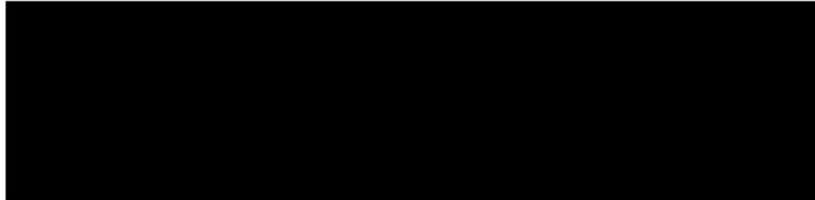


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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DATE: DEC 26 2012

OFFICE: NEBRASKA SERVICE CENTER

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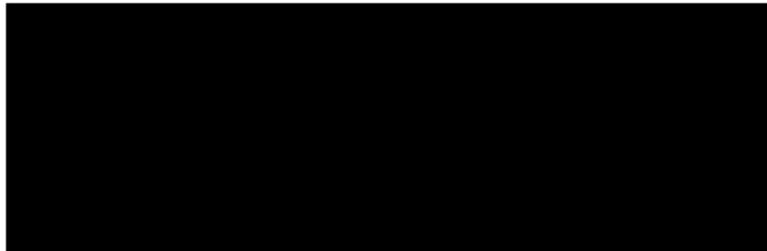
Petitioner:

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.

Thank you,

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 a carpentry company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's October 23, 2009 denial, the director determined that the petitioner failed to demonstrate its 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 October 23, 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 ETA Form 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 ETA Form 750 was accepted on April 25, 2001. The proffered wage as stated on the ETA Form 750 is \$13.00 per hour, which is \$27,040 per year based on 40 hours per week. The ETA Form 750 states that the position requires two years of experience in the job offered as a carpenter.

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 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 1975 and to currently employ 68 workers. On Form ETA 750B, the beneficiary claimed to have been employed by the petitioner since January 1995.

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 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 provided the beneficiary's Forms W-2, Wage and Tax Statements, for 2001 through 2004, and 2008 issued by the petitioner and Forms 1099-Misc for 2005 through 2007 issued by the petitioner. The Social Security number (SSN) listed for the beneficiary on the Forms W-2 for 2001 through 2004, and Forms 1099 for 2005 through 2007 does not match the number listed on the Form W-2 for 2008. Further, the SSN listed on the Forms W-2 and 1099 for 2001 through 2007 is associated with another individual.<sup>2</sup>

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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 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).

<sup>2</sup> Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given the inconsistency in the beneficiary's SSN, the petitioner has not demonstrated that the beneficiary is the actual recipient of the wages listed on the Forms W-2 and 1099 for 2001 through 2007.

The individual taxpayer identification number (ITIN) listed on the beneficiary's 2008 Form W-2 appears to belong solely to the beneficiary. For 2008, the petitioner has established that it paid the beneficiary \$13,153.17, which is \$13,886.83 below the annual proffered wage. Therefore, the petitioner has not established it employed and paid the beneficiary the proffered wage from the priority date 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

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The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at [http://www.ssa.gov/OP\\_Home/ssact/title02/0208.htm](http://www.ssa.gov/OP_Home/ssact/title02/0208.htm) (accessed on December 10, 2012).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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.<sup>3</sup> 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 (7<sup>th</sup> 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 tax returns of record reflect that the sole proprietor supports a family of two. For a sole proprietorship, USCIS considers net income to be the adjusted gross income of the owner's Form 1040 U.S Individual Income Tax Return. The record contains the sole proprietor's tax returns for 2001 through 2007. The tax returns reflect the following amounts for adjusted gross income (AGI):

	<u>AGI</u>
2001 Proprietor's adjusted gross income (Form 1040, line 33)	\$23,095
2002 Proprietor's adjusted gross income (Form 1040, line 35)	\$23,750
2003 Proprietor's adjusted gross income (Form 1040, line 34)	\$18,971
2004 Proprietor's adjusted gross income (Form 1040, line 36)	\$(222,173)

<sup>3</sup> In the instant case, the director erred in considering the petitioner's Schedule C income in analyzing the petitioner's ability to pay the proffered wage. As noted herein, the Schedule C income is carried over to page 1 of the tax return and is factored into the petitioner's sole proprietor's adjusted gross income.

2005 Proprietor's adjusted gross income (Form 1040, line 37)	\$(163,885)
2006 Proprietor's adjusted gross income (Form 1040, line 37)	\$(159,150)
2007 Proprietor's adjusted gross income (Form 1040, line 37)	\$(99,394)

In 2001 through 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$27,040. It is improbable that the sole proprietor could support himself and his spouse on a deficit, much less pay the amount required for the proffered wage from the priority date onwards.<sup>4</sup> Therefore, the petitioner has not demonstrated its ability to pay the proffered wage through either wages paid to the beneficiary or its adjusted gross income.

On appeal, counsel asserts that the director failed to consider the submitted bank statements that adequately show the petitioner's ability to pay. Counsel contends that since the director did not consider the petitioner's adjusted gross income as sufficient to pay the proffered wage, the petitioner's bank statements should be accepted as proving personal funds and personal assets because the petitioner is a sole proprietorship. The record of proceeding contains statements from the sole proprietor's checking account for the period March 30, 2001 through December 16, 2007.<sup>5</sup>

As in the instant case, where the petitioner has not established its ability to pay the proffered wage, the proprietor's bank statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. Here, the sole proprietor's statements from March 30, 2001 through December 10, 2001 show an initial average annual balance as shown in the table below.

Date	Balance	Average
March 30, 2001	\$3,266.93	
April 10, 2001	\$4,360.05	
May 10, 2001	\$1,153.15	
June 10, 2001	\$18,650.60	
July 10, 2001	\$10,441.90	
August 10, 2001	\$16,541.31	
September 10, 2001	\$2,590.44	

<sup>4</sup> The petitioner's sole proprietor did provide an estimate of his 2008 monthly personal expenditures in response to the director's June 29, 2009 request for evidence. No evidence of monthly expenses for the priority date in 2001 through 2007 was submitted. Further, the record includes previously submitted estimates of monthly expenses that are in conflict with each other. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This issue must be addressed in any further filings.

<sup>5</sup> Nothing on the statements indicates whether this is a personal or business account. Further, the petitioner did not provide every monthly statement for the entire period.

October 10, 2001	\$950.40	
November 10, 2001	\$11,225.53	
December 10, 2001	\$2,945.38	
Total	\$72,125.69	\$7,212.57

The petitioner has not established its ability to pay the proffered wage in 2001, because the average annual balance of \$7,212.57 does not exceed the proffered wage of \$27,040. The petitioner failed to submit consecutive monthly bank statements for years 2002 through 2008, and the submitted bank statements do not detail the average annual balance for those years. Given this, the AAO cannot properly analyze whether subsequent statements show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. Notwithstanding, the sole proprietor's cash assets as reflected in his checking account do not establish his ability to pay the proffered wage in 2001. Thus, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date onwards.

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 claims to have been doing business since 1975. The petitioner's sole proprietor's income has decreased significantly from \$23,750 in 2002 to \$(99,394) in 2007, and has been negative since 2004. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses. Unlike *Sonogawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1975. 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

company's accomplishments. 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.