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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

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: FEB 11 2011

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a care attendant. 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 (the 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to 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 unavailable.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$1,710.80 per month (\$20,529.60 per year).<sup>1</sup>

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>2</sup>

No evidence accompanied the petition and the labor certification.

By letter dated December 15, 2008, counsel submitted, *inter alia*, Wage and Tax Statements (W-2) issued to the beneficiary by the petitioner for 2003-\$11,175.00; 2004-\$15,720.00; 2005-\$17,465.00; 2006-\$16,030.00; and 2007-\$19,487.50; the beneficiary's pay statements from the petitioner for the period February 15, 2008, to December 15, 2008, stating year-to-date wage payments of \$19,762.50; and partial copies of the petitioner's federal income tax returns (Forms 1040) for 2001 through 2007.

On January 28, 2009, the director requested that the petitioner submit evidence of its ability to pay the proffered wage from the priority date. Additionally, the director's requested the sole proprietor's average recurring monthly expenses for 2001 through 2007, including but not limited to the following items: mortgage or rent payments; automobile payments; installment loans; credit card payments; and household expenses, and the beneficiary's 2008 W-2 Statement. Finally, the director requested a copy of the sole proprietor's annual reports or third-party audited financial statements for 2001 through 2007, and also additional evidence which may show the petitioner's current assets, such as cash and investment accounts for each year from 2001 to 2007. No such evidence was submitted.

Counsel submitted an explanatory letter dated March 4, 2009. Along with the letter, counsel submitted the sole proprietor's "personal monthly household expense" for 2001 through 2007. Counsel also submitted W-2 statements issued to the beneficiary from 2003 through 2007; the beneficiary's pay statements for the period December 16, 2008, to December 31, 2008 showing year-to-date earnings of \$20,755.00; and the beneficiary's pay statements for the period January 1, 2009 through February 28, 2009, showing year-to-date earnings of \$2,925.00.

On appeal, counsel submitted a legal brief and four pages from the publication "2009 California Employer's Guide" as well as a page from the State of California Employment Development Department, "Tax Rates Wage limits, and Value of Meals and Lodging."

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

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<sup>1</sup> No job experience is required in the labor certification.

<sup>2</sup> 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).

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).

The petitioner submitted W-2 Statements and pay statements evidencing wages paid to the beneficiary by the petitioner for the following years:

Petitioner's Tax Return for Year:	Proffered Wage	Wage Paid	Difference between the Proffered Wage and the Wage Paid in Each Year:
2003	\$20,529.60	\$11,175.00	\$9,354.60
2004	\$20,529.60	\$15,720.00	\$4,809.60
2005	\$20,529.60	\$17,465.00	\$3,064.60
2006	\$20,529.60	\$16,030.00	\$4,499.60
2007	\$20,529.60	\$19,487.50	\$1,042.10
2008	\$20,529.60	\$20,755.00	-0-
2009	\$20,529.60	\$2,925.00	\$17,604.60

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, 2002, 2003, 2004, 2005, 2006, 2007, and 2009.

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 1995 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (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 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 (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.<sup>3</sup>

Counsel submitted the sole proprietor's "personal monthly household expense" for 2001 through 2007 which were stated as follows (also calculated yearly): 2001: Monthly Expense-\$1,974.00/Yearly Expense-\$23,688.00; 2002: Monthly Expense-\$2,014.00/Yearly Expense-\$24,168.00; 2003: Monthly Expense-\$2,074.00/Yearly Expense-\$24,888.00; 2004: Monthly Expense-\$2,104.00/Yearly Expense-\$25,248.00; 2005: Monthly Expense-\$2,710.00/Yearly Expense-\$32,520.00; 2006: Monthly Expense-\$2,835.00/Yearly Expense-\$34,020.00; and 2007: Monthly Expense-\$3,025.00/Yearly Expense-\$36,300.00.

The petitioner failed to submit complete Forms 1040; there are no Schedules A in the record. However, from a review of the Forms 1040, lines 38, that were submitted, the petitioner did itemize her deductions on Schedules A and included the totals on the Forms 1040. They are for 2001-\$39,509.04; 2002-\$38,805.09; 2003-\$33,672.29; 2004-\$31,093.16; 2005-\$34,565.55; 2006-\$40,006.64; and in 2007-\$45,681.00. Expenses found on Schedule A are mortgage interest, healthcare costs, and tax payments. In every year the Schedule A itemized deductions were greater than that reported by the proprietor as "personal monthly household expense."

The proprietor's tax returns reflect the following information for the following years:

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<sup>3</sup> Since the petitioner stated she is married, but filing separately, she may be residing in a household of two individuals but there is no evidence of that fact.

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040)	\$21,512.39	\$58,531.27
	<u>2003</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040)	<\$17,297.76>	<\$42,594.59>
	<u>2005</u>	<u>2006</u>
Proprietor's adjusted gross income (Form 1040)	<\$9,307.30>	\$20,875.40
	<u>2007</u>	
Proprietor's adjusted gross income (Form 1040)	\$20,295.00	

In 2001, and 2003 through 2007, the sole proprietor's adjusted gross incomes fail to cover the proffered wage of \$20,529.60 as it is improbable that the sole proprietor could support herself on recurring yearly deficits which are what remains after reducing the adjusted gross incomes by the amount required to pay the proffered wage and the petitioner's personal household expenses. Even in the absence of disclosed household expenses, those expenses appearing in the returns, e.g. mortgage interest, healthcare costs, and tax payments, reduce the petitioner's adjusted gross income to less than the proffered wage in 2001 through 2007.

On appeal, counsel asserts for the first time that the value of meals and lodging reputedly provided the beneficiary by the petitioner should be considered in the determination of the petitioner's ability to pay. Counsel submitted two pages from the publication "2009 California Employer's Guide" as well as a page from the State of California Employment Development Department, "Tax Rates Wage limits, and Value of Meals and Lodging." No evidence was submitted of the value of meals and lodging reputedly provided the beneficiary by the petitioner. Further, there is no evidence in the record that in the recruiting phase of the labor certification the petitioner offered a wage calculated at the rate of \$1,710.80 per month but not including the addition of fringe benefits which counsel contends are the employer-paid expense of meals and lodging.<sup>4</sup> Finally, assuming the value of food and lodging could be used in considering the petitioner's ability to pay the proffered wage, the petitioner would need to establish the cost of these "wages" to the petitioner. In this matter, the record of proceeding is devoid of any actual valuation of these additional "wages." 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*

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<sup>4</sup> The W-2 statements and pay statements in the record do not include compensation for meals and lodging provided by the petitioner. Unique fringe benefits must be disclosed in the advertisements and posted notices in the recruitment phase of the labor certification process. The employer must establish the value of its fringe benefits and show that they are not common to the comparable jobs upon which the prevailing wage is based. No such evidence is in the record.

*Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). “The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid in a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage.” See 20 C.F.R. § 656.2(C)(3).

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 claimed to have been established in 1995 and to currently employ three workers. The proprietor's gross receipts and net profit or loss for each year are as follows: 2001-\$201,642.55 and <\$9,979.76>; 2002-\$186,130.00 and \$24,738.83; 2003-\$159,911.56 and <\$46,720.65>; 2004-\$100,806.60 and <\$66,815.94>; 2005-\$157,289.69 and <\$32,519.32>; 2006-\$159,894.00 and \$2,525.25; and 2007-\$174,313.00 and <\$10,332.00>. Therefore, despite positive gross receipts, the proprietor suffered a loss in five of the seven years for which tax returns have been submitted. But for the contribution of the proprietor's social security benefits payments and wages, the adjusted gross income reported for years 2001 through 2007 would have been less. Alone, the residential care facility does not appear to be a viable business. Counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of a turn-around

of the petitioner's business fortunes, or expectations of increased profitability. 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.

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.