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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

[Redacted]

B6

DATE: JUL 02 2012

OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Taekwondo training center. It seeks to employ the beneficiary permanently in the United States as a Taekwondo Trainer (Master). 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 February 25, 2009 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)(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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on July 27, 2004. The proffered wage as stated on the Form ETA 750 is \$9.04 per hour (\$18,803.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of education or experience in Taekwondo and Section 15 states the other special requirements as “a minimum level of 4-dan (4th degree)” as certified by a Taekwondo organization.

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

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 1990 and states that it does not employ any workers.² On the Form ETA 750B, signed by the beneficiary on July 16, 2004, the beneficiary did not claim to have worked for the petitioner.

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’l Comm’r 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

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).

² The position offered must be for a permanent and full-time employment. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg’l. Mngm’t., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner must establish that the position is a realistic job offer from the priority date onward. The petitioner’s statement that it employs no workers, combined with the lack of any wages paid, or costs of labor on the sole proprietor’s Forms 1040, Schedule C, for all relevant years calls into question whether the position is a *bona fide* job offer for full-time employment. The petitioner must establish this in any further filings. 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).

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 has not established that it employed and paid the beneficiary the full proffered wage or any wages from the priority date in 2004 onwards.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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'r 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. See *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 petitioner 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 sole proprietor supports a family of four. The record contains a statement of the sole proprietor's estimated monthly expenses totaling \$3,370.00 (\$40,440.00 annually).³ The proprietor's tax returns reflect the following information for the following years:

Tax Year	Sole Proprietor's Adjusted Gross Income (AGI) ⁴
2004	\$35,106.00
2005	\$35,743.00
2006	\$39,061.00
2007	\$36,552.00

In 2004, 2005, 2006, and 2007, the sole proprietor's adjusted gross income is not sufficient to cover his family's yearly expenses of \$40,440 as well as the proffered wage of \$18,803.20.

The record contains unaudited personal financial statements for the sole proprietor prepared by [REDACTED] for 2004, 2005, 2006, 2007, and 2008. On appeal, counsel states that these financial statements demonstrate that the sole proprietor's net current assets exceed the proffered wage for all years at issue. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. *Unaudited financial statements are the representations of management.* The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Additionally, those statements list a number of personal assets, jewelry, watches, musical instruments, with no indication of how the estimated value was determined and the petitioner submitted no documentation in support of this. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

³ The petitioner submitted this monthly expense statement in response to the director's request for evidence (RFE) dated January 12, 2009. It is unclear to which years the petitioner intended this statement to apply. The statement of expenses lists no automobile payment. However, statements related to the sole proprietor's assets list an auto loan for 2004, 2005, 2006, and 2007, which calls into question the petitioner's self-estimate. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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). The petitioner should resolve this issue in any further filings.

⁴ The AGI is found on Form 1040, line 36 for 2004 and line 37 for 2005, 2006, and 2007.

On appeal, counsel asserts that the sole proprietor's bank statements show consistent balances over the proffered wages. The record contains the sole proprietor's savings account statements with Nara Bank from the date it opened on May 15, 2006 through December 2008 as well as a letter from Nara Bank listing the account balance on January 23, 2009.⁵ Because this account was opened approximately two years after the priority date, this would not establish the petitioner's ability to pay the proffered wage from the July 27, 2004 priority date onward.⁶

Counsel also states on appeal that the sole proprietor's total income on line 22 of Form 1040 should be used instead of AGI. Counsel states that the total income amount of \$43,751 for 2006 is higher than the sole proprietor's expenses of \$40,440. However, even if USCIS uses total income instead of AGI,⁷ which it does not accept, the difference between the total income and the sole proprietor's personal expenses is still insufficient to pay the proffered wage of \$18,803.20.⁸

The record contains a property deed of vacant land that the sole proprietor and his wife own as joint tenants,⁹ an escrow and substitution of buyer statement stating a sales price of \$49,000.00 for this

⁵ It is unclear why the record contains a letter dated May 25, 2006 from Nara Bank listing the sole proprietor's savings account balance as being \$67,251.14 and another bank statement with the same account number showing that the balance between May 15, 2006 to May 31, 2006 did not exceed \$20,032.60. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

⁶ As in the instant case, where the petitioner has not established its ability to pay both the proffered wage and personal expenses in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage (and remainder personal expenses). Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage (to include funds for remainder personal expenses). If the petitioner seeks to rely on bank account statements, it should submit evidence of cash assets for 2004, the year of the priority date, all of 2005, and all of 2006 in any future filings. The sole proprietor would also need to resolve the issue related to its estimated personal expenses noted above, and establish that it could pay the remainder of its personal expenses (in addition to the full proffered wage) as the AGI reported was insufficient to cover all the estimated personal expenses alone (without even consideration of the proffered wage).

⁷ AGI is based on total income reduced by allowed relevant deductions.

⁸ Using total income instead of AGI is a minimal difference of \$3,961 in 2004; \$4,335 in 2005; \$4,690 in 2006; and \$4,069 in 2007. Thus, even if total income could be used instead of AGI, these amounts are insufficient to establish the petitioner's ability to pay the proffered wage in addition to the sole proprietor's estimated expenses.

⁹ The escrow indicates that the sole proprietor and his wife took title to the above-referenced land "subject to" an existing Deed of Trust of record," but the grant deed and the 2008 property tax

property, and a car registration card demonstrating that the sole proprietor's wife owns a 1994 Lexus. However, these types of property do not constitute readily liquefiable assets, and there is nothing in the record that suggests the value of any such assets, or that the sole proprietor or his wife would be willing to sell the property to pay the beneficiary's wage.

The record also contains a "Seller Final Closing Statement," dated March 26, 2004, in which the sole proprietor is listed as the seller of property in San Pedro, California with net proceeds totaling \$109,308.74. The record also contains a "Buyer's Final Settlement Statement," dated March 29, 2004, listing the sole proprietor as the buyer of property in Rancho Palos Verdes, California, in which \$109,308.74 was wire transferred to the seller. Similarly to the property listed above, this is not a readily liquefiable asset that may be used as evidence of the petitioner's ability to pay the proffered wage. The funds the sole proprietor received from selling the first property were immediately transferred to buy the second property. There is no other evidence in the record demonstrating how these funds were reported on the sole proprietor's tax returns. Therefore, these transactions are insufficient to demonstrate the petitioner's ability to pay the proffered wage from the priority date onward.¹⁰

documentation does not reference this. Thus, even if this evidence could be used to demonstrate the petitioner's ability to pay the proffered wage, it is unclear that the sole proprietor and his wife have full ownership rights of this property. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

¹⁰ The petitioner seems to view the value of the property as "additional resources" from which the petitioner asserts it can pay the proffered wage similar to an equity line. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, lines of credit, or similarly, an equity line. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

A line of credit or equity line is a "commitment to loan" and not an existent loan. A petitioner must establish that unused funds from a line of credit are available at the time of filing the petition. Nothing in the record shows that the petitioner had an available credit, or equity line, in 2004. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit or equity line cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit or an equity line as evidence of ability to pay, the

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 (Reg'l Comm'r 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 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 has not demonstrated any unexpected business losses or any evidence of its historic growth. The petitioner states on the Form I-140 that it was established in 1990 and did not employ anyone (as of June 2007). There is not any evidence in the record of the petitioner's reputation in the industry. 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.

petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit or equity line will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).