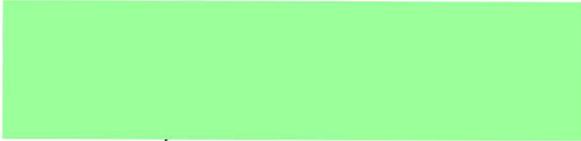


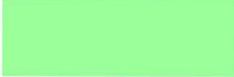


U.S. Citizenship
and Immigration
Services

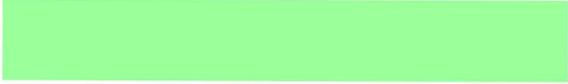
(b)(6)



DATE: **MAR 18 2013**

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an interior remodeling and exterior painting company. It seeks to employ the beneficiary permanently in the United States as a painter. 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 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 4, 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 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 22, 2004. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered as a painter.

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.¹

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 1989 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on December 16, 2004, the beneficiary claimed to have worked for the petitioner from December 1996 to September 2002.

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 2004 onwards.²

¹ 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).

² In his decision, the director referred to Forms W-2 given to the beneficiary by the petitioner. The AAO notes that the petitioner did not submit any Forms W-2 with the instant petition and no Forms W-2 are included in the record of proceeding. Therefore, this part of the director's decision is withdrawn.

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.

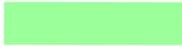
The record of proceeding contains the following evidence: the sole proprietor's Forms 1040 with Schedule C for 2004, 2005, 2006, 2007, and 2008; an offer letter from the petitioner to the beneficiary dated July 30, 2007; a list of the sole proprietor's 2008 monthly household expenses; and statements from [REDACTED] for a checking account in the name of [REDACTED], the sole proprietor, for 2004, 2005, 2006, 2007, and 2008.

In the instant case, the sole proprietor supports a family of one. The proprietor's tax returns reflect the following information for the following years:

Proprietor's adjusted gross income (Form 1040):

2004

2005



(b)(6)

Petitioner's adjusted gross income (Form 1040):	\$59,551.00 ³	\$33,763.00 ⁴	
	<u>2006</u>	<u>2007</u>	<u>2008</u>
Petitioner's adjusted gross income (Form 1040):	\$32,294.00	\$16,163.00	\$33,335.00

In 2007, the sole proprietor's adjusted gross income of \$16,163.00 fails to cover the proffered wage of \$20,800.00. 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 record of proceeding contains an estimated list of the sole proprietor's monthly household expenses for 2008 dated September 10, 2009 submitted with the instant petition. The record of proceeding also contains an estimated list of the sole proprietor's monthly household expenses for 2008 dated March 4, 2009 which was submitted with a previously filed petition. The AAO notes that even though the director requested a list of the sole proprietor's monthly household expenses for all relevant years, the sole proprietor only submitted a list for 2008. The estimated household expenses from each list for 2008 are reflected below:

Monthly Household Expenses for 2008 (list dated September 10, 2009):

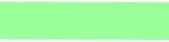
Mortgage/rent:	\$900.00
Car payment:	\$0.00
Installment Loans:	\$200.00
Credit Card Payments:	\$500.00
Other Household Expenses:	\$500.00
<hr/>	
Yearly total:	\$25,200.00/year

Monthly Household Expenses for 2008 (list dated March 4, 2009):

Mortgage/rent:	\$1679.32
Car payment:	\$0.00
Installment Loans:	\$213.56
Credit Card Payments:	\$1000.00
Other Household Expenses:	\$350.00 to \$600.00
<hr/>	
Yearly total:	\$38,914.56 to \$41,914.56

The sole proprietor's estimated monthly payments for rent and credit card payments vary significantly. It is unlikely that the sole proprietor would incorrectly estimate his rent payment for 2008 as he wrote these lists within six months of each other. Doubt cast on any aspect of the

³ The proprietor's adjusted gross income for 2004 is found on line 36 of the Form 1040.
⁴ The proprietor's adjusted gross income for 2005-2010 is found on line 37 of the Form 1040.



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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

For 2005, 2006, and 2008, after deducting the proffered wage of \$20,800.00, the following amounts remain:

<u>2005</u>	<u>2006</u>	<u>2008</u>
\$12,963.00	\$11,494.00	\$12,535.00

Based on the sole proprietor's estimated monthly expenses for 2008, he could not support himself on \$12,535.00. Additionally, based on his estimated monthly payments for 2008, it is unlikely that he could support himself on \$12,963.00 in 2005 and on \$11,494.00 in 2006.

On appeal, counsel asserts that for the year 2005, the sole proprietor's itemized deductions should be deducted from his adjusted gross income (AGI). Counsel states, "[The] petitioner's Adjusted Gross Income for 2005 (\$33,763.00) minus its itemized deductions for those years (\$11,794.00) leaves a difference that is sufficient to meet petitioner's proffered wage obligations 2005 independent of petitioner's yearly expenses." If the sole proprietor's itemized deductions, which are shown on line 28 of IRS Form 1040 Schedule A, are deducted from the AGI as counsel suggests, the remaining balance would be \$21,969, which covers the proffered wage of \$20,800, but leaves even less for household expenses than the AGI of \$33,763. Counsel does not cite any precedent or give any reason why itemized deductions should be deducted from AGI to determine the ability to pay. The sole proprietor's AGI does not include itemized deductions. Itemized deductions are reflected on Schedule A of the Form 1040 and are deducted from AGI on the Form 1040 as part of the calculation for taxable income and the amount owed by the sole proprietor or refunded to the sole proprietor.⁵ Thus, counsel's argument is without merit.

The record of proceeding contains monthly statements for a checking account in the sole proprietor's name covering the period 2004 through 2008. The following table shows the average annual balances for the relevant years:

	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>
Average annual balance:	\$8,564.69	\$3,362.06	\$9,162.89	\$7,890.23

As in the instant case, where the petitioner has not established its ability to pay the proffered wage, the difference between the proffered wage and the wages paid to the beneficiary, in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full

⁵ [http://www.irs.gov/uac/Schedule-A-\(Form-1040\)-Itemized-Deductions](http://www.irs.gov/uac/Schedule-A-(Form-1040)-Itemized-Deductions) (accessed February 7, 2013).

proffered wage, the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage, the difference between the proffered wage and the wages paid to the beneficiary. In this case, based on the average annual balances for 2005 through 2008, the sole proprietor's cash assets are not sufficient to cover the full proffered wage, or the difference between the proffered wage and the wages paid to the beneficiary. Thus, the petitioner has not established its continuing ability to pay the proffered wage for 2005 through 2008.

Counsel additionally argues that the petitioner has the ability to pay based on the totality of the circumstances.

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, counsel argues that the petitioner was established in 1989 and "has remained successful for over 20 years." Counsel, however, does not submit any evidence of the petitioner's success over the last 20 years, of the petitioner's reputation in the industry, or any historical growth as that in *Sonogawa*. Furthermore, the petitioner also failed to include any evidence of historical growth of its business, its reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses.

Additionally, counsel argues that bank account statements show that the petitioner is a healthy business and has "more than enough cash on hand" to meet its wage obligations. As discussed

above, the cash assets in the checking account do not contain sufficient average yearly balances which exceed the proffered wage.

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.