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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: MAY 18 2012 Office: NEBRASKA SERVICE CENTER FILE: [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 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 with the field office or service center that originally decided your case by filing a 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 initially denied by the Director, Nebraska Service Center and came before the Administration Appeals Office (AAO) on appeal. This decision was affirmed and the appeal was dismissed by the AAO on January 3, 2011. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decision of the AAO, dated January 3, 2011, will be affirmed, and the petition will be denied.

The petitioner is an adult residential facility. It seeks to employ the beneficiary permanently in the United States as a care provider. 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). As set forth in the director's decision issued on April 17, 2009, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward. The director denied the petition accordingly. The AAO affirmed the director's decision on January 3, 2011, and noted that the petitioner had not established its ability to pay the proffered wage as of the priority date.

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.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3)

The motion will be considered as a motion to reconsider under the regulation at 8 C.F.R. § 103.5(a)(3) as counsel has asserted that the AAO decision was an incorrect application of law or USCIS policy.

The AAO reviewed the record of proceeding under its *de novo* review authority. The AAO's *de novo* authority has been long recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 8, 2002. The proffered wage as stated on the Form ETA 750 is $7.63 per hour or $15,870.40 annually.

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 1993, to have a gross annual income of [redacted], and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 8, 2002, the beneficiary claimed to have begun working for the petitioner in February 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 a priority date for any immigrant petition later based on the Form 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, 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 onward.[1]

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.

[1] The W-2 forms submitted will be discussed below.

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. *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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately [redacted] where the beneficiary's proposed salary was [redacted] (or approximately thirty percent of the petitioner's gross income).

Similarly, in the instant case, it is much less likely that the sole proprietor could support herself, her spouse and three dependents on a much lower average gross income than in *Ubeda*, especially where the proffered wage of [redacted] is a much higher percentage of the petitioner's gross income than in that case. The petitioner's tax returns list Adjusted Gross Income (AGI) for 2002 through 2007 as follows:

- 2002 - [redacted]
- 2003 -
- 2004 -
- 2005 -
- 2006 -
- 2007 -

The sole proprietor submitted W-2 Form showing wages paid to the beneficiary as follows:

- 2002 - [redacted]
- 2003 -
- 2004 -
- 2005 -
- 2006 -

- 2007 - [redacted]

Here, the AAO must note that the petitioner lists its name and address on Form ETA 750 as [redacted] The petitioner states its name and address on Form I-140 as [redacted] Form I-140 states a Federal Employer Identification Number [redacted] While the W-2 forms and tax returns list a [redacted] and the same address, the name of the entity on these forms is listed differently as [redacted] The bank statements in the record list three separate entities with the same address: [redacted]. Nothing in the record shows that all of these entities operate under the same FEIN or that the wages from [redacted] are properly attributable to the petitioner. This issue must be resolved in any further filings.

Upon resolution of the FEIN and name issue above, for 2002 through 2007 the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2002 - [redacted]
- 2003 - [redacted]
- 2004 - [redacted]
- 2005 - [redacted]
- 2006 - [redacted]
- 2007 - [redacted]

The AGI listed above may be used to demonstrate the ability to pay the difference between the proffered wage and wages paid to the beneficiary, as follows:

Year	Difference between the proffered wage and the wages paid to the beneficiary (the amount of the deficiency in the wages paid to the beneficiary)	AGI	Estimated Annual Household Expenses	Year(s) in which the AGI exceeded the amount of the deficiency in the wages paid to the beneficiary and the annual household expenses
2002	[redacted]			
2003				
2004				
2005				
2006				
2007				

Although the sole proprietor's adjusted gross income exceeded amount of the deficiency in the wages paid to the beneficiary for 2002, 2006, and 2007, this does not account for the recurring

estimated monthly household expenses, as listed in the record, totaling [redacted] year). Thus, it is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by [redacted] the yearly total of monthly household expenses.[2] From the evidence submitted, the record establishes that the sole proprietor could not pay the difference between the proffered wage and the wages paid to the beneficiary.

On motion, counsel cites the court's decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), for the proposition that depreciation costs may be added back to the petitioner's income to demonstrate its ability to pay the proffered wage.[3] Counsel includes a copy of this decision and copies of previously submitted tax returns in support of this claim.

The AAO does not find the court's decision in *Construction and Design* to be particularly supportive or persuasive of the petitioner's position in this case. The instant petition does not arise out of the

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[2] Additionally, the petitioner's tax returns for 2006 and 2007 list mortgage interest in the amounts of [redacted] respectively. This significantly calls into question the sole proprietor's estimated monthly expenses. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* This issue must be addressed in any further filings in order for the AAO to accept the sole proprietor's estimated expenses.

[3] Counsel states that "*Construction and Design Co.* echoed the holding of [redacted] where it was recognized that depreciation costs did not affect cash flow and may be added back to the income or loss to show ability to pay by the petitioner." However, it should be noted that in [redacted] declined to add depreciation back to income and stated the following:

> Although it is true that non-cash expenses, such as depreciation, do not affect the cash flow of an entity, the reallocation of non-cash expenses to cash or other accounts triggers the adjustment of additional accounts in Employer's accounting books. Therefore, if we were to reallocate all the non-cash expenses, it would cause us to perform accounting gymnastics and an in depth analysis of the Employer's accounting records which fall outside the scope of review of this Panel.

2002-INA-105 at 3 (2003 BALCA). Despite this fact, counsel has not stated how a decision by the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) decision is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, on January 8, 2004 BALCA vacated and remanded the January 10, 2003 decision in *Ranchito Coletero* through *en banc* review. *See Ranchito Coletero*, 2002-INA-105 (2004 BALCA).

Seventh Circuit and therefore *Construction and Design* is not binding on this matter, and that case dealt with an employer which was organized as an S Corporation, which is not the case here where the petitioner is a sole proprietor. Further, the court's holding in that case affirmed the district court's decision in denying the work visa sought by the petitioner. *Id.* at 598.

Furthermore, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), has upheld the AAO's view of depreciation. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, at 118.

Therefore, counsel's arguments on motion that depreciation should be added back to income determining the petitioner's ability to pay the proffered wage are unpersuasive.

The record of proceeding contains monthly business checking and business savings account statements from [redacted] in the petitioner's name and from Washington Mutual in the name of the sole proprietor and the petitioner. As stated above, the record also contains bank records in the names of [redacted]. Yet, there is no evidence in the record that each entity operates under the same FEIN. Even if these entities are determined to operate under the same FEIN under these separate names, the funds listed in these bank statements are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI, which is insufficient to establish the petitioner's ability to pay the proffered wage. Therefore, the AAO will not consider these amounts separately in determining the petitioner's continuing ability to pay the proffered wage from the priority date onward.[4]

[4] It should also be noted that the account statements provided only account information for one or

In support of the motion, counsel cites the Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004). In keeping with this memorandum, the AAO will consider the petitioner's wages paid to the beneficiary as well as the petitioner's net income and net current assets in determining the petitioner's continuing ability to pay the proffered wage.

This memorandum states that USCIS "adjudicators should make a positive ability to pay determination in any one of the following circumstances:"

> (1) Net income
>
> The initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage.
>
> (2) Net current assets
>
> The initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage.
>
> (3) Employment of the beneficiary
>
> The record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage.

First, as stated above, the petitioner's AGI for 2002 through 2007 in relation to the annual household expenses is insufficient to pay the difference between the proffered wage and the wages paid to the beneficiary.

Second, the record contains a statement entitled "Current Assets and Liabilities" from the sole proprietor, but this is an unaudited statement that the AAO will not consider.[5] The record lacks further documentation to determine the net current assets of the sole proprietor.

Third, as stated above, the record demonstrates that the petitioner has not paid the beneficiary wages of an amount equal to or exceeding the proffered wage at any time from the priority date onward.

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two months in each year from 2002 through 2007 and would therefore be insufficient to establish a continuing ability to pay the proffered wage from 2002 onward.

[5] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business [here, the sole proprietor] are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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 this matter, no specific detail or documentation has been provided similar to *Sonegawa.* The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are persuasive in this matter. In two years for tax returns submitted, the sole proprietor's taxes reflected negative AGI. In three other years, the sole proprietor's AGI was only around $2,000 or less. The sole proprietor's later tax returns suggest that the sole proprietor has grossly underestimated its personal expenses based on the amount of mortgage interest claimed. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.*

The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Based on a review of the underlying record and argument submitted on motion, the petitioner has not established his continuing financial ability to pay the proffered wage from the priority date onward.[6]

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 motion to reopen is granted and the decision of the AAO dated January 3, 2011 is affirmed. The petition is denied.

[6] The AAO notes that it is unclear as to whether the beneficiary met the "direct care training" requirements as listed in Item 15 of Form ETA 750 by the priority date. The training certificate in the record lists a certification date of October 2, 2003, which is after the priority date. The petitioner must address this issue in any further filings.