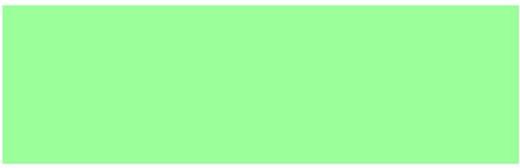


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: MAY 08 2013

OFFICE: TEXAS 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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition, and the petitioner appealed this decision to the Administrative Appeals Office (AAO). The AAO issued a request for evidence (RFE) on April 11, 2012. On June 21, 2012, the AAO dismissed the appeal as the petitioner had not timely responded to the RFE.<sup>1</sup> The matter is now before the AAO on a motion to reopen. The motion will be granted. The evidence submitted on motion will be considered, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that it had the continuing ability to pay the proffered wage from the priority date onward.

On motion the sole proprietor submitted his monthly personal checking account statements for 2005,<sup>2</sup> 2006, 2007, 2008, 2009, 2010, and 2011.<sup>3</sup> The sole proprietor also submitted his monthly personal savings account statements for 2007,<sup>4</sup> 2008, 2009, 2010, and 2011.<sup>5</sup>

As set forth in the director's denial, the 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

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<sup>1</sup> The AAO issued a request for evidence (RFE) on April 11, 2012 concerning the sole proprietor's ability to pay the beneficiary the proffered wage and whether the beneficiary is related to the sole proprietor. Specifically, the AAO provided 45 days to respond and requested the sole proprietor submit: (1) his personal IRS Form 1040, including Schedule C, for 2008, 2009, 2010, and 2011; (2) evidence of the sole proprietor's monthly personal expenses for 2003 through 2011; (3) evidence to clarify whether the beneficiary is related to the sole proprietor; and (4) whether the job offer is for full-time employment. The AAO received the petitioner's response to the RFE on June 25, 2012, 75 days after the AAO issued the RFE and four days after the AAO issued its decision dismissing the appeal.

<sup>2</sup> The sole proprietor did not provide his checking account statement for the full month of January 2005.

<sup>3</sup> The sole proprietor did not provide his checking account statement for the full month of December 2011.

<sup>4</sup> The sole proprietor did not provide his savings account statements for January, February, March, and May 2007.

<sup>5</sup> The sole proprietor did not provide his savings account statement for the full month of November 2011.

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 (labor 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 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 1, 2003. The proffered wage as stated on the Form ETA 750 is \$21,840.00 per year. The Form ETA 750 states that the position requires two years of experience in the position offered.

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 or motion.<sup>6</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner did not indicate when it was established and indicated that it currently employs three workers.

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

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<sup>6</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).

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, or any wages, from the priority date in 2003 onwards.

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 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 the instant case, according to the sole proprietor's tax returns, he has supported himself, his spouse, and three dependents from 2003 through 2008. In 2009, this changed to two dependents, and in 2010, to one dependent. The proprietor's tax returns reflect the following information for the following years:

<b>Year</b>	<b>Adjusted Gross Income (AGI)</b>	<b>AGI minus the proffered wage</b>	<b>The number of the sole proprietor's dependents</b>	<b>Proffered wage as a percentage of AGI</b>
2003	\$43,996.00	\$22,156.00	3	50%
2004	\$43,206.00	\$21,366.00	3	51%
2005	\$49,674.00	\$27,834.00	3	44%
2006	\$66,857.00	\$45,017.00	3	33%
2007	\$80,246.00	\$58,406.00	3	27%
2008	\$68,837.00	\$46,997.00	3	32%
2009	\$64,393.00	\$42,553.00	2	34%
2010	\$69,392.00	\$47,552.00	1	31%
2011	\$69,415.00	\$47,575.00	1	31%

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, for 2003, 2004, and 2005, the sole proprietor's adjusted gross income was \$43,996.00, \$43,206.00, and \$49,674.00, respectively. It is improbable that the sole proprietor could support himself, his spouse, and three dependents on the amount that remains after reducing the adjusted gross income by the amount required to pay the proffered wage. For 2003, the proffered wage is 50% of the sole proprietor's AGI; for 2004, it is 51% of his AGI; and for 2005, it is 44% of his AGI. Additionally, the sole proprietor did not submit evidence of his monthly personal expenses for 2003 through 2011 as requested in the AAO's RFE and did not provide this evidence on motion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Without this evidence, it is unclear whether the sole proprietor would have shown his ability to pay the beneficiary's proffered wage for 2003 through 2011.

On motion the sole proprietor submitted copies of his monthly balances in his personal checking and saving accounts. The following table states the annual balances of the sole proprietor's checking and savings account balances:

<b>Year</b>	<b>Checking Account Yearly Average</b>	<b>Savings Account Yearly Average</b>
2003	Not submitted	Not submitted
2004	Not submitted	Not submitted
2005	\$1,994.97 <sup>7</sup>	Not submitted

<sup>7</sup> As stated above, the record does not contain the sole proprietor's checking account statement for January 2005. Therefore, the checking account average listed here is only an average of 11 months of data.

2006	\$3,345.09	Not submitted
2007	\$1,529.26	\$4,667.59 <sup>8</sup>
2008	\$2,449.16	\$3,354.99
2009	\$2,075.09	\$2,096.17
2010	\$1,175.85	\$2,831.56
2011	\$1,603.00 <sup>9</sup>	\$2,306.04

In the instant case, for the sole proprietor to demonstrate his ability to pay the proffered wage based on the yearly average balances in his checking and savings accounts, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. 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 sole proprietor did not submit evidence of his checking and savings accounts for 2003 and 2004. The average annual balances in the years 2005, 2006, 2007, 2008, 2009, 2010, and 2011 are not sufficient to cover the full proffered wage of \$21,840.00. Thus, the sole proprietor's cash assets as reflected in his checking and savings accounts do not establish the petitioner's continuing ability to pay the proffered wage. Further, the sole proprietor did not provide evidence of his personal monthly expenses as requested in the AAO's RFE. On motion, the petitioner has not provided the sole proprietor's estimate of monthly expenses. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, the sole proprietor's ability to pay the beneficiary's proffered wage could not be determined even if the balances in the sole proprietor's bank accounts had exceeded the proffered wage.

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

<sup>8</sup> As stated above, the record does not contain the sole proprietor's savings account statements for January, February, March, and May 2007. Therefore, the savings account average listed here is only an average of eight months of data.

<sup>9</sup> As stated above, the record does not contain the sole proprietor's checking account statement for December 2011. Therefore, the checking account average listed here is only an average of 11 months of data.

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 Form I-140 does not indicate how long the petitioner has been in business. The petitioner has not provided any evidence of its historical growth or of its reputation in the industry. The petitioner has not demonstrated the existence of any uncharacteristic business expenses or losses in any year since the priority date which would have affected the petitioner's ability to pay the proffered wage. The petitioner has not provided the sole proprietor's expenses, preventing the AAO from analyzing the totality of the petitioner's financial circumstances. Therefore, the petitioner has not established its continuing ability to pay the beneficiary's proffered wage from the priority date onward.

Therefore, the petitioner has not shown its ability to pay the beneficiary's proffered wage through wages paid, its adjusted gross income, its bank account balances, or in the totality of the circumstances.

Additionally, the sole proprietor did not submit evidence responsive to the AAO's RFE. In its RFE, the AAO requested evidence that the job offer was for full-time employment. The AAO alerted the petitioner that the failure to properly respond to the RFE may result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Because the petitioner failed to submit the evidence as requested by the AAO's earlier RFE, timely or otherwise, in response to the RFE or on motion, and because the evidence in the record does not establish the sole proprietor's ability to pay the proffered wage from the priority date onward, the petitioner has not overcome the grounds for denial from the director's decision. Therefore, the petition will remain denied.

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 motion to reopen is granted; however, the previous decision of the AAO, dated June 21, 2012, will not be disturbed. The petition remains denied.