



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 28 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 issued a final denial by the Director, Nebraska Service Center on December 5, 2012, after an initial denial dated August 8, 2012, and a motion to reopen and reconsider was filed by the petitioner on September 12, 2012. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an environmental consulting, and underwater ecological tour company. It seeks to employ the beneficiary permanently in the United States as an exploration project coordinator. 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 December 5, 2012 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 1, 2009. The proffered wage as stated on the ETA Form 9089 is \$26.09 per hour, or \$54,267.20 per year. The ETA Form 9089 states that the position requires a bachelor's degree in Marine Science, Marine Biology or Oceanography, and 24 months of experience.

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 2004 after its purchase from another owner, and to currently employ seven workers. On the ETA Form 9089, signed by the beneficiary on August 8, 2011, the beneficiary claimed to have worked for the petitioner since June 6, 2003

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 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.

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

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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 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 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 himself with no dependents according to the evidence provided. The proprietor's tax returns reflect the following information for the following years:

	<u>2009</u>	<u>2010</u>	<u>2011</u>
Proprietor's adjusted gross income (AGI) (Form 1040, line 37)	(\$3,671)	\$18,128	\$106,994

The proffered wage is \$54,267.20. The petitioner did not pay the full proffered wage to the beneficiary during any of the relevant years. The petitioner submitted evidence regarding wages paid to the beneficiary for the years 2009 through 2011.

According to the evidence presented, the beneficiary was paid the following wages:

	total paid	proffered wage deficit
2009 (Form 1099) \$19,760.94 (Form W-2) +\$ 1,199.52	\$20,960.46	\$33,306.74
2010 (Form W-2)	\$29,451.20	\$24,816.00
2011 (Form 1099)	\$8,474.95	\$45,792.25

In 2009, the sole proprietor's adjusted gross income of (\$3,671) fails to cover the proffered wage deficit of \$33,606.74. The sole proprietor's adjusted gross income of \$18,128 for 2010 was also insufficient to pay the difference between the actual wages paid in that year, and the proffered wage. It is improbable that the sole proprietor could support himself on a deficit in 2009 and 2010, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The petitioner demonstrated its ability to pay the proffered wage in 2011.

On appeal, counsel asserts that since the priority date is June 1, 2009 the petitioner would not have had to pay the full proffered wage for the 2009 year, and therefore they would have actually needed to demonstrate the ability to pay the proffered wage for seven months at a total of \$32,655.87 ( $[\$54,267.20 / 12] \times 7$ ). Counsel also asserts that since the beneficiary was actually paid \$20,960.46 in 2009 the difference between the actual wages paid and the proffered wage would have amounted to \$11,695.41. Counsel indicates that as a sole proprietor it is understood that the petitioner's personal expenses must be considered in assessing the ability to pay the proffered wage based on adjusted gross income; and that according to the evidence presented, in 2009 the petitioner's personal expenses totaled \$20,701.92 for the seven month period ( $[\$35,489.00 / 12] \times 7$ ), but his net assets totaled \$73,820.42. Counsel asserts that the petitioner therefore, would have sufficient income to pay the prorated proffered wage during the seven month period after deducting personal expenses. This figure of \$73,820.42 for 2009, as presented is based on retirement accounts in the amount of \$56,233.81, bank accounts in the amount of \$8,586.91, personal professional dive gear in the amount of \$2,000, and electronics, cameras, and computers in the amount of \$2,000.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner also indicates upon appeal that the director erred in concluding that year-end inventory would be carried forward from Schedule C on its income tax return and added to Form 1040. The petitioner's counsel asserts that this is incorrect and that remaining company assets are "never" carried over to the Form 1040. Counsel submits a letter from Steve Bastardi, CPA to affirm this premise. However, the letter from CPA Bastardi, dated January 30, 2013, indicates that "Ending inventory may be held or sold by the owner/sole proprietor at any time. The *entire value* is not actually reported on federal Form 1040." There is no supporting evidence of the inventory, its value, and no evidence of petitioner's personal asset values in the record. 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)).

In addition, although the petitioner lists his net assets as \$73,820.42 for 2009, and includes retirement accounts as well as personal equipment, he has not supplied any objective evidence of the valuation of his personal property. 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)). The record of proceeding contains quarterly and yearly statements from the sole proprietor's traditional individual retirement accounts (IRAs) for 2009. The sole proprietor has asserted that he would be willing to take withdrawals from the IRA account to pay the proffered wage. However, withdrawals from a traditional IRA before age 59 ½ are considered early withdrawals. The sole proprietor was under age 59 ½ in each relevant year. If an individual takes an early withdrawal from a traditional IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. See 26 U.S.C. § 72(t); 26 U.S.C. § 408.

In 2009, the balance of petitioner's IRAs was \$56,233.81. The difference between the proffered wage and the actual wage paid in 2009, was \$33,306.74. Therefore, in 2009, the petitioner's IRA would have been reduced to \$22,927.07, and further reduced by any early withdrawal penalties and additional taxes incurred. Taking into account the tax burden that would result from the sole proprietor's proposed early IRA withdrawals, the year-end balances in 2009 do not appear to be sufficient to cover the difference between the proffered wage and the wages paid to the beneficiary as well as the personal expenses of the petitioner in both 2009 and 2010, as the proffered wage deficit in 2010 (\$24,816), exceeds the remaining IRA balances. It is noted that the petitioner submitted IRA statements for 2010 through 2012. However, in assessing the overall totality of the circumstances with the fluctuating AGI from 2009 through 2011, and no year indicated in which they have paid the full proffered wage to the beneficiary, the evidence is insufficient to determine the petitioner had the ability to pay the proffered wage without additional documentation of the petitioner's assets and potential IRA withdrawal penalties.

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 has not submitted sufficient evidence in line with *Sonegawa*, such as a demonstration of established historical growth or financial stability. The petitioner's AGI fluctuated during the relevant years and in fact showed a deficit during the priority date year. The petitioner also has not established that there were any uncharacteristic business expenditures, or losses, or that any other factors might be relevant in order to demonstrate under the totality of circumstances it would have the ability to pay. 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.