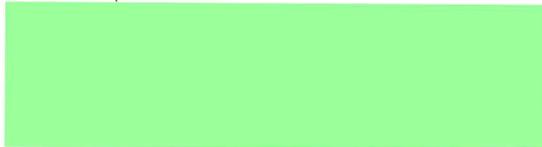


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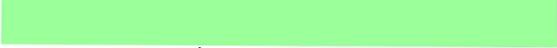


U.S. Citizenship
and Immigration
Services



Date: Office: NEBRASKA SERVICE CENTER FILE: 

APR 05 2013

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.

Ron Rosenberg
Acting 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 an individual who owns a landscaping gardening business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 October 30, 2007 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.

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

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

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).

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 January 9, 1998. The rate of pay or the proffered wage set forth by the DOL is \$17.36 per hour or \$36,108.80 per year (based on a 40-hour per week work schedule). The Form ETA 750 also indicates that the position requires two years of work experience in the job offered. The petitioner in this case is a sole proprietor. [REDACTED] is the sole proprietor.

To demonstrate that the petitioner has the ability to pay the proffered wage from January 9, 1998 onwards, the petitioner submitted copies of the following evidence:

- The sole proprietor's personal tax returns filed on the Internal Revenue Service (IRS) Form 1040 U.S. Individual Income Tax Returns for the years 1998 through 2006;
- IRS Forms W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 1996 through 1998;
- A copy of the sole proprietor's home equity line of credit monthly statement issued in December 2006;
- Some business bank account statements issued from 1998 to 2002;
- Copies of the mortgage documents regarding the sole proprietor's personal home showing that he borrowed \$208,000 to purchase the home;
- A copy of the title insurance policy on this house;
- A copy of the appraisal document of the sole proprietor's house showing the house is appraised at \$635,000 as of December 15, 2006;
- A letter dated January 29, 2007 from [REDACTED] stating that he agrees to engage the petitioner as his personal landscaper provided that the petitioner hires the beneficiary as the primary gardener responsible to maintain his eight-acre land, that he will pay the petitioner at least \$46,000 annually for the services provided, and that he is financially able to compensate the petitioner;
- A copy of [REDACTED] compensation package from [REDACTED] showing that his compensation not including stock awards in 2005 was in excess of \$10 million;
- A signed agreement between the petitioner and [REDACTED] indicating that [REDACTED] agrees to compensate the petitioner \$46,000 per year if the petitioner employs the beneficiary as the landscaper responsible to provide landscaping services to [REDACTED] and

- Copies of IRS Forms W-2 issued by [REDACTED] to the beneficiary for the years 2003 through 2005.

On the Form I-140 petition, the petitioner claimed to have established the business in 1985 and to currently have one employee.

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.

Based on the evidence submitted, the beneficiary received the following wages from the petitioner in 1998:²

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
1998	\$9,000	\$36,108.80	(\$27,108.80)

Therefore, the petitioner has not established that he paid the beneficiary the full proffered wage in 1998 or employed the beneficiary after 1998. The AAO cannot consider the wages that the beneficiary received from [REDACTED] in 2003, 2004, and 2005. [REDACTED] is not the petitioner in this case. He has no obligation to pay the beneficiary's proffered wage. The court in *Sitar v.*

² Under 8 C.F.R. § 204.5(g)(2), the petitioner is only required to demonstrate the ability to pay the proffered wage from the priority date (January 9, 1998). Therefore, the Forms W-2 for 1996 and 1997 will not be considered here since they were wages paid to the beneficiary before the priority date. They will be considered, however, when considering the totality of the circumstances affecting the petitioning business, if the evidence warrants such consideration.

Ashcroft, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

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 \$27,108.80 in 1998 and the full proffered wage of \$36,108.80/year from 1999 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 (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, 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 (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 sole proprietor supports a family of four (himself, his spouse, and two dependent children) in 1998 and 1999, three from 2000 to 2004 (minus one child), and two in

2005 and 2006 (minus the two children). The director issued a Notice of Intent to Deny (NOID) on July 16, 2007 advising the petitioner to submit a list of his monthly recurring household expenses, but he did not submit the list requested.

Absence the details of the petitioner's monthly recurring household expenses, the director assumed that the petitioner started to pay his monthly mortgage obligation from 1998 and deducted it from his adjusted gross income (AGI).³ The table below shows the details of the director's analysis with respect to the petitioner's ability to pay:

Tax Year	The Petitioner's AGI ⁴	Annual Mortgage Payment ⁵	Net Income (AGI less Annual Mortgage Payment)	Proffered Wage
1998	\$29,599	\$21,885.84	\$7,713.16	\$27,108.80
1999	\$24,878	\$21,885.84	\$2,992.16	\$36,108.80
2000	\$29,806	\$21,885.84	\$7,920.16	\$36,108.80
2001	\$31,584	\$21,885.84	\$9,698.16	\$36,108.80
2002	\$33,903	\$21,885.84	\$12,017.16	\$36,108.80
2003	\$35,151	\$21,885.84	\$13,265.16	\$36,108.80
2004	\$31,288	\$21,885.84	\$9,402.16	\$36,108.80
2005	\$18,565	\$21,885.84	(\$3,320.84)	\$36,108.80
2006	\$20,577	\$21,885.84	(\$1,308.84)	\$36,108.80

Hence, the director concluded that it is not realistic for the petitioner to be able to pay the beneficiary's proffered wage of \$36,108.80/year during any relevant timeframe including the period from the priority date in 1998 or subsequently. The AAO agrees.

On appeal and throughout these proceedings, counsel maintains that the petitioner has the ability to pay based on the *Sonegawa's* totality of the circumstances standard. Specifically, counsel

³ We note that the petitioner's house, according to the various mortgage documents submitted, was not purchased (closed) until March 30, 2000. If this is true, the petitioner would not have any mortgage payments in 1998 and 1999, but the petitioner or his counsel did not seem to object to the director's analysis above. In addition, if the petitioner did not have any mortgage payments before 2000, it is not clear what his monthly recurring household expenses would look like, since the petitioner has never submitted the list of his recurring household expenses. Unless otherwise disputed, we will deem such an assumption as reasonable.

⁴ The adjusted gross income on the IRS Form 1040 is found on line 33 (1998-02001), 35 (2002), 34 (2003), 36 (2004), and 37 (2005-2006).

⁵ The monthly mortgage payment according to one of the mortgage documents is \$1,823.82; thus, the annual mortgage payment is \$21,885.84.

asserts that the petitioner has the ability to pay the proffered wage through: (a) [REDACTED] promise to pay \$46,000 per year so long as the petitioner employs the beneficiary to provide landscaping services to [REDACTED]; (b) his ability to borrow money using the equity against his house market value; (c) the balances on his business bank account; and (d) the rental income received.

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 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.

Here, counsel contends on appeal that "if things work out [between the petitioner and [REDACTED]], the petitioner anticipates that the additional business [REDACTED] will give the petitioner would enable him to expand into other more lucrative opportunities in the upscale Greenwich market."

The promise by [REDACTED] to compensate the petitioner is merely a promise. It is not evidence of the petitioner's ability to pay, unless the record includes proofs showing that [REDACTED] pays the petitioner and that the beneficiary is employed by the petitioner, as agreed by both parties. A review of the entire record, however, does not show that the agreement was ever materialized by both parties. No evidence has been submitted that the beneficiary was employed by the petitioner after 1998.

On appeal, counsel states that the petitioner's home is currently appraised at \$635,000 (as of December 15, 2006) – an appreciation of about \$427,000 from the time the petitioner first purchased the house (the record shows he bought the house for \$208,000 in 2000). For this

reason, counsel contends that the petitioner was able to borrow money against his home equity to improve his business. Based on the copy of the petitioner's home equity line of credit monthly statement issued in December 2006, we note that the petitioner was extended a \$75,000 credit limit.

The AAO will not consider the petitioner's line of credit as evidence of the petitioner's ability to pay. We cannot accept a line of credit as evidence of the petitioner's ability to pay, unless the petitioner demonstrated that the line of credit or the loan was available at the time the petitioner filed the petition or that the line of credit would augment, instead of weaken, the petitioner's overall financial position. More specifically, if the petitioner chooses to rely on the line of credit as evidence of the ability to pay, it has to submit documentary evidence, such as a detailed business plan and audited cash flow statements, to show that the line of credit will augment the petitioner's overall financial position. The record contains no business plan or audited cash flow statement. Nor does it include evidence to show that the line of credit or the loan was available at the time of filing the petition (the line of credit was available in 2003). There is no indication in the record that the petitioner specifically borrowed money or obtained a line of credit to pay the beneficiary's wage. Thus, the petitioner's line of credit will not be considered as evidence of its ability to pay.

Fundamentally, we decline to accept the notion that the petitioner has significant home equity value that he can use to borrow money and pay the beneficiary's proffered wage. First, real property such as the one described in this case is not readily convertible into cash. In addition, it is unlikely that the sole proprietor will sell his personal 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 urges the AAO to consider the balances available on the business bank account and the rental income that the petitioner received every year. We are not persuaded that the petitioner has sufficient cash to pay the beneficiary's proffered wage. We note that the amounts available in the petitioner's bank account between 1998 and 2002 are not in excess of \$5,000. Similarly, the rental income of \$17,000 received per year is not sufficient to cover the beneficiary's proffered wage of \$36,108.80. Besides, we have already considered the rental income received when we use the petitioner's AGI as evidence of his ability to pay. The total figure reported on each of the Schedule E of the IRS Form 1040 (Supplemental Income and Loss) is included in calculating the petitioner's AGI. Absent further explanation and evidence, the rental income as shown on each of Schedule E of the petitioner's IRS Form 1040 does not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

In summary, unlike *Sonegawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1985. 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. Further, the record is devoid of any evidence showing unusual circumstances that would explain the petitioner's inability to pay the proffered wage during any of the relevant time period from the priority date.

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.