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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: MAY 03 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Elizabeth McCormack

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 an individual who owns a landscaping/gardening business. It seeks to employ the beneficiary permanently in the United States as a landscaper/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 determined that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's wage continuously from the priority date. Accordingly, the director denied the petition.

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 October 18, 2010 decision, the only 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 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 ETA Form 750 was accepted for processing by the Department of Labor (DOL) on April 25, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is $11.25 per hour, $450 per week, or $23,400 per year. The proffered position as a landscaper/gardener requires the applicant to have a minimum of a 10th grade education and three (3) months on-the-job training. The beneficiary claimed at part B of the Form ETA 750 that he finished 6th grade in 1986 and that he worked as a mannequin finisher at [redacted] from 1994 to 1995. The record also includes a letter dated April 20, 2001 from [redacted] stating that the beneficiary worked at [redacted] as a gardener from January 1999 to February 2001.

To show that the petitioner had the continuing ability to pay $450 per week or $23,400 per year, it submitted copies of the following relevant evidence:

- Mr. [redacted] individual tax returns filed on Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2008;
- A deed of trust and assignment of Mr. [redacted] personal home;
- A list of Mr. [redacted]' monthly household expenses showing a total of $2,488 recurring expenses per month or $29,856 per year;
- A letter from Chicago Title dated March 6, 2009 showing that Mr. and Mrs. [redacted] have an ownership interest in [redacted] – a timeshare vacation program;
- Various credit card statements issued to Mr. and Mrs. [redacted] in 2004 and 2009; and
- The beneficiary's Forms W-2 for 2008 and 2009.

Upon review of the evidence submitted, the director found that the petitioner (Mr. [redacted]) did not have sufficient net income or net current assets to pay the beneficiary's wage of $23,400/year from the priority date, specifically between 2001 and 2007.

On appeal, counsel maintains that the petitioner has the ability to pay the proffered wage from the priority date. More specifically, counsel contends that the director has failed to consider other evidence in the record such as the petitioner's real property, other investments, and his line of credit as evidence of the ability to pay.

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]

[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).

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship with Mr. [redacted] as the sole proprietor. On the Form I-140 petition, the petitioner claimed to have established his business in 1986, to currently employ three workers, and to have gross annual income and net annual income of $363,589 and $42,218, respectively.

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).

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 2008 and 2009:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2008	$34,680	$23,400	Exceeds PW
2009	$28,560	$23,400	Exceeds PW

Therefore, the petitioner has established that it has the ability to pay the proffered wage in both 2008 and 2009, but not in the years 2001 through 2007. 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 the full proffered wage of $23,400/year from 2001 to 2007.

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). 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 above, 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.

During the qualifying period, specifically between 2001 and 2004, Mr. [redacted] and his spouse filed joint tax returns and claimed three dependents. In 2005, 2006, and 2007, Mr. [redacted] and his spouse claimed one dependent in their tax returns. A review of the petitioner's tax returns reveals the following information about his adjusted gross income (AGI) and his ability to pay the beneficiary's wage, specifically in the years 2001 through 2007:

Tax Year	The Petitioner's Adjusted Gross Income (AGI)	The Annual Proffered Wage (PW)	Annual Household Expenses	AGI less Annual Household Expenses (Net Income)
2001 (line 33, Form 1040)	$2,450	$23,400	$29,856	($27,406)
2002 (line 35, Form 1040)	$14,107	$23,400	$29,856	($15,749)
2003 (line 34, Form 1040)	$16,468	$23,400	$29,856	($13,208)
2004 (line 36, Form 1040)	$12,817	$23,400	$29,856	($17,039)
2005 (line 37, Form 1040)	$23,912	$23,400	$29,856	($5,944)
2006 (line 37, Form 1040)	$43,224	$23,400	$29,856	$13,368
2007 (line 37, Form 1040)	$71,138	$23,400	$29,856	$41,282

Based on the table above, except in 2007, the petitioner would not have available funds to pay the beneficiary's salary of $23,400/year after he deducted his gross income by his annual household expenses. 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 and continuing until the beneficiary obtains lawful permanent residence, specifically from 2001 to 2006.

On appeal, counsel for the petitioner states that Mr. [redacted] has home and property interests and a deed of trust and assignment worth $23,975.75. In addition, the petitioner, according to counsel, has an ownership interest in the [redacted] worth $69,280. Copies of the home mortgage documents, deed of trust and assignment, and the letter certifying the petitioner's ownership in the [redacted] are included in the record.

We decline to accept these documents as evidence of the petitioner's ability to pay. Real property and a time share vacation program certificate such as the ones this case is not readily convertible into cash. In addition, it is unlikely that Mr. [redacted] would sell his personal home or his time share vacation certificate 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 that the AAO consider the petitioner's line of credit as evidence of its ability to pay.

The AAO will not consider the petitioner's line of credit as evidence of the petitioner's ability to pay. The director stated that USCIS could not 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, the director stated that if the petitioner chose to rely on the line of credit as evidence of the ability to pay, it had to submit documentary evidence, such as a detailed business plan and audited cash flow statements, to show that the line of credit would 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. 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.

In addition, counsel asserts on appeal that the director has failed to consider the income that will be generated by the employment of the beneficiary. Citing *Masonry Master, Inc. v. Thornburgh,* 875 F.2d 898 (D.C. Cir. 1989) in response to the director's request for evidence, counsel stated:

> Here, with the additional support of the beneficiary's employment, the employer will be able to more than support the offered wage and all associated costs. With

> the additional revenue that will be generated by the employment of the beneficiary, the employer will be able to simultaneously pay the offered wage and increase his revenue growth. The employer reasonably and conservatively expects to profit from the beneficiary's employment at a rate of two to three times the expected yearly wages. With the additional income generated from the employment of the beneficiary and the employer's personal assets, the employer will unequivocally be able to meet his financial obligations in this case.

Counsel's assertions are not persuasive. The AAO is not bound to follow the published decision of a United States district court. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[2] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an unskilled laborer – one with less than two years of experience or training – will significantly increase profits for the petitioner. The record does not include special qualifications, awards, or distinguished citations for the beneficiary. Simply stating the beneficiary will generate sufficient income for the petitioner to pay the beneficiary's proffered wage does not establish the reliability of the assertions and does not establish the petitioner's ability to pay the proffered wage. 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)). This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns.

Finally, USCIS may also 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

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[2] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

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. 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, 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 2006, had uncharacteristically substantial expenditures which prevented it from paying the beneficiary the proffered wage.

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 in the record, the AAO concludes that the petitioner does not have the ability to pay the salary offered as of the priority date and continuing to present. 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.