



U.S. Citizenship  
and Immigration  
Services



B6

Date: **OCT 10 2012** Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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.

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. It 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 denied the petition, finding that the petitioner failed to establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, 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 March 8, 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)(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 at 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 filed and accepted for processing by DOL on April 30, 2001. The rate of pay or the proffered wage set forth by the DOL is \$11.04 per hour or \$22,963.20 per year. The Form ETA 750 also indicates that the position requires two years of work experience in the job offered.

To demonstrate that the petitioner has the continuing ability to pay \$11.04 per hour or \$22,963.20 per year from April 30, 2001 until the beneficiary obtains lawful permanent residence, the petitioner submitted copies of the following evidence:

- [REDACTED] Individual Income Tax Returns filed on Forms 1040 for the years 2001 through 2008;
- [REDACTED] estimated expenses per month for 2008;
- The beneficiary's Forms W-2 Wage and Tax Statement for the years 2001 and 2002;
- A form W-2 of [REDACTED] for 2003; and
- The business' bank statements from 2002 to 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a [REDACTED] [REDACTED] is the [REDACTED] On the Form I-140 petition, [REDACTED] Penticoff claimed to have initially established the business in 1999, to currently employ six workers, and to have a gross annual income of \$369,689.

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.<sup>1</sup>

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

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<sup>1</sup> 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).

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.

Based on the evidence submitted, the beneficiary received the following wages from the petitioner in 2001 and 2002 (all in \$):

<i>Tax Year</i>	<i>Actual wage (AW) (Box I, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2001	24,140	22,963.20	Exceeds the PW
2002	20,130	22,963.20	(2,833.20)

Therefore, the petitioner has established the ability to pay the proffered wage in 2001, but not in 2002, 2003, and thereon until the beneficiary receives his lawful permanent residence. The AAO cannot consider the Form W-2 for 2003 since it does not appear that the 2003 Form W-2 was issued to the beneficiary. We note the recipient's social security, name, and address included on that 2003 Form W-2 are different from the social security, name and address included on the Forms W-2 issued to the beneficiary in 2001 and 2002.<sup>2</sup>

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to show that it can pay \$2,833.20 in 2002 and the full proffered wage of \$22,963.20/year from 2003 until the beneficiary obtains lawful permanent residence.

When the petitioner does not establish that it employed or paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco*

<sup>2</sup> The beneficiary's name is [REDACTED]. The social security, name, and address listed on the Forms W-2 for 2001 and 2002 are: [REDACTED] Houston, TX; respectively. The social security, name, and address listed on the Form W-2 for 2003 are: [REDACTED] and [REDACTED] Houston, TX; respectively. It is not clear whether [REDACTED] with the social security number [REDACTED] and [REDACTED] with the social security number [REDACTED] are one and the same person. The record contains no evidence to demonstrate that they are one and the same person.

*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, as noted earlier, is structured as a sole proprietorship. Sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two (spouse and one dependent child). In response to the Request for Evidence dated January 13, 2010 (2010 RFE), the petitioner presented his monthly household expenses in 2008 as follows:

Mortgage/Rent	\$	1,425
Utilities	\$	500
Food	\$	500
Car Payment	\$	421
Insurance	\$	348
Credit Cards	\$	1,200
Entertainment	\$	100
Educational Expenses	\$	-
Clothing	\$	100
Other	\$	100
Total monthly household expenses	\$	<u>4,694 (56,328 per year)</u>

The table below shows the following information about the petitioner's gross adjusted income (AGI) and ability to pay the beneficiary's wage (all in \$):

Tax Year	The Petitioner's AGI	Annual Household Expenses	Net Income (AGI less Annual Household Expenses)	AW minus PW
2002	90,325	56,328	33,997	2,833.20
2003	66,108	56,328	9,780	22,963.20
2004	73,812	56,328	17,484	22,963.20
2005	35,037	56,328	(21,291)	22,963.20
2006	48,742	56,328	(7,586)	22,963.20
2007	113,678	56,328	57,350	22,963.20
2008	123,171	56,328	66,843	22,963.20

The net income (AGI less Annual Household Expenses) for the years 2003, 2004, 2005, and 2006 is less than the difference between the beneficiary's actual wage and the proffered wage; therefore, the petitioner did not have the ability to pay in those years.

On appeal, counsel asserts that the petitioner has sufficient funds in the bank to pay the difference between the actual wage and the proffered wage. Copies of the petitioner's bank statements submitted show the following balances for the years 2003-2006 (all in \$):

	Average Balance	AW minus PW
2003	6,311.39	22,963.20
2004	6,312.75	22,963.20
2005	7,620.52	22,963.20
2006	8,026.90	22,963.20

The average balances of the petitioner's bank statements from 2003 to 2006 are all less than the difference between the actual wage and the proffered wage. The petitioner did not have sufficient liquid funds in the bank to cover the beneficiary's proffered wage.

On appeal, counsel states that depreciation should not be included in calculating the petitioner's net income.

The AAO declines to accept counsel's statement as persuasive, as the court in *River Street Donuts* has held that depreciation represents an actual cost of doing business – "a real expense" – and thus, it should not be added back to boost or reduce the company's net income or loss. *River Street Donuts* at 118.

Finally, 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. 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 record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage particularly from 2003 to 2006. Unlike *Sonogawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1999. 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 the business' accomplishments.

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. 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. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.