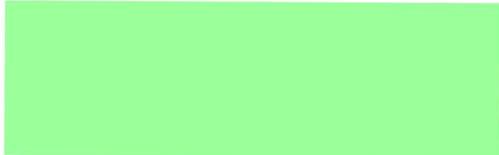


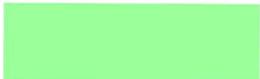
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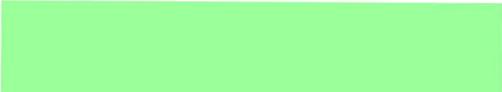
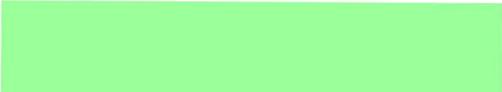
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

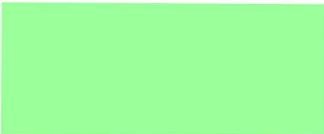


Date: **JUL 16 2012** Office: NEBRASKA SERVICE CENTER FILE: 

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.

Thank you,


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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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).¹ 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 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 March 24, 2009 denial, an 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

¹ The labor certification submitted with the instant petition includes the original pages 1 and 2 of Form ETA 750A. Form ETA 750B shows only a copy of the beneficiary's signature, dated April 26, 2001. The form includes several changes initialed [REDACTED] on July 5, 2005, as well as an original signature dated July 5, 2005. The original signature does not match the copy of the beneficiary's signature dated April 26, 2001. There is no stamp from the DOL on either page of the 750B to indicate that a change to these forms was authorized by the DOL after the 2001 filing. No information is provided to explain why the beneficiary's information regarding his employment history was changed and the forms were signed again on July 5, 2005. No information is provided to explain why all original pages were not submitted. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

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, 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 Form ETA 750 was accepted on April 28, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour which is \$39,291.20 per year based on forty hours per week. The Form ETA 750 states that the position requires two years of experience in the job offered as a specialty cook.

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.²

The record contains a letter dated January 6, 2009, signed by [REDACTED] Certified Public Accountant (CPA), stating that from 2001 through 2003 the business was unincorporated and owned by [REDACTED] and from 2004 through 2007 the business was operated under [REDACTED] and was owned by [REDACTED]. Although the CPA's letter is dated January 6, 2009, no information was provided as to the current legal structure of the petitioner.

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship from 2001 to 2003,³ and as a single member limited liability company (LLC) from

² 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).

³ A 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'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

2004 to 2007.⁴ On the petition, the petitioner claimed to have been established in 1995 and to currently employ seven workers. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to work for the petitioner since November 2000.

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 submitted the beneficiary's IRS Forms W-2, Wage and Tax Statements, stating wage payments from the petitioner to beneficiary in the amounts of \$2,000, \$13,000, \$13,000, and \$7,162.50 for 2003, 2004, 2005, and 2006, respectively.⁵ The beneficiary's

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).

⁴A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

⁵The social security number shown on the beneficiary's Internal Revenue Service (IRS) Forms W-2 issued by the petitioner appears to be an individual taxpayer identification number (ITIN) issued by the IRS to the beneficiary. An ITIN is a tax-processing number issued by the IRS to those

IRS Forms W-2 of record show that the petitioner paid the beneficiary from 2003 to 2006 less than the proffered wage. The petitioner must establish its ability to pay the difference between what it actually paid the beneficiary and the proffered wage of \$39,291.20 for 2003 through 2006.

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 was structured as a sole proprietorship from 2001 to 2003. 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).

From 2001 to 2003 the sole proprietor's tax returns reflect the following information for the following years:

2001

Proprietor's adjusted gross income (Form 1040, line 33) \$55,144

individuals who do not have a Social Security number (SSN) for filing tax returns and other tax-related documents. The ITIN is a nine-digit number that always begins with the number 9 and has a range of 70-88 in the fourth and fifth digit; effective April 12, 2011, the range was extended to include 90-92 and 94-99 in the fourth and fifth digit, example 9XX-90-XXXX. The instructions to IRS Form W-2 state that an employer should not accept an ITIN for employment purposes. When an employer prepares a Form W-2, it should show the correct SSN for the employee. *See* <http://www.irs.gov/instructions/iw2w3/ch01.html> (accessed April 24, 2012).

	<u>2002</u>
Proprietor's adjusted gross income (Form 1040, line 35)	\$51,404
	<u>2003</u>
Proprietor's adjusted gross income (Form 1040, line 34)	\$65,341

In the instant case, from 2001 to 2003 the sole proprietor, [REDACTED] supported a family of four. The sole proprietor's adjusted gross income for 2001, 2002, and 2003 would cover the proffered wage of \$39,291.20. However it is improbable that the sole proprietor could support himself, his wife, and two children with only \$15,852.80, \$12,102.80, and \$26,049.80 per year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

As mentioned above, a sole proprietor must show that its owner can cover his existing business expenses, pay the proffered wage out of his adjusted gross income or other available funds, and support himself and his dependents. The petitioner provided a list of [REDACTED] average personal monthly expenses, dated January 21, 2009, totaling \$2,915 per month for: mortgage and home insurance; utilities; telephone, computer and cable; gasoline; clothing; food; and miscellaneous. The list does not demonstrate whether the expenses listed in January 2009 were the same for the relevant period of time in 2001, 2002 and 2003. USCIS may reject a fact stated in the petition if 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). Thus, the evidence of record is deficient and the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003 has not been established.

The record before the director closed on January 26, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was the most recent return available. However, the petitioner did not submit a copy of its 2008 federal income tax return. The petitioner's 2004, 2005, 2006, and 2007 federal income tax returns stated its net income as detailed below.

- In 2004, the petitioner stated net income⁶ of \$7,890.
- In 2005, the petitioner stated net income of \$(13,587).
- In 2006, the petitioner stated net income of \$(7,657).
- In 2007, the petitioner stated net income of \$(4,398).

Therefore, the petitioner did not establish that it had sufficient net income to pay \$26, 291.20 in 2004 and 2005, and \$32,129.20 in 2006, which is the difference between the wages actually paid to the

⁶ The petitioner's net income is reported on its member's IRS Form 1040, Schedule C at line 31 for 2004, 2005, 2006 and 2007.

beneficiary for those years and the proffered wage. In 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ Since the petitioner did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the Schedules C (Form 1040) submitted by the petitioner, net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2004, 2005, and 2006, or the full proffered wage in 2007. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Thus, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date.

On appeal, counsel states that [REDACTED] taxable interest indicates evidence of sizeable savings. The record of proceeding does not contain any statements from [REDACTED] personal savings account, covering the period from 2001 through 2003. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 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 evidence of record falls short regarding the petitioner's business organization and finances. The petitioner's tax returns for 2004 through 2007 fail to demonstrate that the petitioner had the ability to pay the proffered wage. For the years 2005 through 2007, the petitioner's tax returns reflect negative net income. No evidence was submitted to demonstrate the petitioner's net current assets during any of the relevant years. No evidence was submitted to establish a basis for expected continued growth. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during those years. Although the petitioner claimed to have been in business since at least 1995, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability.

Based upon the evidence submitted, the petitioner did not establish that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director,⁸ the instant petition was filed without a complete original Form ETA 750. As noted above, the record includes the original pages 1 and 2 of the labor certification. All other pages of the labor certification appear to be copies. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

The regulation at 8 C.F.R. § 103.2(b) provides:

⁸ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [USCIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: “In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.” (emphasis added). Counsel has not provided any authority permitting USCIS to accept a photocopy of the ETA 750, nor any explanation as to why only page one of the original was submitted. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer. The record contains no evidence that the petitioner has obtained an official duplicate labor certification or requested the director to do so. Therefore, even if the petitioner’s evidence had established the petitioner’s ability to pay the proffered wage during the relevant period, the evidence would not support an approval of the Form I-140 petition unless a duplicate original of the Form ETA 750 labor certification had first been obtained. This issue must be addressed in any future filings.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.