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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]

DATE: AUG 16 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Mexican bakery. It seeks to employ the beneficiary permanently in the United States as a "Baker, Mexican Style." 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 established that it 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 October 22, 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary 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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on September 27, 2004. The proffered wage as stated on the Form ETA 750 is $11.95 per hour ($24,856 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered.

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. On the petition, the petitioner claimed to have been established in 1992 and to currently employ 8 workers. On the Form ETA 750B, signed by the beneficiary on April 1, 2001, 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 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'l Comm'r 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'l Comm'r 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 in 2004 onwards.[2]

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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 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).

[2] The record of proceedings contains pay statements issued by the petitioner to the beneficiary for the period June 27, 2009, to July 26, 2009. While it appears that the petitioner was employing the beneficiary during at least this period of time, the record does not include documentation of the wages paid per year for any of the relevant years from 2004 onward. It is noted that the director requested the beneficiary's W-2 statements and pay stubs in a request for evidence dated July 23, 2009, however, no such documentation was provided in response. Therefore, the petitioner has not demonstrated that it paid the beneficiary the full proffered wage from the priority date onward.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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'r 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.

In the instant case, the petitioner initially provided Schedule C, Profit or Loss from Business, from the sole proprietor's individual tax return for the years 2001 to 2006. The petitioner did not provide the individual tax return, Form 1040, for those years. The petitioner also did not provide a statement of personal expenses. On July 23, 2009, the director issued a request for evidence for the petitioner's complete individual tax returns for the years 2004 to 2008, or audited financial statements, as well as the beneficiary's W-2 statements, pay stubs, the sole proprietor's monthly recurring household expenses, and documentation of the beneficiary's work experience. The petitioner responded on August 21, 2009, providing pay statements as discussed above, an experience letter, and the sole proprietor's individual tax returns for the requested years.

The sole proprietor's tax returns reflect adjusted gross income (AGI) for the following years:

- In 2004, the petitioner's AGI[3] was $46,635.
- In 2005, the petitioner's AGI[4] was $40,340.
- In 2006, the petitioner's AGI was $39,779.
- In 2007, the petitioner's AGI was $39,320.
- In 2008, the petitioner's AGI was $42,838.

While the sole proprietor's AGI is in excess of the proffered wage of $24,856 in each of the relevant years, the petitioner has not demonstrated that it can pay the proffered wage and support the sole proprietor and his family. As discussed above, the AAO must be able to determine whether the sole proprietor can pay the proffered wage out of his AGI or other available funds, and also show that he can sustain himself and his dependents. *See Ubeda*, 539 F. Supp. 647. In the instant case, the sole proprietor supports a family of three (3). The petitioner was put on notice of the specific evidence required for the adjudication of the petition by the director's request for evidence, and again in the denial notice. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).[5] As indicated above, the petitioner did not submit any evidence of his monthly recurring expenses with the initial petition filed or in response to the director's request for that evidence, or on appeal.[6] On appeal, counsel submitted only Form I-290B, Notice of Appeal or Motion, received on November 23, 2009, and indicated that a "brief and/or additional evidence will be submitted to the AAO within 30 days." He did not submit a brief or any evidence at that time. The AAO has received no further information from counsel or the petitioner to date, more than two years and eight months later.

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[3] AGI is found on Form 1040, line 36, for tax year 2004.

[4] AGI is found on Form 1040, line 37, for tax years 2005 to 2008.

[5] The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

[6] The AAO notes that the sole proprietor has claimed high mortgage interest rate deductions on his Forms 1040 in a number of years and an attached worksheet has significant interest paid on mortgages (over $45,000 in 2006). Therefore, it would appear that the sole proprietor pays a substantial amount annually in mortgage expenses, which alone would exceed any remainder of the sole proprietor's AGI and fail to establish that the petitioner had sufficient funds to pay both the proffered wage and the sole proprietor's personal expenses.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a statement of the sole proprietor's monthly recurring expenses or evidence of those expenses. The monthly expenses would have demonstrated the amount of the sole proprietor's AGI available to cover the proffered wage after consideration of expenses, further revealing its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. Sole proprietors must show that they can cover their existing business expenses, pay the proffered wage out of their adjusted gross income or other available funds, and sustain themselves and their dependents. *See Ubeda*, 539 F. Supp. 647. The evidence in the record does not establish that the sole proprietor is able to do this.

On appeal, counsel asserts that the "information provided was sufficient to make the determination" and claims that the required information constitutes "an invasion of privacy." Counsel provides no legal support for his contentions, nor an explanation of the sufficiency of the financial information provided for the sole proprietor. As discussed above, the information in the record is insufficient to document the petitioner's ability to pay the proffered wage to the beneficiary from the priority date onward as well as the sole proprietor's personal expenses. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has provided no additional evidence on appeal, and counsel's assertions alone are insufficient to overcome the director's denial. In the case of a sole proprietor, the sole proprietor must establish its ability to pay the beneficiary's proffered wage as well as the sole proprietor's personal expenses. *See Ubeda*, 539 F. Supp. 647. Therefore, the petitioner has not carried its burden to prove its ability to pay the proffered wage to the beneficiary from the priority date forward.

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'l Comm'r 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's AGI is not substantial, and declines from 2004 to 2007. The petitioner's gross sales fluctuate from year to year, as does the amount the petitioner reports as the wages paid less employment credits. No evidence of the petitioner's reputation has been provided. The information provided by the petitioner does not reflect significant or historically increasing sales. The petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. The petitioner failed to submit the required evidence requested by the director in order to determine the petitioner's ability to pay the proffered wage. The petitioner failed to submit this evidence on appeal. Without such information, the AAO cannot conclude whether the petitioner can establish its continuing ability to pay the proffered wage from the priority date onward as well as the sole proprietor's personal expenses as required based on the petitioner's status as a sole proprietor, and therefore is precluded from making a favorable determination based on the totality of the circumstances. 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 appeal is dismissed.