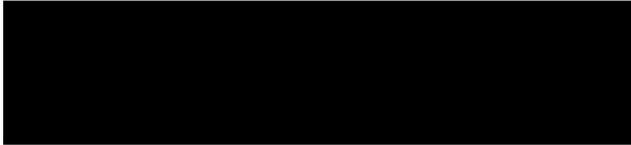


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE:



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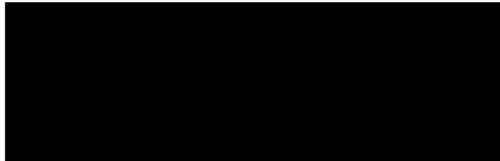
Petitioner:

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:

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.

Thank you,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion will be granted, the previous decision of the AAO will be withdrawn, and the director's denial will be reconsidered. The appeal will be sustained, and the petition will be approved.

The [REDACTED] the petitioner in this case, is a research and testing business solely owned by [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer and manager. 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 denied the petition, finding that the petitioner did not have the ability to pay the beneficiary's wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and in a decision dated May 27, 2010, dismissed the petitioner's appeal.

On June 22, 2010, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner submits evidence to establish that it has the ability to pay the proffered wage. The record shows that the motion to reopen is properly filed and timely. Further, the motion provides new facts and is supported by affidavits or other documentary evidence. The motion to reopen is granted and the AAO's previous decision is withdrawn. The remaining 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 AAO's previous decision, the chief 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 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. In addition, section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 ETA Form 750 was accepted for processing by the Department of Labor (DOL) on December 26, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$44.39 per hour or \$92,331.20 per year. The Form ETA 750 further states that the position requires a bachelor's degree in mechanical engineering.<sup>1</sup>

To demonstrate that the petitioner has the ability to pay \$44.39/hour or \$92,331.20/year beginning from December 26, 2001, the petitioner submitted the following evidence on motion:

- Copies of the individual tax returns of [REDACTED] filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2009;
- A list of Mr. [REDACTED] monthly household expenses between 2001 and 2010;<sup>2</sup>
- Letters dated June 14, 2010 from [REDACTED] Assistant Vice President/Branch Manager of [REDACTED] Woodland Hills Branch, disclosing how much money Mr. [REDACTED] has in his bank accounts as of June 2010;
- A letter dated June 8, 2010 from Mr. [REDACTED] certified public accountant, [REDACTED], stating that Mr. [REDACTED] has been his client for at least the past 10 years and that Mr. [REDACTED] has a net worth of approximately \$3 million in each of those years;

<sup>1</sup> The beneficiary has a master's degree in mechanical engineering from Columbia University, New York, and a bachelor's degree in mechanical engineering from Worcester Polytechnic Institute, Worcester, Massachusetts. The record includes copies of the diplomas and school transcripts.

<sup>2</sup> In his list, Mr. [REDACTED] states that he has clear title to all five properties he owns in California. He claims his total annual household expenditure from 2001 to 2010 is \$52,480.

- A letter from [REDACTED] Mr. [REDACTED] investment broker and banker stating that Dr. Solomon's accounts are in excess of \$5 million; and
- A letter dated December 22, 2010 from [REDACTED] Banking Specialist, disclosing how much money Mr. [REDACTED] has in his bank accounts as of December 2010.

The evidence in the record of proceeding shows that the [REDACTED] is structured as a sole proprietorship. Mr. [REDACTED] is the sole proprietor of the business. On the petition, Mr. [REDACTED] claimed that he founded the [REDACTED] in 1974 and that the business currently employs 25 workers. On the Form ETA 750B, signed by the beneficiary on November 30, 2001, the beneficiary claimed to have worked for the petitioner since November 1999.

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.

As noted in the previous decision, the beneficiary in this case was not paid and employed by the [REDACTED] but by the Laboratory of Risk and Safety Analyses, a C corporation which Mr. [REDACTED] owns. The AAO found that the [REDACTED] and the [REDACTED], though they both are owned by [REDACTED], are two distinct and separate legal entities, and for that reason, we could not accept any evidence from the [REDACTED] to demonstrate the petitioner's ability to pay. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003) (stating that nothing in the governing regulation, 8 C.F.R. § 204.5, permits USCIS to consider the financial resources of entities who have no legal obligation to pay the wage).

When the petitioner fails to 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 (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).

As stated earlier, the petitioner in this case 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.

The sole proprietor in this case is married with no dependent children. On motion, he presents his annual household expenses as follows:

Insurance on real property and cars	\$24,450
Gas, electric, and telephone bills	\$7,500
Internet services	\$3,330
Maid services	\$2,400
Health insurance	\$4,800
Food	\$10,000
Total annual household expenses	\$52,480

The evidence indicates that he does not carry a mortgage on his properties or other debt. However, he does pay real estate taxes as reflected on his schedules A. The AAO will add the

real estate taxes into the petitioner's household expenses in order to determine whether he has the ability to pay the proffered wage. The real estate taxes are as follows:

2001	\$4,760
2002	\$4,867
2003	\$5,060
2004	\$5,236
2005	\$5,304
2006	\$5,440
2007	\$5,578
2008	\$5,774
2009	\$5,918

The table below shows the petitioner's adjusted gross income (AGI) less the petitioner's household expenses:

Tax Year	The Petitioner's AGI	Annual Household Expenses <sup>3</sup>	AGI less Annual Household Expenses	Proffered Wage (PW)
2001 (line 33, Form 1040)	\$1,481,998	\$57,240	\$1,424,758	\$92,331.20
2002 (line 35, Form 1040)	\$1,223,880	\$57,347	\$1,166,533	\$92,331.20
2003 (line 34, Form 1040)	\$650,579	\$57,540	\$593,039	\$92,331.20
2004 (line 36, Form 1040)	\$611,943	\$57,716	\$554,227	\$92,331.20
2005 (line 37, Form 1040)	\$565,570	\$57,784	\$507,786	\$92,331.20
2006 (line 37, Form 1040)	\$527,564	\$57,920	\$469,644	\$92,331.20
2007 (line 37, Form 1040)	\$766,042	\$58,058	\$708,984	\$92,331.20
2008 (line 37, Form 1040)	\$310,481	\$58,254	\$252,227	\$92,331.20
2009 (line 37, Form 1040)	\$192,112	\$58,398	\$133,714	\$92,331.20

The petitioner's adjusted gross income, less his household expenses, is sufficient to pay the proffered wage of the beneficiary from the priority date.<sup>4</sup>

<sup>3</sup> The annual household expenses here include the real estate taxes that the petitioner reported on his tax returns.

<sup>4</sup> The letters from [REDACTED] indicate that the petitioner had, as of June 14, 2010 and December 22, 2010, a combined balance of \$954,744.25 and \$924,113.76, respectively in his bank accounts. The letter from Dr. [REDACTED] certified public accountant states that he has been the petitioner's accountant for at least the past 10 years, and that during that time period, Dr. [REDACTED] had a net worth over \$3 million in each of those years. The undated letter from Mr. [REDACTED]'s investment broker and banker states that Dr. [REDACTED] has over \$5 million in his

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence in the record, the AAO is persuaded that the petitioner has the ability to pay the salary offered as of the priority date and continuing to present. 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 met that burden.

**ORDER:** The motion to reopen is granted. The AAO decision dated May 27, 2010 is withdrawn. The appeal is sustained, and the petition is approved.

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accounts. These statements are consistent with the petitioner's tax returns which establish that the petitioner has the ability to pay the proffered wage.