

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

B6

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

JAN 28 2011

Petition:

Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 private household. It seeks to employ the beneficiary permanently in the United States as a child monitor. 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 and also pay its yearly household expenses. 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 18, 2010 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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 Form ETA 750, Application for Alien 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 Form ETA 750, 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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$9.61¹ an hour, or \$19,988.80 per year. The Form ETA 750 states that the position requires no prior work experience as a child monitor.

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

On appeal, counsel submits a letter from the petitioner dated April 19, 2010. [REDACTED] notes that the W-2 Form issued to the beneficiary for 2008 was for the period January 10, 2008 to the end of the year. [REDACTED] states that the beneficiary did not work for her until January 10, 2008, and that at the proffered wage of \$10.73 an hour, the beneficiary's wages for 2008 were \$19,527.52. [REDACTED] also states that in tax year 2008 she and her husband received a total of \$500,000 from three sources with which they covered the balance of their expenses in addition to her spouse's wages. [REDACTED] submits three documents dated April 16, 2010 and described as certifications, to the record.

The first certification, signed by [REDACTED] states that from 2000 to 2009, [REDACTED] bequeathed to her daughter, [REDACTED] yearly gift of \$100,000. [REDACTED] states that she intends to continue such gifts to her daughter as long as she is capable.

The second certification is signed by [REDACTED] and states that the corporation in February 2008 extended a \$150,000 personal loan to [REDACTED], the corporation's president and chairman of the board, against his receivables from the company.

The third certification is signed by [REDACTED] states that he has granted several zero-interest personal loans to his son, [REDACTED], and identifies seven loans of varying amounts provided between May 2008 and November 2008 that total \$250,000. [REDACTED] states that the loans are due and demandable ten years after May 2008.

Other relevant evidence includes the petitioner's tax returns, Forms 1040, U.S. Individual Income Tax Return, for tax years 2006 and 2007 submitted with the I-140 petition. In response to the director's RFE dated December 14, 2009, the petitioner also submitted its tax returns for tax years

¹ The original rate of pay on the certified ETA Form 750 was \$8.82 an hour. This rate changes is one of several corrections made to the original ETA Form 750 and approved by DOL on either October 12, 2006 or April 19, 2007. Other amendments included amending the job duties and the required education and prior experience in the job.

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).

2001, 2002, 2003, 2004, 2005 and 2008, as well as the beneficiary's W-2 Form for 2008. This document indicates the petitioner paid the beneficiary \$19,543.68.

The petitioner also submitted an extensively documented list of monthly household expenses totaling \$62,447.35. Evidence in support of the itemized list was primarily dated 2010, with some submissions dated 2008 or 2009. As the director noted in his decision, based on this documentation, the petitioner's yearly household expenses are \$749,368.20.

The petitioner also submitted copies of her Citigold checking and savings account statements for October, November and December 2009. The December statement indicates a balance of \$54,557.86 in combined checking and money market funds. The petitioner also submitted copy of a January 18, 2010 balance for a Citibank checking, savings, and investments account that indicated the sum of \$119,570.36 Philippines pesos on deposit, and savings of \$2,637,073.34 Philippines pesos.³ There is no other relevant evidence found in the record.

The petitioner is a private household and the petitioner's tax returns indicate that her spouse earns his wages in foreign income. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to work for the petitioner from August 1992 until the date she signed the ETA Form 750.⁴

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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. In the instant case, the petitioner states that the

³ Based on exchange rates at the website XE.com, available as of January 12, 2011, these two figures are comparable to \$2,709 and \$59,765.59 U.S. dollars.

⁴ The beneficiary's Form G-325A, Biographic Information, signed by her on July 5, 2007 and submitted to the record with her Form I-485 Application to Adjust Status, also indicates that she worked for the petitioner since August 1992, and lived in the petitioner's house in San Francisco since April 1996.

beneficiary only began to work for her in January 2008, while the record contains evidence that the beneficiary has worked for the petitioner since 1992. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."

The record only contains the beneficiary's 2008 W-2 Form that indicates the petitioner paid the beneficiary \$19,543.68. The petitioner submitted no other evidence, such as Forms 1099-MISC, or pay stubs to establish any other wages paid to the beneficiary as of the 2001 priority date and through tax year 2007. Thus, the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2007, and the difference between the beneficiary's actual wages and the proffered wage in tax year 2008.⁵

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 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).

A private household is analytically similar to 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 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). Thus, the AAO will consider the personal assets of the petitioner in this case.

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

⁵ The AAO notes that on appeal the petitioner references a different hourly pay rate of \$10.73 on appeal. That is not found on the amended original ETA Form 750. As stated previously, the hourly rate of pay is \$9.61.

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 supports a family of nine in tax years 2003 to 2005, a family of eight in tax years 2006 and 2007, and a family of seven in 2008.⁶ The petitioner's tax returns reflect the following information for the following years:

Petitioner's adjusted gross income:	2001	2002	2003	2004
	\$29,578 ⁷	\$26,945	\$24,178	\$37,327
	2005	2006	2007	2008
	-\$65,441	\$243,022	\$306,500	\$143,531

In all relevant tax years except tax year 2005, the petitioner's adjusted gross income covers the proffered wage of \$20,000. However, as the director noted, the petitioner was requested to submit a list of monthly expenses to establish that it could both pay the proffered wage and cover its household yearly expenses. As previously stated, the petitioner's documented yearly expenses are \$749,368.20. In none of the tax years examined, is the petitioner's adjusted gross income sufficient to pay the proffered wage and the petitioner's yearly household expenses.

On appeal, counsel asserts that the petitioner has sufficient funds to pay the proffered wage. On appeal, the petitioner submits evidence of further financial assets to the record. The AAO notes that although the petitioner submits three certifications to explain the provision of \$100,000 from her mother in tax year 2008; \$250,000 in zero-interest loans from her husband's father in tax year 2008, and \$150,000 in February 2008 from the petitioner's husband's business, the documentation submitted to the record is not sufficient to establish that the petitioner actually received these funds. Of more probative weight would be evidence of the receipts of the claimed additional financial assets into the petitioner's financial accounts.

⁶ The petitioner's tax return transcripts for tax years 2001 and 2002 do not indicate number of dependents. For purposes of these proceedings, the AAO presumes that the petitioner had nine dependents, two adults and seven children, in these two years.

⁷ The petitioner's adjusted gross income for tax years 2001 and 2002 are taken from Internet generated IRS Tax Return Transcripts requested by the petitioner on January 15, 2010. Only adjusted gross income is indicated on these transcripts. The petitioner's adjusted gross income for the remaining tax years are taken from either line 34, 36, or 37 of the respective Forms 1040.

Further, the claimed additional financial assets for tax year 2008 from the petitioner's family members or her spouse's business, in combination with the petitioner's adjusted gross income for tax year 2008 total \$643,531, \$105,837 less than the documented yearly expenses of \$749,368. As stated previously, the petitioner's banking and savings account statement submitted to the record are for tax year 2009, and thus do not establish that the funds represented in the statements were available for the petitioner in tax year 2008. Thus, the petitioner has not established its ability to pay the proffered wage and its yearly household expenses in 2008.

With regard to tax years 2001 to 2007, the evidence submitted on appeal only reflects one additional source of funding during tax years 2001 to 2008, the additional yearly \$100,000 gift from the petitioner's mother. Even if the receipt of this annual gift were established clearly in the record, this sum alone is not sufficient to pay both the proffered wage and the petitioner's yearly household expenses during tax years 2001 to 2008. A petitioner must establish the elements for the approval of the petition at the time of filing. 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).

The AAO also notes that the petitioner's banking and savings accounts do demonstrate additional funds available to pay the yearly household expenses and the proffered wage. However, the records submitted to the record are primarily for tax year 2009 and cannot be utilized to establish the petitioner's ability to pay both the proffered wage and its household expenses in tax years 2001 through 2007.

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 [REDACTED] 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 is a private household, with foreign income and family loans being the primary source of revenue to support a household of seven to nine individuals. The record reflects that the beneficiary has worked for the petitioner for many years, with no evidence submitted to the record of any wages earned other than those earned in 2008. The record does not contain any further evidence regarding the totality of the circumstances in this individual case. Thus, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

With regard to the realistic nature of the job offer, the AAO would also note that the proffered position as certified in 2007 is for a child monitor, and that the record indicates that the beneficiary has worked for the petitioner since 1992, or for eighteen years. Even though the petitioner's tax return for 2008 reflects five children as dependents, the AAO would question whether the job duties of child monitor are still reflective of the actual work duties performed by the beneficiary.

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.