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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 29 2010

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is in the construction business. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 March 17, 2009 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on June 29, 2007. The proffered wage as stated on the ETA Form 9089 is The ETA Form 9089 states that the position requires two years of experience in the proffered position.

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 2000 and to currently employ no workers. On the ETA Form 9089, signed by the beneficiary on September 7, 2007, the beneficiary did not claim to have previously 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 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. 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 2007 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 expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at 6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well

[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).

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 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, [redacted] on a gross income of slightly more than [redacted] where the beneficiary's proposed salary was [redacted] or approximately thirty percent (30%) of the petitioner's gross income.

The record closed in this proceeding with the petitioner's response to the director's Notice Of Intent To Deny (NOID) on August 8, 2008. As of that date the most recent tax return available was for tax year 2007, the year of the priority date. In the instant case, the sole proprietor supports a family of two. The proprietor's 2007 tax return reflects the following information:

- Proprietor's adjusted gross income (Form 1040, line 37) [redacted]

In 2007, the sole proprietor's adjusted gross income of [redacted] fails to cover the proffered wage of [redacted] It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. As previously stated, the proprietor must not only demonstrate the ability to pay the proffered wage, but his living expenses and those of any dependents. The proprietor did not provide a list of those expenses. Thus, it cannot be determined whether the proprietor had sufficient resources to pay the proffered wage plus those living expenses.

On appeal, counsel asserts that the petitioner has established the ability to pay the proffered wage. Counsel states that social security benefits should be included in the ability to pay analysis, that the beneficiary would replace contract labor with those costs being reflected on the proprietor's tax returns, and that income was reduced by self employment health benefits.

The petitioner submitted a copy of one business bank statement for May 1, 2008 to June 1, 2008. That statement will not establish the ability to pay the proffered wage from the 2007 priority date as it cannot be determined whether those funds were available to the proprietor in 2007. Generally, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a 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 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about 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 . The petitioner's clients had been included in the lists of the best-dressed The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in . 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 proprietor failed to submit his living expenses and those of any dependents. Thus, it cannot be determined whether the proprietor had sufficient income or countable resources to pay the proffered wage plus applicable living expenses. The proprietor asserts that he had social security benefits which should be counted in the ability to pay analysis. The proprietor's 2007 tax return shows social security benefits of of which is stated to be taxable on the tax return. That portion of the social security benefits not included in the proprietor's taxable income may be, in certain circumstances, added to adjusted gross income in the ability to pay analysis. Under appropriate circumstances, the proprietor could have available to pay the proffered wage of In any future proceedings, the proprietor should provide evidence that the social security benefits were actually paid to the proprietor, such as a Form SSA-1099 to support the claim. In many occasions social security benefits are direct deposited into personal bank accounts. Thus, there is also the possibility that the benefits may be double counted if considering a proprietor's personal bank records in the ability to pay analysis. Even when including the social security benefits, the proprietor has insufficient income to pay the proffered wage plus undetermined personal living expenses.

The petitioner claims that the beneficiary would replace all or a portion of the contract labor reflected on the proprietor's Schedule C, and that those sums could be used to pay the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. The petitioner did not submit W-2s or Forms 1099 to document wages paid. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of the unnamed contract workers involves the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.[2]

The proprietor provided a list of personal assets stating that those assets could be used to pay the proffered wage. The listed assets with stated values are as follows:

- [redacted]

The stated value of the proprietor's primary residence and [redacted] has not been established in the record. The values are not supported by real estate appraisals or title opinions showing that any such assets are unencumbered. Further, the proprietor has not provided any information about the investments to which he refers or established that they do in fact exist. The nature and value of personal effects has not been established, nor has the proprietor provided any information about business checking assets in the 2007 priority year. Real estate, business equipment and personal effects are not readily liquefiable and are not the type of assets that would normally be used for paying wages. The stated assets and values listed do not establish the petitioner's ability to pay the proffered wage. The sole proprietor's tax return would reflect rental income received in the sole proprietor's adjusted gross income which has already been considered above. 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)).

---

[2]The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

Finally, the petitioner asserts that its self-employment health benefits should be considered as an asset in the ability to pay analysis. The payment of health benefits is an expense, not an asset, and will not enhance the petitioner's ability to pay the proffered wage plus applicable living expenses.

The petitioner has not established that its reputation in the industry is such that it is more likely than not it would have the continuing ability to pay the proffered wage from the priority date onward. 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.

Beyond the decision of the director, the petitioner has not established that the beneficiary has two years of experience in the proffered position as required by the ETA Form 9089. As previously stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). *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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petitioner indicated on the ETA Form 9089 that the beneficiary had been employed by [redacted] The petitioner did not, however, submit documentary proof of that experience, or other claimed experience, as required by 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.