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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]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 0 2 2011

IN RE: Petitioner: Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual who owns a landscaping business. The business seeks to employ the beneficiary permanently in the United States as a landscaper. 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 May 17, 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 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 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 for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage set by the DOL, as stated on the Form ETA 750, is $8.13 per hour or $16,910.40 per year.

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]

To show that the petitioner has the ability to pay $8.13 per hour or $16,910.40 per year beginning from April 30, 2001, it submitted copies of the following evidence:

- Individual tax returns of which he filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2008;
- A list of monthly recurring household expenses;
- Copies of bank statements issued in various months of 2008, 2009, and 2010;
- An affidavit from stating he has been employing the beneficiary continuously since May 1988 and paying $8.13/hour in cash;
- An affidavit from z stating that she is the daughter of and that she has been renting from her father and paying him $1,200/month; and
- A copy of the grant deed for the property located at 4

The evidence in the record of proceeding shows that the petitioning business is structured as a sole proprietorship, in which is the sole proprietor of the business.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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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 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).

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 only evidence submitted here to prove that the beneficiary was paid and employed by the petitioner is a sworn statement from in which he states that he has employed the beneficiary full-time, 40 hours per week, and paid him $8.13 per hour in cash since May 1988. He also states he has no Form W-2 or Form 1099-MISC issued to the beneficiary. On appeal, counsel asserts that the payments to the beneficiary are reflected on the petitioner's individual tax returns, at its schedules C, under "casual labor."

A review of the petitioner's tax returns, however, reveals that the petitioner only spent somewhere between $4,250 per year and $12,600 per year on casual labor from 2001 to 2008. These amounts are below the beneficiary's wage of $8.13 per hour or $16,910.40 per year. It is not clear how much of those amounts, if any, the beneficiary received from the petitioner between 2001 and 2008, or how many laborers other than the beneficiary were employed by the petitioner during that time period. On the Form I-140, the petitioner states that his business was established in 1991 and that he currently employs two people. Further, the record contains no other documentation such as payroll, accounting, or personnel records or any other evidence indicating employment or payment by the petitioner to the beneficiary at any time before or after April 30, 2001.

While counsel is correct that the regulation at 8 C.F.R. § 204.5(g)(2) allows the petitioner to submit and the director to accept "other evidence which may be used to determine whether the petitioner has the ability to pay the proffered wage," a sworn statement which is inconsistent with other evidence cannot be used to demonstrate that the petitioner employed the beneficiary and paid the proffered wage. The petitioner's figures for casual labor reported on schedules C do not match what the petitioner says it paid to the beneficiary in the sworn statement; thus the veracity of the sworn statement is called into question. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.* Further, 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)).

When 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).

The petitioner, as noted earlier, 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.

Based on the tax returns submitted, the petitioner in this case is married and has two dependent children. On August 21, 2009 the director the petitioner, a request for evidence (RFE), in which he was advised to send, among other things, a list of his monthly recurring household expenses including mortgage payments, automobile payments, installment loans, credit card payments, and household expenses, such as utilities, gas, insurance, food, medication, and so forth.

In response, provided the director with a list of his monthly living expenses as of September 17, 2009, in which he listed the following expenses:

Car insurance	$167
Credit cards	$400
Water	$45
Food	$800
Electricity	$80
Gas	$50
Mortgage	$2,457.49
Cable TV	$70

Cell phone	$500
Insurance	$47.75
Taxes (property)	$196.39
Gas (auto)	$100
Trash collection	$80
Car maintenance, clothes, and household supplies	$300
Total expenses/month	$5,293.63
Annual expenses ($5,293.63 multiplied by 12 months)	$63,523.56

A review of tax returns reveals the following information about his gross income during the qualifying period, from 2001 to 2008, and his ability to pay the beneficiary's wage:

Tax Year	Adjusted Gross Income (AGI)	Annual Household Expenses[2]	AGI less Annual Household Expenses	The Proffered Wage per year (PW/year)
2001 (line 33, Form 1040)	$26,404	$63,523.56	($37,119.56)	$16,910.40
2002 (line 35, Form 1040)	$26,376	$63,523.56	($37,147.56)	$16,910.40
2003 (line 34, Form 1040)	$24,772	$63,523.56	($38,751.56)	$16,910.40
2004 (line 36, Form 1040)	$29,260	$63,523.56	($34,263.56)	$16,910.40
2005 (line 37, Form 1040)	$51,426	$63,523.56	($12,097.56)	$16,910.40
2006 (line 37, Form 1040)	$24,450	$63,523.56	($39,073.56)	$16,910.40
2007 (line 37, Form 1040)	$39,711	$63,523.56	($23,812.56)	$16,910.40
2008 (line 37, Form 1040)	$34,858	$63,523.56	($28,665.56)	$16,910.40

Based on the table above, the petitioner would not have available funds to pay the beneficiary's wage of $16,910.40 after he deducted his annual household expenses from his gross income. Therefore, the AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage beginning on the priority date.

On appeal, counsel for the petitioner states that owns real property, which he purchased, outright, in 1988, and that the balance owed on that property is $49,398.04. Copies of the grant deed and the real property tax information for the year 2010 from are in the record.[3]

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[2] The director requested in the RFE that the petitioner submit a list of recurring household expenses. In reply, the petitioner submitted a list of household expenses titled March 2008. Absent evidence to the contrary, the AAO will accept and utilize this response as the petitioner's list of recurring expenses.

[3] The tax records indicate that the sole proprietor acquired the property on November 18, 1988 and that it is his principal residence.

We decline to accept this evidence of the petitioner's ability to pay. Real property such as the residence in this case is not readily convertible into cash. In addition, it is unlikely that would sell his home to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, counsel also indicates that receives rental income of $1,200 per month from his daughter, claims in her sworn statement she has been renting from her father for the last six years.

individual tax returns, however, do not reflect that he has been receiving rental income for the last six years. The records include no tangible documentation such as rent receipts, copies of checks payable for rent, or other evidence to support ' assertions. As noted earlier, we cannot accept a witness statement as reliable that is in conflict with other documentation. In this case, the petitioner's tax returns are inconsistent with statement in that he does not report the income on his returns. Thus, the veracity of assertions are in question. *See Matter of Ho, id.* Further, no evidence of record resolves the inconsistencies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici, id.*

On appeal, counsel claims that the petitioner has been in a competitive business for at least twenty years. Additionally, the petitioner has provided bank statements showing that he deposited $5,674.16 per month on the average between March 2008 and August 2010, with the highest deposit being $19,150. Counsel contends that the petitioner's net income alone is not indicative of his ability to pay the proffered wage from the priority date.

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 (BIA 1967). 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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth of the petitioner. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating [redacted] accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially between 2001 and 2008, had uncharacteristically substantial expenditures. The bank statements submitted are incomplete; the petitioner only submitted partial statements covering some months in 2008, 2009, and 2010. It is true that in some months the petitioner deposited significantly more than other months, but overall the bank statements only show the balance in an account on a given date, and do not show the sustainable ability to pay the proffered wage throughout the qualifying period. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not represent the petitioner's actual ability to pay the proffered wage from the priority date.

The AAO acknowledges that the petitioner has a viable business. The business' gross receipts have steadily increased since 2001. However, the issue here is whether the petitioner has the ability to pay $8.13/hour or $16,910.40/year as of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. 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, the AAO is not persuaded that the petitioner has that ability.

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.