(b)(6)

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]

DATE: MAY 3 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (director). The petitioner subsequently filed a motion to reopen and motion to reconsider which were dismissed by the director as untimely filed. The petitioner then appealed this decision to the Administrative Appeals Office (AAO). Per 8 C.F.R. § 103.5(a)(1)(i), USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. On appeal, counsel asserts that the motion to reopen and the motion to reconsider were filed late for reasons beyond the petitioner's control. Counsel provides affidavits, phone records and medical records to support this assertion. The AAO finds that the late filing was indeed beyond the petitioner's control and will consider the appeal of the instant petition. The appeal will be dismissed.

The petitioner is a shipping/retail business. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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, 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on December 8, 2006. The proffered wage as stated on the ETA Form 9089 is $17.16 per hour ($35,692.80 per year). The ETA Form 9089 states that the position requires 24 months of experience in the proffered position or as an administrator.

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 2005 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on May 7, 2009, the beneficiary does 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 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record closed before the director on February 2009 with the receipt of the petitioner's response to the director's notice of intent to deny (NOID). As of that date, the petitioner's 2008 tax returns were not yet due. However, in response to a request for evidence (RFE) from the AAO, the petitioner submitted his tax returns for 2008 to 2012, along with Internal Revenue Service (IRS) Forms W-2 for the beneficiary for 2008 through 2012.

Upon review of the newly submitted tax returns, it is apparent that the sole proprietor has owned three different UPS stores:

UPS Store # – listed as the petitioner in the instant case
Federal Employer Identification Number (FEIN)

[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).

UPS Store #
No FEIN reported

UPS Store #
No FEIN reported

It appears that the entity listed as the petitioner, the UPS Store # at , is no longer owned by the sole proprietor. The sole proprietor filed a Schedule C for this entity in 2006 through 2008 but did not file this schedule for the UPS Store # in 2009 through 2012. However, the IRS Forms W-2 submitted by the sole proprietor reflect that the beneficiary was employed by the UPS Store # , FEIN from 2008 through 2012, but the employer's address is listed as . The discrepancies between the employer's name, FEIN and address listed on the submitted IRS Forms W-2 raises doubt about the integrity of the documents submitted and the accuracy of the information reported. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, the wages reported on the IRS Forms W-2 will not be considered as evidence of the petitioner's ability to pay.

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. As discussed above, in the instant case, the petitioner has not established that it paid the beneficiary the proffered wage for any year from the priority date onward.

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 reports the following yearly expenses:

Year	Yearly expenses	Yearly expenses plus proffered wage
2006	$38,988	$74,680.80
2007	$38,988	$74,680.80
2008	$45,240	$80,932.80
2009	$48,000	$83,692.80
2010	$50,520	$86,212.80
2011	$51,240	$86,932.80
2012	$53,160	$88,852.80

The proprietor's tax returns reflect the following information for the following years:

Year	Proprietor's adjusted gross income (AGI)
2006	$7,826
2007	$52,087
2008	$1,558
2009	$325
2010	$14,689
2011	$32,575
2012	$17,692

Therefore, the sole proprietor's adjusted gross income fails to cover the proffered wage plus the proprietor's yearly expenses for any year from 2006 through 2012.

On appeal, counsel asserts that funds held in the sole proprietor's wife's name in a Wells Fargo Bank Portfolio Management Account should also be considered when analyzing its ability to pay the proffered wage. Under the umbrella of the Portfolio Management account, the sole proprietor's wife appears to have held a checking account, savings account and several timed certificate of deposit accounts (CD). We note that the sole proprietor's income tax returns are filed jointly with his wife and that they live in California, a community property state. Therefore, we may properly consider these funds in calculating the petitioner's ability to pay.

On April 11, 2013, the AAO sent an RFE to the petitioner requesting complete bank account information for 2006 and 2007 so that the sole proprietor's ability to pay could be properly calculated. The petitioner's response included the requested bank account statements, plus bank account statements for 2008 through 2012. We first consider the sole proprietor's bank accounts in 2006. In that year, the sole proprietor must show the ability to pay $66,854.80 (yearly expenses + proffered wage – AGI) through the bank accounts. According to the bank account statements submitted for 2006 for the sole proprietor's personal bank accounts, the sole proprietor has an average annual balance of $64,738 available. This is not sufficient to establish the sole proprietor's ability to pay the proffered wage in addition to his yearly expenses. Therefore, the petitioner has not established its ability to pay in 2006.[2]

Counsel further asserts that funds available in the petitioner's business bank account should be considered. The funds in the sole proprietorship's business bank account appear to be included on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI. The funds will not be considered for a second time in the analysis of the petitioner's bank accounts.

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. at 612. 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

[2] After the initial year, the petitioner must show that its bank account balance increased by more than the amount of wages owed plus living expenses. However, when the initial year shows that the petitioner did not have sufficient funds to pay the proffered wage plus living expenses, the calculation for the later years cannot be completed because the petitioner cannot carry a negative balance forward.

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.

In the instant case, the sole proprietor's business intending to employ the beneficiary routinely lost money showing net income of ($97,796), ($51,442) and ($54,604) for 2006 through 2008 respectively. While the proprietor has been in business approximately eight years, it does not appear that he earns substantial compensation from the business. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which he has since recovered, or of the proprietor's reputation within its 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.

Beyond the decision of the director, it appears that the job location for the proffered position is no longer owned by the sole proprietor. As such, the sole proprietor does not intend to employ the beneficiary at this location. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of your organization's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

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.