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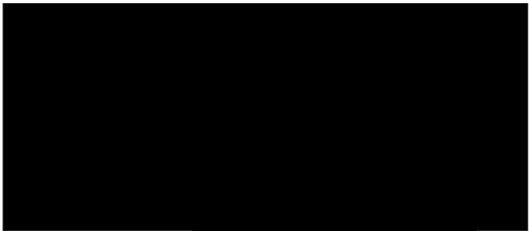
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **MAR 25 2013**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 public accountants business. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$30.66 per hour (\$63,772.80 per year).

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 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 1999 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on October 20, 2006, the beneficiary did not claimed 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 a Form ETA 750 labor certification application establishes 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, 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 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 established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 and onwards.

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).

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). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 *aff'd*, 703 F.2d 571.

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 the instant case, the sole proprietor presently supports a family of four.² The proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040, lines 33 & 35)	\$18,442.00	\$46,472.00
	<u>2003</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040, lines 34 & 36)	\$51,446.00	\$58,944.00

² According to the tax returns submitted, the sole proprietor supported two dependents in 2001 and 2002, three dependents in 2003, and four dependents in 2004, 2005, and 2006.

	<u>2005</u>	<u>2006</u>
Proprietor's adjusted gross income (Form 1040, lines 37 & 37)	\$82,821.00	\$131,283.00

It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage in 2001, 2002, 2003, and 2004, without also considering the sole proprietor's personal monthly expenses. No personal expenses statements were submitted by the sole proprietor, and as the director noted, it is reasonable to assume that the sole proprietor could not support his family on a deficit which would occur if the family's recurring personal expenses were deducted. In years 2001, 2002, 2003, and 2004, the sole proprietor's adjusted gross incomes fail to cover the proffered wage of \$63,772.80 even without considering the sole proprietor's personal monthly expenses. Assuming reasonable personal monthly expenses in 2005, it is improbable that the petitioner's could pay the proffered wage and his personal expenses from his adjusted gross income.

On appeal counsel submits a brief dated February 28, 2008, and submits, *inter alia*, a copy of a web page from [http://www2.dca.ca.gov/...](http://www2.dca.ca.gov/) accessed on February 29, 2008; the sole proprietor's and his spouse's self prepared personal "average ending balance statements" related to bank accounts for the years 2002, 2003, 2004, 2005, 2006, and 2007; the sole proprietor's and his spouse's self prepared statement of balances in five "Regular CEPT Certificate (CD)" certificates of deposit in 2007/2008; and approximately 324 of the sole proprietor's bank checking statements for the time period from January 1, 2001, to January 11, 2008.

Counsel asserts that the director erroneously utilized the petitioner's adjusted gross income to determine the ability to pay the proffered wage instead of using "Total Income" (Form 1040, Line 22). Counsel cites no regulation or court decision to support his contention that total income, rather than adjusted gross income, should be used to determine the petitioner's adjusted gross income according to *Ubeda v. Palmer, Id.* The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

According to counsel, the petitioner's certificates of deposit are reputedly available to pay the proffered wage. There is no statement from the sole proprietor making the same offer. Counsel submitted several self-prepared statements³ in the manner of summaries that also listed five certificate of deposit certificates in joint names, husband and wife. There is no independent evidence of the existence of the certificates including the over 300 pages of bank statements that are in the record. The certificates have periods listed in 2007 and 2008. No evidence such as tax returns, annual reports or audited financial statements were submitted in this case for years 2007 and 2008 that would show the existence of these savings and provide information that they are unencumbered and available funds. Assuming the certificates do show the sole proprietor's savings available to pay the proffered wage in 2007 and 2008, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set

³ Not business records from a banking institution.

of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The date from which the petitioner must prove his ability to pay is 2001 and onwards. On that point, counsel asserts in his brief that, "Thus, 2001 was the only year the petitioner did not have enough income or net current assets to pay the proffered wage. In 2002 and 2003 the petitioner's net current assets were enough to cover the proffered wage and his living expense."

The AAO accepts counsel's statement, as the evidence submitted corroborates the claim that the petitioner did not in 2001 have the ability to pay the proffered wage. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Id.* This alone is a reason for ineligibility for the immigration benefit requested. Further, the evidence submitted is insufficient to determine the petitioner's net current assets from the priority date and onwards as asserted by counsel.

According to counsel, the petitioner had substantial averages of cash in a bank consisting of funds in a personal account and funds in a business account, and the personal accounts and the business accounts should be added together. A perusal of the of the petitioner's banking statements for 2002 through 2005 shows only one account which is that of the sole proprietor and his spouse. Each collection of statements for years 2002 through 2005 list items that indicate it is a business account. The petitioner's business bank account number on all the statements is the same in each year.

Counsel has submitted summaries of the sole proprietor's and his spouse's self prepared personal "average ending balance statements" related to reputed personal bank accounts for years 2002, 2003, 2004, 2005, 2006, and 2007. In other words, the business documents were not submitted, just summaries of business documents that are not in the record. While the regulation 8 C.F.R. § 204.5(g)(2) allows the submission of bank account records, the self prepared summaries are not sufficient evidence of the bank records. 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)). Further, counsel has not explained since the petitioner reported his taxes using Form 1040, why these "personal" assets would not have to be stated on the tax returns submitted.

Further, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel asserts that the petitioner's certified public accounting licensure is an asset that has value, "both current and long-term," and it is evidence of the petitioner's ability to pay. Again, counsel cites neither regulation nor court decisions that would allow the licensure to be evaluated as a

business asset. Further, counsel places no dollar value on the license so the AAO is unable to review or analyze this contention.

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. 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.

In the instant case, the petitioner's gross receipts as stated on Forms 1040, Schedules C were in 2001-\$49,223.00; in 2002-\$67,802.00; in 2003-\$120,928.00; in 2004-\$154,270.00; in 2005-\$148,520.00; and in 2006-\$167,761.00. Despite the gross receipts, the profit that the petitioner stated on the Forms 1040, Schedules C averaged for the six years for which tax returns were submitted only \$46,269.17 even with nominal or nonexistent wage expenses. In 2006, wages were stated on Schedule C, Part II, Line 26, in the amount of \$44,400.00, otherwise they were stated as "zero" for years 2001 to 2005.

The Schedules C referenced here are those in which the sole proprietor stated accounting as one of the business enterprises on the Schedules C. It is important to note, for the determination of the petitioner's adjusted gross income, income from any source was considered.

Generally, the petitioner's gross receipts increased each year, but the kinds of businesses that the sole proprietor operated to produce those receipts varied each year, with no distinction made on the Forms 1040, Schedules C to "break-out" each enterprise's income and expenses. As was discussed, the sole proprietor had insufficient adjusted gross income in 2001, 2002, 2003, 2004, and 2005, based upon the record submitted even without consideration of this impediment to an analysis of the totality of the sole proprietor's finances in the public accounting business.

Under the facts of this case, the petitioner commingled income and expenses from a multitude of businesses with his accounting business and reported those incomes and expenses as combined without making a distinction between them when he reported his income and expenses on Forms 1040, Schedules C for each year. The sole proprietor engaged in other business enterprises such as loan brokerage in 2001, finance processing and insurance brokerage in 2002, 2003, in 2004, as an insurance agency in 2005, and in 2006 as an insurance agent, financing and as a real estate broker contemporaneously with his accounting business. Further, the sole proprietor's spouse made contributions from her separate occupation to the family's income, and that income is a component of the petitioner's adjusted gross income. Therefore the viability of the sole proprietor's accountant business, especially in those years when the petitioner's adjusted gross incomes were less than the proffered wage, is called into question.

While not a basis of this decision, all of these aforementioned separate enterprises have made contributions to the sole proprietor's adjusted gross income for the years for which tax returns were submitted. Since the labor certification was secured by a public accountants business to employ an accountant for that business full time, and not other businesses, it is not clear under the circumstances of this case if the beneficiary will be employed full time and paid the proffered wage by the petitioner as an accountant. That is to say, the petitioner's adjusted gross incomes for the years for which tax returns were submitted would be presumably less in each year if just the public accounting business was considered, and therefore, it is less likely that the sole proprietor of the public accountants business could pay the proffered wage. *See* 8 C.F.R. § 204.5(c). Under the totality of circumstances analysis, the AAO has insufficient information to either analyze or review the petitioner's finances as a public accountants business over the period for which tax returns and other evidence were submitted without also considering other business enterprises stated on the Schedules C. The labor certification makes no reference to any business except the public accountants business. The labor certification is valid only for a particular job opportunity and for the area of intended employment stated on the labor certification. *See Matter of Sunoco*, 17 I & N, Dec. 283 (BIA 1979).

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 in 2001, 2002, 2003, 2004, and 2005.

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.