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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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**APR 22 2010**

FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

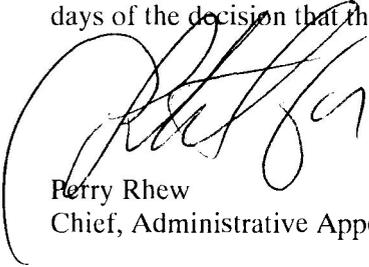
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant 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 states on the petition that it is a painting and decorating company. However, during these proceedings, counsel has stated that the husband and wife, the owners of the petitioner listed on the Form I-140, Immigrant Petition for Alien Worker, and not the painting and decorating company, are petitioning for the beneficiary. The Form ETA 750, Application for Alien Employment Certification, which accompanies the petition lists the owners of the painting and decorating company as the employers in this matter.<sup>1</sup>

The petitioner seeks to employ the beneficiary permanently in the United States as a construction carpenter (carpenter). 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. Therefore, the director denied the petition.

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 December 18, 2007 denial, at issue in this case is whether 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

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<sup>1</sup> Counsel also submitted the personal tax returns of this husband and wife in an attempt to establish an ability to pay the wage. The petitioner stated through counsel that this husband and wife are sponsoring the instant beneficiary in much the same manner as a family sponsors a nanny for its household. According to counsel, this husband and wife seek to employ and pay the beneficiary themselves, and have him work as a carpenter at their various properties, as needed. Thus, the AAO will analyze this case as a private household/sole proprietor case.

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 show 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 petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$43,680 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position. The Form I-140 was filed by [REDACTED] Federal Employer Identification Number: [REDACTED]. The Form ETA 750, however, lists that the husband and wife who own [REDACTED] as the employer in this matter. Counsel indicated that the director erred in addressing the decision to the company listed on the petition. This is not correct. The record contains a Form I-140 for the company, an entity not listed on the labor certification. The decision on the petition must be addressed to the petitioner listed on the Form I-140. Moreover, the AAO finds that the petition may not be approved as it is not supported by the proper labor certification.<sup>2</sup> The certified job offer is to work for the husband and wife at [REDACTED].

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence in the record, including new evidence properly submitted on appeal.

The record shows that the applicant listed on the Form ETA 750 is structured as a private household/sole proprietorship. The petitioning business submitted only documentation related to this separate entity, the private household.

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<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The AAO notes, however, that United States Citizenship and Immigration Services (USCIS) records indicate that the painting and decorating company which is listed as the petitioner on the Form I-140 has also petitioned for two additional beneficiaries whose petitions were approved. One of these two beneficiaries had a priority date of July 30, 2002 and adjusted to lawful permanent resident status on April 9, 2009 based on the approved Form I-140 petition. The petition for the second, additional beneficiary has a July 30, 2002 priority date. USCIS approved this petition on June 24, 2008. This beneficiary has not yet adjusted to lawful permanent resident status.

It is not clear from the records currently before the AAO whether the painting and decorating company petitioned for these two additional beneficiaries or whether the owners of that company asked USCIS to consider them as the petitioners in the matter, after filing the two petitions as a painting and decorating company. Counsel has indicated that the company was the petitioner in those two other matters. However, counsel did not submit any documentary evidence to support this assertion. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *See 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any further filings, the petitioner must document for the record who is the petitioner in those two additional cases. The AAO will analyze this matter taking into consideration that the owner's private household may have the added expense of two additional sponsored workers' wages from 2002 through the end of the period addressed in this decision.

The petitioner did not state for the record the number of workers that it currently employs. On the Form ETA 750B, signed by the beneficiary on July 22, 2002, the beneficiary claimed to have worked for the individual owners since 1998. The individual owners did not, however, submit any Forms W-2, Wage and Tax Statement, or other documentation to establish having paid the beneficiary during the relevant period.

At the outset, the AAO would underscore that on August 28, 2007, the director issued a request for evidence (RFE) that instructed the petitioner to submit additional evidence of its ability to pay the proffered wage from the April 25, 2001 priority date onwards. First, the director indicated that the 2002 Form 1040, U.S. Individual Income Tax Return, in the record suggested that the petitioner was representing itself as a sole proprietorship. Thus, the director specifically requested that the petitioner also submit: its individual tax returns for 2001, 2003, 2004 and 2005; and a list of the sole proprietor's recurring monthly expenses, "including but not limited to: 1. Mortgage or rent payments; 2. Automobile payments; 3. Installment loans; 4. Credit card payments; 5. Household expenses." The director also requested other information regarding the sole proprietor's financial position such as, checking and savings account statements and any other personal assets.

In reply to the RFE, the requested information such as the owner's 2003 individual tax return and a list of the recurring monthly expenses of the owner's private household was not submitted.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not submit

copies of the owner's 2003 tax return and a list of the owner's monthly recurring household expenses.<sup>3</sup> This tax return would have demonstrated the amount of taxable income the owner's reported to the U.S. Internal Revenue Service, and provided required information regarding the sponsoring employer's ability to pay the proffered wage in that year. The list of monthly recurring household expenses would have demonstrated what amount the owner must allocate to living expenses. Without it, USCIS has no information regarding what amount to subtract from the sponsoring employer's income to cover living expenses, before analyzing the employer's ability to pay the wage with that income. The petitioner's failure to submit a copy of the 2003 tax return and the individual owner's list of recurring monthly expenses cannot be excused. 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).<sup>4</sup> The appeal will be dismissed on this basis.

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, 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 Sonogawa*, 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 provided any documentation of having paid the beneficiary at any time during the relevant period from the priority date 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

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<sup>3</sup> Here, as noted above, the individual owner's tax returns are required because the individuals are the sponsoring entity on the labor certification.

<sup>4</sup> The petitioner also failed to provide the 2003 tax return or information regarding its recurring monthly household expenses on appeal. This office would note that when, as in the present matter, 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 such 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).

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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 ETA 750 applicant is a private household/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). Thus, 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. Where there are business-related income and expenses, they are reported on Schedule C, Profit or Loss from Business, and are carried forward to the first page of the tax return.<sup>5</sup> 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 (7<sup>th</sup> 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.

In this case, the sole proprietor supported a family of five from the priority date year of 2001 through 2004, and has supported a family of four since that date. The record before the director closed on October 9, 2007 when the petitioner submitted a reply to the RFE. The 2007 tax return was not yet due at that time. Therefore, the 2006 tax return is the most recent return available. The proprietor's tax returns reflect the following information for the following years:

Proprietor's 2001 adjusted gross income (Form 1040, line 33)	\$190,160
Proprietor's 2002 adjusted gross income (Form 1040, line 35)	\$214,313
Proprietor's 2003 adjusted gross income (Form 1040, line 34)	Tax return not submitted
Proprietor's 2004 adjusted gross income (Form 1040, line 36)	\$105,469
Proprietor's 2005 adjusted gross income (Form 1040, line 37)	\$107,146

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<sup>5</sup> Here, the private household/sole proprietor has individual income tax returns which do not include a Schedule C that lists a separate business apart from the private household. Rather, as noted previously, in this case, a husband and wife seek to employ and pay the beneficiary themselves, and have him work as a carpenter at their various properties, as needed. As noted above, the labor certification only contemplates work at [REDACTED]. The labor certification as certified by DOL does not state that the beneficiary will work at other locations.

Proprietor's 2006 adjusted gross income (Form 1040, line 37)      \$183,297

The record is not clear regarding whether the private household/proprietor had the ability to pay the wage in 2001 from its adjusted gross income. That is, the petitioner did not submit the proprietor's list of monthly recurring household expenses (for a family of five) as requested by the director in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the household income to cover its living expenses, before this office may analyze its ability to pay the proffered wage of \$43,680 with that income. Thus, the ETA 750 applicant has not demonstrated that it had sufficient income to pay the proffered wage in 2001.<sup>6</sup>

The record is also not clear regarding whether the petitioner had the ability to pay the wage in 2002 from its adjusted gross income. Again, the petitioner did not submit its list of monthly recurring household expenses (for a family of five) as requested by the director in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the petitioner's income to cover its living expenses, before this office may analyze its ability to pay the wage with that income. Second, the record is not clear regarding whether the petitioner had the added expense of two additional sponsored workers' wages in 2002. If it did, the petitioner must demonstrate the ability to pay their salaries out of its income as well before this office can find that it has shown the ability to pay the instant wage in 2002. Thus, neither the private household nor the petitioner has shown sufficient income to pay the instant proffered wage or the other sponsored workers' wages (if any) in 2002.

The petitioner did not submit its 2003 tax returns, as requested by the director in the RFE. Therefore, the record lacks the evidence required by the regulations to show the petitioner's continued ability to pay the wage. Further, the petitioner did not submit its list of monthly recurring household expenses (for a family of five) as requested in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the petitioner's income to cover its living expenses, before this office may analyze its ability to pay the wage. Also, the record is not clear regarding whether the private household had the added expense of two additional sponsored workers' wages in 2003. If it did, the private household must demonstrate the ability to pay their salaries out of its income as well before this office can find that it has shown the ability to pay the instant wage in 2003. Thus, neither the private household nor the petitioner has shown that it had sufficient income to pay the instant proffered wage or its sponsored workers' wages (if any) in 2003.

In addition, the record is not clear regarding whether the private household had the ability to pay the wage in 2004 from its adjusted gross income. The petitioner did not submit proprietor/private household's list of monthly recurring household expenses (for a family of five) as requested by the director in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the private household's income to cover its living expenses, before this office may analyze its ability to pay the wage with that income. Second, the record is not clear as to whether the private household had the added expense of two additional sponsored workers' wages in 2004. If it did, the proprietor/private household must show the ability to pay their salaries out of its income as well before this office can find that it has shown the ability to pay the instant wage in 2004. Thus, neither

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<sup>6</sup> The petitioner listed on the Form I-140 provided no evidence of its ability to pay the proffered wage.

the private household nor the petitioner has shown that it had sufficient income to pay the instant proffered wage or its sponsored workers' wages (if any) in 2004.

The record is not clear regarding whether the proprietor/private household had the ability to pay the wage in 2005 from its adjusted gross income. The petitioner did not submit the proprietor's list of monthly recurring household expenses (for a family of four) as requested in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the private household's income to cover living expenses, before this office may analyze the proprietor's ability to pay the wage with that income. Second, the record is not clear regarding whether the proprietor/private household had the added expense of two additional sponsored workers' wages in 2005. If it did, the private household must demonstrate the ability to pay their salaries out of its income as well before this office can find that it has shown the ability to pay the instant wage in 2005. Thus, neither the private household nor the petitioner has shown that it had sufficient income to pay the instant proffered wage or its sponsored workers' wages (if any) in 2005.

Finally, the record is not clear regarding whether the private household had the ability to pay the wage in 2006 from its adjusted gross income. The petitioner did not submit the private household's list of monthly recurring household expenses (for a family of four) as requested in the RFE. Thus, the AAO has no information regarding what amount it must subtract from the private household's income to cover its living expenses, before this office may analyze its ability to pay the wage with that income. Second, the record is not clear regarding whether the private household had the added expense of two additional sponsored workers' wages in 2006. If it did, the proprietor/private household must show the ability to pay their salaries out of its income as well before this office can find that it has shown the ability to pay the instant wage in 2006. Thus, neither the private household nor the petitioner has shown that it had sufficient income to pay the instant proffered wage or its sponsored workers' wages (if any) in 2006.

Thus, neither the private household nor the petitioner has shown that it had sufficient income to pay the proffered wage in 2001. Neither the private household nor the petitioner has established that it had sufficient income to pay the instant wage or its sponsored workers' wages, if any, from 2002 through 2006.

Therefore, neither the private household nor the petitioner has shown the continuing ability to pay the beneficiary the proffered wage and any additional sponsored workers' wages from the priority date forward through an examination of wages paid to the beneficiary, or its adjusted gross income.

On appeal, counsel indicated that the private household has shown an ability to pay the wage through an income each year of over \$100,000, including interest income of over \$10,000 from various properties; through savings accounts with deposits of over \$121,000; through properties/buildings valued at over \$5,000,000; through the five businesses which the proprietor/private household owns; and through an equity line of credit.

Counsel also indicated that the private household does not have business expenses to report, as suggested by the director. It does not have such expenses reflected on its individual tax returns in the record because the proprietor/private household owns five businesses which function as separate

legal entities and report taxes in completely separate filings. The owners/proprietors stated through counsel that the beneficiary will work directly for the proprietor/private household as carpenter at its five properties. The proprietor/private household indicated through counsel that its principal expense is its mortgage, the interest for which in 2001 was \$25,840.

In sole proprietor cases, the AAO may, at times, consider funds in personal savings and checking accounts that are available to the proprietor throughout the relevant period, when analyzing the proprietor's ability to pay the wage. However, the record of proceeding shows only that the husband and wife petitioning for the beneficiary in this matter had ██████████ in a savings account and ██████████ in a checking account on November 16, 2001; they had ██████████ in this savings account and ██████████ in this checking account on June 17, 2002; and they had \$64,236.05 in this savings account and ██████████ in this checking account on March 15, 2007. Counsel submitted only page one of the private household's monthly account statements for only three months in the relevant period of analysis from 2001 through 2006. Page one of these three statements does not include the entire statement. It makes no reference to the daily balance or the average balance in these accounts for the month. Information regarding the amounts in these accounts on three given dates is not sufficient to show a sustainable ability to pay the wage throughout the relevant period. Also, no evidence was submitted to demonstrate that the funds reported on these bank statements somehow reflect additional available funds that were not already considered when the AAO analyzed the petitioner's tax returns.

In sum: 1) the private household did not submit complete checking and savings statements for each month of the entire period of analysis, which include its daily balance from the priority date onwards; 2) the private household did not provide information regarding how much it must allocate to its monthly recurring household expenses; and 3) the record is not clear as to whether the private household had the added expense of two other sponsored workers' wages in 2002 through the end of the period analyzed in this decision. Thus, neither the private household nor the petitioner has shown that from the priority date onwards it had funds in its savings and checking accounts substantial enough to cover the full proffered wage of ██████████, each year from 2001 onwards.

Regarding the interest income from the proprietor's properties listed on the tax returns in the record, the AAO duly considered those funds when analyzing the tax returns.

As to other assertions made on appeal, there is no evidence in the record that the proprietor owns properties valued at over ██████████. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *See 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, even if the proprietor/private household did document that it owned properties valued at over \$5 million, real property is not a readily liquefiable asset that may be viewed as funds available to pay the wage. It is also not likely that a proprietor would sell such significant assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup>

Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Regarding the businesses which the proprietor/private household claimed to have owned, this office does note that attached to the proprietor's tax returns in the record is information regarding losses and income posted by five companies. For example, in 2001: the proprietor posted a loss of [REDACTED] at [REDACTED], rental real estate loss for an S corporation; the proprietor also posted a loss of [REDACTED] at [REDACTED], rental real estate loss, and had investment income of \$40 for this S corporation; the proprietor posted a loss of [REDACTED] at [REDACTED] rental real estate loss for an S corporation; the proprietor posted a loss of [REDACTED] at [REDACTED], rental real estate loss for an S corporation; and the proprietor posted a loss of [REDACTED] at [REDACTED] net income (loss) for an S corporation/pass through entity. Also, there is, in the record, a letter dated October 8, 2007 on [REDACTED] letterhead stationery signed by [REDACTED], which indicates that the husband and wife petitioner in this matter own the five businesses to which the attachments to the tax returns, summarized here, refer.

First, this evidence is not sufficient to demonstrate that the proprietor/private household is sole shareholder in these five businesses. That is, the unsupported representations of the petitioner's C.P.A. and its other agents are not reliable evidence. There is also no documentary evidence in the record which demonstrates that the husband and wife proprietors who are sponsoring the instant beneficiary are the sole shareholders in these businesses. More importantly, even if the private household were to provide sufficient evidence to show that it is the sole shareholder in these businesses, the proprietor/private household has stated through counsel, and the record corroborates, that these businesses are corporations or separate legal entities from the petitioner in this matter. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of these enterprises or corporations cannot be considered in determining the instant petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In sum, the AAO finds that there is no evidence in the record that these five businesses provided the petitioner with funds beyond those already considered when analyzing the tax returns in the record, as any income from these businesses would be reflected in the proprietor's adjusted gross income.

Regarding lines of credit, first, the only line of credit documented in the record is one for [REDACTED] listed on the proprietor's three savings and checking account statements in the record. There is no evidence in the record that the petitioner had a line of credit available throughout the relevant period sufficient to cover the instant wage and its other sponsored workers' wages, if any. Further, when calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income by adding in its credit limits, bank lines, or lines of credit. 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).

Further, since the line of credit is a commitment to loan, not an existent loan, the petitioner has not established that the unused funds from the line of credit were 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). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner 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 proprietor'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).

Finally, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

Here, the record does not indicate how many employees the private household/proprietor has. Also, the private household did not establish a marked, steady increase in its adjusted gross income that might justify finding the ability to pay the wage. Rather, its adjusted gross income has fluctuated during the relevant period as follows: [REDACTED] in 2001; [REDACTED] in 2002; [REDACTED] in 2004; [REDACTED] in 2005; and [REDACTED] in 2006. Moreover, the private household failed to provide a tax

return for 2003 or other documentary evidence of its financial position in that year, as requested by the director in the request for evidence. Also, the private household has not established the occurrence of any uncharacteristic expenditures or losses, or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the private household has not established that it had the continuing ability to pay the proffered wage. This office acknowledges that the proprietor had a high adjusted gross income, as noted above; however, the record does not contain evidence of the proprietor's liabilities, recurring monthly expenses, or the regulatory prescribed evidence of its ability to pay the proffered wage in 2003. Also, as noted above, the ETA Form 750 and the Form I-140 contain discrepant sponsors. Thus, the Form I-140 petition cannot be approved as filed because the employer on the labor certification submitted with that application does not match the employer on the Form I-140.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.