

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



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:  Office: NEBRASKA SERVICE CENTER Date: FEB 28 2011

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 petitioner filed a motion reopen, which was granted and the previous decision affirmed. The petitioner then filed a second motion to reopen, which was granted and the prior decision affirmed for a second time. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual who runs a dairy farm. It seeks to employ the beneficiary permanently in the United States as a milker. 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).¹ 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 February 4, 2009, March 30, 2009, and June 18, 2009 denials, 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.

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.²

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

¹ Both the ETA Form 9089 and the I-140 were prepared and submitted an individual from the InterAmerican Services LLC (Latinos Unidos). A review of recognized organizations and accredited representatives reported in November 2010 by the Executive Office for Immigration Review, does not mention this individual or Inter American Services LLC. *See* http://www.justice.gov/eoir/statspub/raroster_files/Accredited%20Representatives.pdf (accessed February 25, 2011). Under 8 C.F.R. § 292.1, persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives.

² 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).

who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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).

Here, the ETA Form 9089 was accepted on April 12, 2008. The proffered wage as stated on the Form ETA 750 is \$9.80 to \$11.00 per hour (\$20,384 to \$22,880 per year).³ The ETA Form 9089 states that the position requires a high school education as well as the specific skills of “assist[ing] in birthing process for bovines, ability to identify sick cows, and ability to recognize injured cows.”

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 1982 and to currently employ six workers. On the ETA Form 9089, part K, signed by the beneficiary on June 27, 2008, the beneficiary claimed to have begun working for the petitioner on June 28, 2004.

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

³ With the petitioner’s first motion to reopen, the petitioner submitted a job order, which stated the rate of pay as \$5.15 to \$6.00 per hour. The labor certification was certified at a wage rate of \$9.80 to \$11.00 per hour. The AAO notes that if this job order was used for the labor certification in question, the advertised wage on the job order is in conflict with the certified wage. See 20 C.F.R. § 656.17(f)(5). Additionally, we would note that the job order refers to the employer as [REDACTED] which is identified on another page of the job order as the petitioner’s “site trade name.” In any further filings, the sole proprietor should submit evidence that the petitioner and [REDACTED] are the same company operating under the same tax identification number or other evidence that [REDACTED] is a trade name, alias, or d/b/a.

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. The petitioner submitted a letter stating that the beneficiary has been employed since the age of 15, but that no Forms W-2 or paystubs were issued before April 12, 2009 because the beneficiary was an apprentice to the farm while a high school student. In the instant case, the petitioner submitted the following paystubs:

- The 2009 paystubs stated that the petitioner paid the beneficiary \$4,525.43 through July 3, 2009.⁴
- The 2008 paystubs stated that the petitioner paid the beneficiary \$981 through May 17, 2008.

Although the petitioner is not required to pay the proffered wage until the time of the beneficiary's adjustment to permanent residence, the petitioner explained that the beneficiary is paid at the rate of \$9.00, which is less than the certified rate of \$9.80 to \$11.00 per hour. As the amounts paid to the beneficiary were less than the proffered wage, the petitioner must submit evidence of its ability to pay the difference between the proffered wage and the actual wages paid, which in 2009 is \$15,859 and in 2008 is \$19,403 (upon resolution of the discrepancies noted below).

⁴ The petitioner submitted a paystub dated April 24, 2009 for the pay period June 28, 2009 to July 11, 2009. It is unclear why the petitioner would pay the beneficiary for work to be completed two months later when its usual practice was to pay the beneficiary for work done the previous week. The petitioner also submitted a pay stub with pay date of February 20, 2009 for work done May 4, 2008 to May 17, 2008. It is unclear why the petitioner did not pay the beneficiary in a more timely fashion as was its usual practice. In the letter dated August 4, 2009, the petitioner stated that an accounting error was made on the pay stubs so that an incorrect "year to date" wage is reflected. In any further filings, the petitioner should submit the beneficiary's Forms W-2 or Forms 1099 to verify wages paid and explain these discrepancies. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Additionally, the AAO notes that the pay stubs and the sole proprietor's tax returns do not contain the petitioner's FEIN to verify that the petition, wages paid, and tax returns all belong to the same entity rather than separately structured entities. In any further filings, the petitioner must address this issue.

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, 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.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

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 petitioner submitted tax information for 2008, which reflects that he has a spouse.⁵

Tax Return for Year:	Sole Proprietor's AGI (1040)	Petitioner's Farm Income (Schedule F)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2008 ⁶	-\$158,626	\$1,373,020	\$183,389	-\$194,388

We will consider a sole proprietor's total income or AGI, reflected on the Form 1040 as a whole. See *Ubeda*, 539 F.Supp. 647. Only on appeal, after two denied motions to reopen did the petitioner submit a letter stating that the average monthly household expenses are \$1,440 (\$17,280 per year).⁷

⁵ The petitioner also submitted a tax return for 2007, but as that tax return covers a period of time prior to the priority date, it will be considered only generally.

⁶ It is unclear that the tax form submitted is complete. From the return in the record, it appears that the petitioner takes an itemized deduction, but no corresponding schedule was submitted. In any further filings, the petitioner should submit a complete copy of its tax return.

⁷ The director noted in both decisions denying the petitioner's motions to reopen that the petitioner failed to submit a list of household expenses. The sole proprietor's list of household expenses does not seem to be complete as no expenses were indicated for mortgage/rent, homeowners' insurance, gas, telephone, or possibly cable. As a result, it is not clear that the statement submitted is complete and accurate. In any further filings, the petitioner must address this issue. "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

USCIS electronic records show that the petitioner filed three other Form I-140 petitions which have been pending during the time period relevant to the instant petition.⁸ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2). The other petitions were submitted by the petitioner in December 2007, March 2008, and April 2008 (two of the three have January 2008 priority dates, the other priority date is not clear). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. In 2008, the sole proprietor's AGI was negative, which is incapable of demonstrating the ability to pay the proffered wage for this beneficiary alone, let alone other beneficiaries as well.

Additionally, 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 (BIA 1967). 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

to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁸ The director noted in his March 30, 2009 decision that the petitioner sponsored other workers and that the petitioner must establish its ability to pay all of its sponsored workers.

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.

The record does not contain any evidence of the sole proprietor's readily liquefiable cash assets, which might be used to support himself and his spouse or to pay the multiple sponsored workers such as personal bank statements, certificates of deposits or money market accounts (monthly statements from the priority date onward) to verify the availability of cash assets. In the instant case, the tax returns in the record indicate that the petitioner's AGI was \$72,363 in 2007 (before the priority date) and -\$158,626 in 2008 and the household expenses, which appear to be an incomplete estimate, exceeded the petitioner's negative AGI in 2008. The petitioner submitted no evidence to liken its situation to the one in *Sonegawa* including evidence of its reputation, unusual expenses, or one off year. The petitioner stated that he paid off over \$300,000 in debt in 2008 as reflected on the tax return. The 2008 Form 982 "Reduction of Tax Attributes Due to Discharge of Indebtedness" does not state an amount discharged, but instead includes only a figure for "total amount of discharged indebtedness excluded from gross income" of \$3,846. We note that the petitioner checked a box stating that the discharge of indebtedness was due to insolvency ("not in a Title 11 case"). Line 34a refers to "Statement # 1" for a farm expense of \$316,717 on Schedule F, which corresponds to a number of "old bills," according to the petitioner, that also appear as costs on the 2007 tax return. The petitioner submitted no evidence to show that these were expenses out of the normal course of its business or other costs to liken its situation to the one in *Sonegawa*. Instead, the costs demonstrate a consistent debt obligation. In addition, the petitioner sponsored three other workers during this time and nothing demonstrates the petitioner's ability to pay for all of the sponsored workers.

On appeal, the petitioner stated that the wages paid on its tax returns were more than the proffered wage for the four sponsored workers thus demonstrating his ability to pay all four sponsored workers their proffered wages. The petitioner submitted no evidence in the form of W-2 statements or Forms 1099 to show that the four sponsored workers' wages were included in the wages reported on the tax return. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary or other sponsored workers at the priority date of the petition and continuing to the present. In any further filings, the petitioner would need to submit clear evidence of the respective proffered wages of each beneficiary and evidence of wages paid to each sponsored worker from each respective priority date onward to demonstrate the petitioner's ability to pay. As a result, we are unable to conclude that the petitioner paid the proffered wage or in excess of the proffered wage to any or all of the sponsored workers. 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)). 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.

Additionally, the petitioner failed to establish that the beneficiary had the required special skills by the time of the priority date. An application or petition that fails to comply with the technical

requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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) (noting that the AAO conducts appellate review on a *de novo* basis). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Regarding the beneficiary's qualifications for the position, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies that:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received.

ETA Form 9089, Section H, block 14 requires the "assist[ing] in birthing process for bovines, ability to identify sick cows, and ability to recognize injured cows." Here, the petitioner failed to submit evidence that the beneficiary possessed these specific skills by the priority date. In any further filings, the petitioner should submit evidence that the beneficiary possessed these specific skills prior to the priority date.

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.