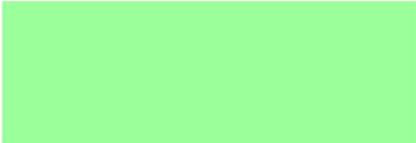


(b)(6)

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



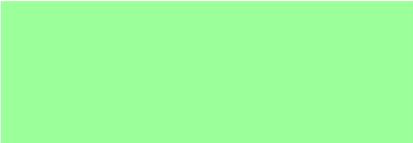
DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: **FEB 28 2013**  
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**DISCUSSION:** The preference visa petition was revoked by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 cook (Chinese style). 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 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 revoked 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 August 6, 2011 revocation, 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 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

In this instance, the petition was initially approved on February 1, 2006. On June 2, 2011, the director issued a Notice of Intent to Revoke (NOIR)<sup>1</sup> stating that the record did not establish the petitioner's ability to pay the proffered wage from the priority date onward. The director asked the petitioner to provide evidence of the petitioner's ability to pay the proffered wage including the sole proprietor's recurring household expenses for years 2003 through 2010 noting that the petitioner's ability to pay the proffered wage could not be established without consideration of these expenses. The petitioner did not respond to the NOIR and the petition was revoked.

On appeal, the petitioner states that the ability to pay the proffered wage has been established and submitted a copy of the petitioner's individual income tax returns for 2003 through 2010, a copy of the petitioner's bank statements from 2004 to August 2011 and a copy of two deeds to show that the petitioner owned real estate in 2011. The petitioner did not submit evidence of the sole proprietor's recurring household expenses as requested in the NOIR. Further, the petitioner failed to address

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<sup>1</sup> The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof.

why the information submitted on appeal was not provided in response to the NOIR. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

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 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 December 8, 2003. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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>2</sup>

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<sup>2</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 the regulation at 8 C.F.R. § 103.2(a)(1). However, as noted above, the record in the instant case provides reason to preclude consideration of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The director specifically requested much of the information submitted on appeal in his NOIR, which

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 1998 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on December 6, 2003, the beneficiary did 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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards, or any wages for that matter.

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 (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

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the petitioner failed to respond 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 (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.

On June 2, 2011, the director issued a Notice of Intent to Revoke (NOIR) asking that the petitioner provide documentation to establish its ability to pay the proffered wage from the priority date onward. Specifically, the director noted that in assessing the petitioner's ability to pay the proffered wage, it would be necessary to take into account the sole proprietor's recurring household expenses in each year and evidence in the petitioner's tax returns for years 2005 through 2010. The petitioner did not respond to the NOIR and approval of the Form I-140 petition was revoked on August 6, 2011.

On appeal, the petitioner submitted copies of its tax returns for years 2003 through 2010, copies of two real estate deeds and bank statements. As previously noted, the failure to submit requested evidence that precludes a material line of inquiry (the sole proprietor's recurring household expenses) shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Further, the petitioner did not state why the information requested in the NOIR was not submitted or that the information was for some reason unavailable.

Even if the information submitted on appeal were considered by the AAO, the documentation would not establish the petitioner's ability to pay the proffered wage as the petitioner failed to provide the sole proprietor's recurring household expenses which is material to the proprietor's ability to pay the proffered wage. As noted above, this information was clearly requested by the director in his NOIR, but the petitioner failed to respond or submit this evidence on appeal. The petition must be denied for this reason and other reasons hereinafter discussed.

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

- 2010 Adjusted Gross Income - \$87,941
- 2009 Adjusted Gross Income - \$66,915
- 2008 Adjusted Gross Income - \$55,755

- 2007 Adjusted Gross Income - \$34,642
- 2006 Adjusted Gross Income - \$29,370
- 2005 Adjusted Gross Income - \$22,798
- 2004 Adjusted Gross Income - \$22,978
- 2003 Adjusted Gross Income - \$16,424

The petitioner's 2003 tax return does not state sufficient adjusted gross income to pay the beneficiary's proffered wage. While the petitioner's tax returns would state sufficient adjusted gross income to pay the proffered wage in years 2004 through 2010, as previously stated, it is unknown what the sole proprietor's recurring household/dependent expenses were in those years and whether the petitioner had the ability to pay the proffered wage and those expenses in any year. After consideration of the beneficiary's proffered wage, the sole proprietor would have less than \$1,000 remaining for personal expenses in 2004 and 2005, and very low amounts in 2006 and 2007, which would be insufficient to exhibit that the sole proprietor could pay both his personal expenses and the proffered wage. 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 (7<sup>th</sup> Cir. 1983). Without the required sole proprietor's personal expenses, whether the petitioner can pay both the beneficiary's proffered wage and the sole proprietor's own expenses cannot be determined in any year.

The petitioner submitted business bank statements for years 2004 through 2011 (with the exception of the statement for July 2008) in attempt to show its ability to pay the proffered wage. No statements were submitted for 2003 when the petitioner's adjusted gross income was insufficient to pay the proffered wage itself. 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, which has not been shown to be sufficient to pay the proffered wage from the priority date onward as well as the sole proprietor's personal expenses. Again, the bank statements will not establish the ability to pay all necessary wages and the sole proprietor's unknown personal expenses because the petitioner did not provide those personal recurring expenses though specifically asked to do so by the director in his NOIR. The petitioner failed to submit this information either in response to the NOIR, or on appeal.

The petitioner submitted copies of two real estate deeds. Those documents are of little evidentiary value as there is no evidence of the real estate value or any encumbrances that may be attached to the real estate. Further, real estate is not the kind of liquid asset that would normally be liquidated to pay an employee's wages. Again, the sole proprietor's personal recurring living expenses have not been provided, though requested, and the petitioner's ability to pay the proffered wage and those unknown expenses cannot be determined for any year.

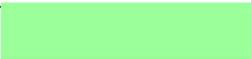
USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612

(Reg'l Comm'r 1967). The petitioning entity in *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 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 failed to submit the requested evidence of personal recurring household/dependent expenses which is necessary for a determination of the sole proprietor's ability to pay the proffered wage in this case. The director clearly requested this evidence in his NOIR, which the petitioner failed to respond to or provide on appeal. The petitioner's 2003 tax return does not state sufficient adjusted gross income to pay the proffered wage standing alone, much less the unknown personal expenses of the sole proprietor. In several other years, the remaining amounts after paying the proffered wage would leave so little that it would fail to evidence the sole proprietor's ability to additionally pay his own personal expenses. See *Ubeda*, 539 F. Supp. 647. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage plus unknown personal expenses. 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.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Based on the foregoing, the petition was revoked for good and sufficient cause.

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.



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**ORDER:** The appeal is dismissed.