. Counsel claims that since the petitioner is a sole proprietor, she has unlimited drawings available from her business assets. However, there is no letter contained in the record stating the proprietor is willing and able to forego some of her salary to pay the proffered wage from 2005 forward.

The sole proprietor also claims that her automobiles (BMW 2004, Cadillac Deville 1997, Ford 2003 F150 truck, and a Dodge Pickup 2001) are worth $120,000. The sole proprietor has not provided evidence of the blue book value of the automobiles to substantiate the claimed value. Further, these assets are not readily liquefiable, and the proprietor has not provided evidence that the cars could be readily utilized to pay the proffered wage.

The sole proprietor's assertions on appeal cannot be concluded to outweigh the evidence presented by the proprietor that demonstrates that the proprietor 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 sole proprietor has not provided sufficient financial evidence to establish her ability to pay the proffered wage from 2005 and onwards. The proprietor has not provided its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. Nor has the proprietor shown that unusual or extraordinary circumstances prevented it from paying the proffered wage in the relevant years. Thus, in assessing the totality of the evidence submitted, the sole proprietor has not established that she had the continuing ability to pay the proffered wage from 2005 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.