(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

DATE: JUL 3 1 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,

Kerri Porbos for

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 painting and surfacing company. It seeks to employ the beneficiary permanently in the United States as a painter. 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 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 November 19, 2008 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).

Here, the ETA Form 9089 was accepted on April 30, 2001[1]. The proffered wage as stated on the ETA Form 9089 is $11.92 per hour ($24,793.60 per year based on 40 hours).

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[1] The ETA Form 9089 utilized the filing date from a previously submitted Application for Alien

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 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 1993 and to currently employ 4 workers. On the ETA Form 9089, signed by the beneficiary on March 20, 2006, the beneficiary claimed to have worked for the petitioner since 1998.

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).

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 evidence that it paid the beneficiary wages from 2001 to 2007 as shown in the table below.

- In 2001, the form 1099-MISC shows wages paid of $25,100.
- In 2002, the form 1099-MISC shows wages paid of $25,010.
- In 2003, the form 1099-MISC shows wages paid of $26,250.
- In 2004, the form 1099-MISC shows wages paid of $26,305.
- In 2005, the form 1099-MISC shows wages paid of $27,110.
- In 2006, the form 1099-MISC shows wages paid of $29,590.
- In 2007, the form 1099-MISC shows wages paid of $30,580.

Employment Certification (Form ETA 750) filed April 30, 2001.

[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).

The Forms 1099-MISC are all handwritten and list the beneficiary's address as , The 2001 to 2006 Forms 1099-MISC do not include the recipient's tax identification number. A Form G-325A, Biographic Information, submitted with a Form I-485, Application to Register Permanent Residence or Adjust Status, for the beneficiary, lists the beneficiary's address as from April 1999 to November 2005 and from November 2005 to the date of signing on August 2, 2007. The director pointed out in the denial that the address on the Forms 1099-MISC w as inconsistent with the addresses listed on the Form G-325A. On appeal, counsel indicates that the petitioner did not file IRS Forms W-2 or 1099-MISC with the Internal Revenue Service (IRS) for the beneficiary because the beneficiary was undocumented. Counsel indicates that upon receiving work authorization from USCIS in 2007, the beneficiary obtained a social security card. At that time, the petitioner issued completed the Forms 1099-MISC for 2001 to 2007 and gave them to the beneficiary. [3]

The record does not contain evidence to establish that the petitioner has filed the Forms 1099-MISC with the IRS. The IRS requires the filing of Form 1099-MISC for contract work when the contractor is paid more the $600. *See* http://www.irs.gov/businesses/article/0,,id=243429,00.html. There are deadlines annually for the filing of Form 1099-MISC along with penalties for late filing. *See* http://www.irs.gov/instructions/i1099gi/ar02.html#d0e1927. The record does not contain evidence that the petitioner has paid the penalties for late filing. The record does not contain evidence of canceled checks representing payments to the beneficiary. Without evidence to establish that the Forms 1099-MISC were filed with the IRS, they appear to be the representations of management. Unsupported representations of management are not reliable evidence and are insufficient to demonstrate the 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the AAO also notes that the petitioner's federal income tax return for 2001 does not reflect any wages paid on Schedule C Part II line 26. The petitioner's 2001 federal income tax return also does not list any cost of labor on Schedule C Part III line 37 or costs of goods sold at Schedule C Part I line 4. Further, the payroll listed at Schedule C Part V is $22,570, yet the petitioner claims it paid the beneficiary $25,100 in 2001. There is no indication in the tax return that the beneficiary's wages were accounted for as a deduction or other cost. This casts doubt on the evidence of wages paid to the beneficiary.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states:

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[3] A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

> 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.

The petitioner's evidence of wages paid to the beneficiary cannot be accepted due to the above noted doubts and inconsistencies. Therefore, the petitioner has not established that it paid the beneficiary the proffered wage from 2001 to 2007.

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 supports a family of two. The sole proprietor's tax returns reflect the following information for the following years:

- In 2001, sole proprietor's adjusted gross income[4] of $(1,704).

[4] The sole proprietor's adjusted gross income is found on Form 1040 line 33 (2001), line 35 (2002),

- In 2002, sole proprietor's adjusted gross income of $(277).
- In 2003, sole proprietor's adjusted gross income of $25,219.
- In 2004, sole proprietor's adjusted gross income of $13,313.
- In 2005, sole proprietor's adjusted gross income of $71.
- In 2006, sole proprietor's adjusted gross income of $200,652.
- In 2007, sole proprietor's adjusted gross income of $51,892.

The sole proprietor's adjusted gross income for 2001, 2002, 2004 and 2005 fails to cover the proffered wage of $24,793.60. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The sole proprietor's adjusted gross income exceeds the amount of the proffered wage in 2003, 2006 and 2007. However, the sole proprietor's adjusted gross income would also be expected to support his family of two. The difference between the prevailing wage and the sole proprietor's adjusted gross income left to support the proprietor's family is reflected in the table below.

- In 2003, difference of $425.40.
- In 2006, difference of $175,858.40
- In 2007, difference of $27,098.40.

The petitioner provided an estimate of monthly expenses to support his family. The estimated monthly personal expenses were $3,400. Based on that estimate, the proprietor's expenses for a year would be $40,800. The sole proprietor has established that it had sufficient income to pay the proffered wage and support his family in 2006. However, the proprietor's expenses for a year would exceed the difference between the proffered wage and the proprietor's adjusted gross income for 2003 and 2007. It is improbable that the sole proprietor could support a family of two on a deficit.

The record contains copies of monthly bank statements for 2008. The funds in the Washington Mutual account are located in the sole proprietorship's business account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 id.* 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

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line 34 (2003), line 36 (2004), and line 37 (2005 to 2007).

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 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 has been in business since 1993 and has four employees. The submitted evidence indicates that the petitioner's gross receipts declined from 2004 to 2005. The petitioner paid no wages in 2001 and minimal wages to all employees from 2002 to 2007. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities. Although bank statements were submitted reflecting funds in the sole proprietorship's business bank account, based on the evidence in the record, the funds appear to have been included on the Schedule C to IRS Form 1040. The net profit (or loss) from Schedule C is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. Further, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. 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.