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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: APR 15 2011 Office: NEBRASKA SERVICE CENTER FILE: LIN 08 050 50232

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 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, with a fee of $630. 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, Nebraska Service Center. The appeal was summarily dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 March 31, 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)(iii) of 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.

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). 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 December 8, 2003. The proffered wage as stated on the Form ETA 750 is $12.54 per hour ($26,083.20 per year). The Form ETA 750 states that the position requires six months experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner indicates that it was established on April 10, 2002 and that it employed three workers. On the Form ETA 750, signed by the beneficiary on November 17, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 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 he employed and paid the beneficiary the full proffered wage from the priority date in 2003 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*, 696 F. Supp. 2d 873 (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

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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, 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 following table reflects the sole proprietor's IRS Forms 1040 Adjusted Gross Income (AGI) amounts, minus average yearly household (HH) expenses, minus the proffered wage amounts, and the remaining income. [2]

YEAR	AGI	HH EXPENSES	REMAINING AMOUNT	PROFFERED WAGE	REMAINING AMOUNT
2003	$40,100.00	$21,960.00[3]	$18,140.00	$26,083.20	($7,943.20)

[2] Although the director did not consider the petitioner's 2008 IRS Form 1040 AGI amount, the AAO will take it into consideration in generally assessing the petitioner's ability to pay the proffered wage.

[3] The petitioner stated that her household expenses were $1,830.00 per month in a letter dated February 26, 2009. The petitioner did not indicate whether these expenses varied over the years. Accordingly, the same annual calculation is being applied for each relevant year. It also appears that these household expenses may be understated. For example, the petitioner does not list any expenses for transportation, e.g., commuting, automobiles, or insurance even though her bank account statements submitted on motion show her making substantial payments on a Toyota and a Lexus automobile. Also, the list of household expenses claims monthly property tax expenses of $338.00. However, the petitioner's 2007 Form 1040, Schedule A lists $6,829.00 in deductable property taxes, or $569.00 per month. Doubt cast on any aspect of the petitioner's

2004	$37,278.00	$21,960.00	$15,318.00	$26,083.20	($6,642.20)
2005	$58,877.00	$21,960.00	$36,917.00	$26,083.20	$10,835.80
2006	$30,758.00	$21,960.00	$8,798.00	$26,083.20	($17,285.20)
2007	$33,034.00	$21,960.00	$11,074.00	$26,083.20	($15,009.20)
2008	$72,160.00	$21,960.00	$50,200.00	$26,083.20	$24,116.80

In order to determine the sole proprietor's ability to pay the proffered wage, her monthly expenses must be subtracted from the adjusted gross income amounts. The sole proprietor claims four dependents on her individual tax return in 2005; therefore, although the record demonstrates the petitioner's ability to pay the proffered wage in 2005, it is highly unlikely that the petitioner could support herself and four dependents on what remains after subtracting the proffered wage amounts. In addition, as noted in the above table, the sole proprietor's adjusted gross income less her annual expenses is insufficient to pay the proffered wage for 2003, 2004, 2006, and 2007. In 2008, because the household expenses claimed are under stated when compared to the petitioner's itemized deductions listed on page 2 of the Form 1040, it has not been established that she had the ability to pay the proffered wage in 2008.

On appeal, counsel asserts that on the basis of the documents submitted, the petitioner has established her ability to pay the proffered wage as required by regulation.

Counsel asserts that the balances (cash on hand) in the petitioner's bank accounts, including certificate of deposit balances, are sufficient to demonstrate her ability to pay the proffered wage. The record of proceeding contains a letter from who stated that she is the sole proprietor's bookkeeper and that based upon her request, she is providing a list of the sole proprietor's bank account balances. The petitioner provides a copy of her Prima Account Statement dated December 9, 2008. While the statement shows a total balance from the various accounts to be $33,630.53 as of December 9, 2008, it is insufficient to demonstrate the petitioner's ability to pay the proffered wage in 2003, 2004, 2006, and 2007. Furthermore, there is nothing in the record to show when the various accounts were initially opened. Counsel submits a copy of bank statements from for December of 2003, 2004, 2005, 2006, 2007, and 2008. Although the bank statements are addressed to the petitioner's owner, they distinctly state that the account is a joint owner account between for 2003; and for 2004, 2005, 2006, 2007, and 2008. As neither are deemed petitioners in the instant matter, the bank

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proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner did not submit her Schedule A for 2008, but it appears from page 2 of her 2008 Form 1040 that she had $37,420.00 in itemized deductions in that year, over twice the 2003 deduction.

account balances cannot be relied upon to demonstrate the petitioner's ability to pay the proffered wage. It has not been established that thses funds were available to the petitioner to pay expenses, including the proffered wage. Therefore, the sole proprietor cannot establish her ability to pay the proffered wage.

The petitioner submitted a list of her assets including business property and personal real estate. Counsel infers that the value of the sole proprietor's real property should be considered in determining her ability to pay the proffered wage. Contrary to counsel's claim, real estate is not a readily liquefiable asset. Further, it is unlikely that the sole proprietor would sell such significant assets to pay the beneficiary's wage. It is speculative to claim that funds from the sale of real property would be available specifically to be used to pay the proffered wage. *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)). Further, any funds which may be generated from the sale of any of the real property would only be available at some point in the future. A petitioner must establish its ability to pay from the date of the priority date, which in this case is December 8, 2003. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel infers that USCIS should add back depreciation to the petitioner's net income. However, as noted above, both USCIS and the federal courts have concluded that adding back depreciation to net income overstates petitioner's ability to pay the proffered wage. Depreciation is a real expense. *See, e.g., River Street Donuts, LLC.*

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that she could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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. 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 weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.[4] The petitioner has not established that the relevant years were uncharacteristically

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[4] Counsel cites in the brief the decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage.

The court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *Id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595.

Therefore, if the AAO were to follow the holding of the court in *Construction and Design* in the instant case, the petitioner would be required to establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by approximately 1.4. The multiplier is based on data provided by the Bureau of Labor Statistics, which is available at http://www.bls.gov/news.release/ecec.t01.htm (accessed February 3, 2011). Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to $36,516.48 per year.

unprofitable or a difficult period for the petitioner's business. The petitioner has not established its reputation within the industry. Finally, as explained supra, the record contains inconsistencies pertaining to the petitioner's household expenses which undermine the credibility of the evidence as a whole. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

However, as the instant case does not arise in the seventh circuit, the AAO will not require the petitioner to establish its continuing ability to pay the proffered wage at the higher "fully burdened" wage rate.