(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: MAY 20 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 initially denied by the Director, Texas Service Center and came before the Administration Appeals Office (AAO) on appeal. The AAO remanded the matter to the director. The subsequent decision of the director to recommend that the petition be denied was certified to the AAO. This decision was affirmed and the appeal was dismissed by the AAO on January 28, 2009. The AAO granted a subsequent motion to reopen and motion to reconsider the matter and reaffirmed its prior dismissal of the appeal on January 26, 2011. A subsequent appeal was rejected by the AAO on June 8, 2011. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted. The previous decisions of the AAO will be affirmed, and the appeal will be dismissed.

The petitioner is an import/export business. It seeks to employ the beneficiary permanently in the United States as an order processor. 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). As set forth in the director's certified decision issued on June 16, 2008, 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 and certified this decision to the AAO. The AAO affirmed the director's decision and dismissed the appeal on January 28, 2009, and again on January 26, 2011, on each occasion noting that the petitioner had not established its ability to pay the proffered wage as of the priority date.

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.

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

The AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. The AAO's *de novo* authority has been long recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $320.00 per week or $16,640.00 annually based upon a forty hour week.

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, to have a gross annual income of $687,354.00, and to currently employ 1 worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

On motion, counsel asserts that the AAO has erred in its determination that the petitioner has not submitted sufficient evidence to demonstrate that it has the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel contends that an examination of the petitioner's net profits as listed on the Schedule C of the Forms 1040, U.S. Individual Income Tax Return, of the petitioner's owner reveals sufficient funds to pay the proffered wage in 2002 and 2004. While counsel acknowledges that the petitioner's net profits were not enough to pay the full proffered wage in 2005, counsel notes that the petitioner's owner had sufficient funds in a savings account to pay the difference between the petitioner's net profits and the full proffered wage in 2005. Counsel states that the AAO has broadened its interpretation of "ability to pay" in that an appeal should not be dismissed for the petitioner's lack of ability to pay as long the petitioner is actually paying the proffered wage. Counsel asserts that Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary in 2008, 2009, and 2010, reflect the petitioner's ability to pay the full proffered wage. Counsel contends that the petitioner's ability to pay the proffered wage since the priority date should be viewed in light of the totality of the circumstances as outlined in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel includes copies of previously submitted documents as well as an affidavit and a separate statement from the petitioner's owner, Form 1099-MISC statements issued by the petitioner to the beneficiary in 2008, 2009, and 2010, a description of the petitioner's product line, a list of clients, production and shipping schedules for orders placed by a preliminary copy of a letter of credit involving and the petitioner, a summary of paid invoices for for 2011, a summary of pending invoices , for 2011, individual invoices for orders from two different retail stores, documentation relating to two bank accounts held by the petitioner at the petitioner's accounts receivable report for 2010, the petitioner's accounts payable report for 2010, a listing of home, home accessories, and gift shows the petitioner was scheduled to attend in June, July, and August of 2011, and a catalog listing the petitioner's products for the spring and summer of 2011.

Relevant evidence in the record includes:

- The petitioner's accounts receivable reports for December 13, 2001, December 24, 2001, January 7, 2002, December 17, 2002, December 26, 2002, January 16, 2003, December 4, 2003, January 2, 2004, December 16, 2004, January 14, 2005, October 27, 2006, December 4, 2006, December 28, 2006, January 24, 2007, and October 30, 2007.

- Statements for the petitioner's business checking account, mutual fund account, and business line of credit account from the for January 31, 2001, December 31, 2001, January 31, 2002, December 31, 2002, January 31, 2003, December 31, 2003, January 30, 2004, January 31, 2005, December 31, 2005, January 31, 2006, December 29, 2006, January 31, 2006, December 29, 2007, and January 31, 2007.

- A bank statement for the petitioner's business checking account for the period from December 1, 2007 to December 31, 2007 from

- Two statements dated August 8, 2008 from reflecting the petitioner's business line of credit account.

- Statements for the pension plan account of the petitioner's owner from for the periods from September 9, 2003 to December 31, 2003, September 27, 2004 to December 31, 2004, October 1, 2005 to December 31, 2005, July 1, 2006 to September 30, 2006, and October 1, 2007 to December 31, 2007.

- Annual portfolio summaries for investments held by the petitioner's owner with the for 2002, 2003, 2004, 2005, 2006, and 2007.

- Statements for a retirement account of the petitioner's owner from for the periods from October 2001 to December 2001, October 2002 to December 2002, October 2003 to December 2003, October 2004 to December 2004, October 2005 to December 2005, July 2006 to September 2006, and October 2007 to December 2007.

- Statements of investment accounts held by the petitioner's owner with for the periods from June 30, 2001 to September 30, 2001, September 30, 2002 to December 31, 2002, September 30, 2003 to December 31, 2003, September 30, 2004 to December 31, 2004, November 30, 2005 to December 31, 2005, October 31, 2006 to November 30, 2006, and November 30, 2007 to December 31, 2007.

- Bank statements for checking and savings accounts of the petitioner's owner from for the periods from August 15, 2000 to September 17, 2000, October 16,

2003 to November 17, 2003, December 14, 2004 to January 13, 2005, December 14, 2005 to January 16, 2006, December 14, 2006 to January 15, 2007, November 15, 2007 to December 13, 2007, and June 13, 2008 to July 14, 2008.

- A catalog listing the petitioner's products for the fall of 2008 and winter of 2009.
- Copies the petitioner's 2001 through 2006 Form 1040, U.S. Individual Income Tax Returns with Schedule C, Profit or Loss From Business.
- A copy of a bank statement dated August 31, 2007 from for the petitioner's owner showing a business line of credit of $65,000 with $6,375.44 usable.
- A copy of a bank statement dated March 14, 2008 from for the petitioner's owner showing a business line of credit of $100,000 with $45,026.85 usable.
- A letter from the petitioner's owner dated October 3, 2007.
- An accounts receivable report for the petitioner dated September 20, 2007.
- A bank statement for the petitioner's owner from for the period August 14, 2007 through September 16, 2007 showing a regular checking balance of $1,300 and a super yield money market account of $25,220.59.
- A bank statement for the petitioner's owner from for the period February 14, 2008 through March 13, 2008 showing a regular checking balance of $1,300 and a super yield money market account of $25,449.41.
- A statement from the as of June 30, 2007 reflecting a total of $41,256.87 in a retirement fund for the petitioner's owner.
- A statement from the as of December 31, 2007 reflecting a total of $40,473.85 in a retirement fund for the petitioner's owner.
- A statement of retirement accounts from for the period April 2007 through June 2007 for the petitioner's owner reflecting a balance of $16,178.33.
- A statement of retirement accounts from for the period October 2007 through December 2007 for the petitioner's owner reflecting a balance of $16,104.56.

- A statement of retirement accounts from . for the period April 1, 2007 through June 30, 2007 for the petitioner's owner reflecting a value of $6,112.98.
- A statement of retirement accounts from . for the period October 1, 2007 through December 31, 2007 for the petitioner's owner reflecting a value of $6,184.93.
- A statement of retirement accounts from as of the month ending June 30, 2007, for the petitioner's owner reflecting a value of $11,299.47.
- A statement of retirement accounts from as of the month ending February 29, 2008, for the petitioner's owner reflecting a value of $10,263.75.
- A list of the petitioner's inventory classified by manufacturers as of September 30, 2007.
- A catalog listing the petitioner's products for the fall and winter of 2007 and 2008.
- A history of the petitioner, a list of the petitioner's payables for April 2008.
- Invoices for the petitioner's payables for various periods in March and April 2008.
- Several advertisements showing the petitioner's products in various national magazines and catalogs.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 a priority date for any immigrant petition later based on the Form 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 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. On motion, counsel submits Form 1099-MISC statements reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2008 – $17,264.23

- 2009 – $14,796.25 ($1,843.75 less than the proffered wage of $16,640.00)
- 2010 – $13,985.63 ($2,654.37 less than the proffered wage of $16,640.00)

On motion, counsel asserts that the AAO has broadened its interpretation of "ability to pay" in that an appeal should not be dismissed for the petitioner's lack of ability to pay as long the petitioner is actually paying the proffered wage. Counsel cites an unpublished AAO decision in support of his statement. However, counsel's assertion is not persuasive. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner established that it had paid the beneficiary the proffered wage in 2008. However, the petitioner failed to establish that it paid the beneficiary the full proffered wage of $16,640.00 in 2009 and 2010. Although the petitioner must demonstrate the ability to pay the full proffered wage in 2009 and 2010, it must be noted that the petitioner is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in 2009 and 2010.

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. 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. *Ubeda v. Palmer*, 539 F. Supp. at 647, *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately $20,000.00 where the beneficiary's proposed salary was $6,000.00 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supports herself. The sole proprietor's Form 1040 tax returns reflect the following information for the following years:

- Proprietor's adjusted gross income (Form 1040, line 33) for 2001 was $24,470.00.
- Proprietor's adjusted gross income (Form 1040, line 35) for 2002 was $14,373.00.
- Proprietor's adjusted gross income (Form 1040, line 34) for 2003 was $22,334.00.
- Proprietor's adjusted gross income (Form 1040, line 36) for 2004 was $15,126.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2005 was $9,914.00.
- Proprietor's adjusted gross income (Form 1040, line 37) for 2006 was $22,981.00.

The proprietor's adjusted gross income is not sufficient to pay the proffered wage in 2002, 2004 and 2005. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The AAO is unable to determine if the sole proprietor could pay the proffered wage of $16,640.00 and her monthly recurring expenses in 2001, 2003, and 2006 from the sole proprietor's adjusted gross income. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although requested by the director, the petitioner declined to provide evidence of its monthly expenses for the entire relevant period including, but not limited to, lease payments, mortgage payments, vehicle payments, insurance payments, utility payments, child care expenses, etc. The petitioner's failure to submit these documents cannot be excused. 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). The petitioner cannot establish its continuing ability to pay the proffered wage without a detailed listing of the petitioner's assets and personal liabilities for each relevant year from 2001 onward.[1]

On motion, counsel submits an affidavit signed by the petitioner's owner on March 9, 2011. The petitioner stated in pertinent part:

> a.) As sole owner of [redacted] my basic living expenses are already included in my schedule of expenses. Please note that I spent all my time running this business and I don't even draw any salary for myself.
> b.) I do not have any lease payment and never have since the inception of my business 1989/1990.

[1] A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

c.) I do not have any vehicle payment or car loan to pay as I own my vehicle-a 2001 Mercedes.
d.) I don't have any childcare expenses. I am unmarried and have no children.
e.) Rent payments are included in my schedule of expenses.
f.) Insurance payments or auto insurance payments are included in my schedule of expenses.
g.) Utility payments are included in my schedule of expenses.

The inference that the Schedule C of the Form 1040 tax returns filed by the petitioner's owner lists her personal liabilities and recurring monthly personal expenses is not persuasive. As discussed above, 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. *Ubeda v. Palmer*, 539 F. Supp. at 647, *aff'd*, 703 F.2d 571. The Schedule C of the Form 1040 tax return is not meant to reflect either a petitioner's personal liabilities or daily living expenses and cannot be accepted as a detailed listing of the petitioner's personal liabilities and recurring personal expenses for each relevant year from 2001 onward.

On motion, counsel contends that an examination of the petitioner's net profits as listed on the Schedule C of the Forms 1040, U.S. Individual Income Tax Return, of the petitioner's owner reveals sufficient funds to pay the proffered wage in 2002 and 2004. While counsel acknowledges that the petitioner's net profits were not enough to pay the full proffered wage in 2005, counsel notes that the petitioner's owner had sufficient funds in a savings account to pay the difference between the petitioner's net profits and the full proffered wage in 2005. However, counsel's reliance upon net profits listed in the Schedule C of the petitioner's Form 1040 tax returns as a means to calculate funds available to the petitioner to pay the proffered wage is misplaced. As noted previously, in those cases where the petitioner is a sole proprietor, USCIS utilizes the adjusted gross income of the sole proprietor as expressed on their federal tax return and not the net profits of the sole proprietor's business as expressed on Schedule C to determine the petitioner's ability to pay the proffered wage.

On motion, the petitioner provides Form 1099-MISC statements reflecting that the petitioner paid the beneficiary the full proffered wage of $16,640.00 in 2008, and a portion thereof, $14,796.25 in 2009 and $13,985.63 in 2010. Nevertheless, it cannot be determined whether the petitioner's adjusted gross income was sufficient to pay the difference between wages paid to the beneficiary and the full proffered wage of $16,640.00 in 2009 and 2010, as the petitioner did not include its federal tax returns for comparison for those years.

The record contains the petitioner's accounts receivable reports for December 13, 2001, December 24, 2001, January 7, 2002, December 17, 2002, December 26, 2002, January 16, 2003, December 4, 2003, January 2, 2004, December 16, 2004, January 14, 2005, October 27, 2006, December 4, 2006, December 28, 2006, January 24, 2007, and October 30, 2007. On motion, counsel submits a copy of the petitioner's accounts receivable report for 2010. However, the unsubstantiated reports appear to

have been compiled by the petitioner rather than an accountant using accepted accounting methods. The reports have not been presented in the context of audited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. The accounts receivable reports contained in the record are not persuasive evidence as the accounts receivable reports are the representations of petitioner/sole proprietor and are insufficient to demonstrate the ability to pay the proffered wage.

The record contains summaries of two business lines of credit. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A limit on a credit card cannot be treated as cash or as a cash asset. Further, a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms,* 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak,* 14 I&N Dec. at 45. Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in a tax return or audited financial statement and will be fully considered in the evaluation of the net current assets of the business. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall,* 16 I&N Dec. 142 (Acting Reg. Comm. 1977). Here, as the evidence of the lines of credit have not been submitted in the context of audited financial statements, their availability to pay the proffered wage has not been established.

The record contains counsel's statements regarding the pension plan account of the petitioner's owner from [redacted] for September 9, 2003 to December 31, 2003 with balance of $4,282.79, September 27, 2004 to December 31, 2004 with balance of $5,019.49, October 1, 2005

to December 31, 2005 with balance of $5,149.29, July 1, 2006 to September 30, 2006 with balance of $5,457.80, and October 1, 2007 to December 31, 2007 with balance of $6,184.83.

Counsel provides annual portfolio summaries for three separate accounts held by the petitioner's owner with the for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. These accounts had a total balance of $20,115.76 at the end of 2001, $20,303.96 at the end of 2002, $23,066.62 as of September 30, 2003, $28,653.97 at the end of 2004, $34,425.56 at the end of 2005, $38,809.41 at the end of 2006, and $40,473.85 at the end of 2007.

Counsel includes statements for the retirement account of the petitioner's owner from Services, Inc., for the periods from October 2001 to December 2001 with balance of $5,209.79, October 2002 to December 2002 with balance of $9,170.20, October 2003 to December 2003 with balance of $11,575.55, October 2004 to December 2004 with balance of $13,069.05, October 2005 to December 2005 with balance of $13,805.52, July 2006 to September 2006 with balance of $14,708.23, and October 2007 to December 2007 with a balance of $16,104.56.

Counsel submits statements for a retirement account held by the petitioner's owner with for the periods from June 30, 2001 to September 30, 2001, September 30, 2002 to December 31, 2002, September 30, 2003 to December 31, 2003, September 30, 2004 to December 31, 2004, November 30, 2005 to December 31, 2005, October 31, 2006 to November 30, 2006, and November 30, 2007 to December 31, 2007. This account had a balance of $7,760.87 on September 30, 2001, a balance of $6,438.37 on December 31, 2002, a balance of $8,837.58 on December 31, 2003, a balance of $9,527.33 on December 31, 2004, a balance of $9,415.77 on December 31, 2005, a balance of $10,223.24 on November 30, 2006, and a balance of $10,713.38 on December 31, 2007.

The pension and retirement accounts held by the petitioner's owner at are investment accounts devoted to providing funds to the petitioner's owner in retirement rather than a liquid source of funds readily available to pay the proffered wage and, therefore, it is improbable that the petitioner would liquidate these assets to pay the proffered wage. Further, the petitioner's owner has failed to disclose whether the funds in these accounts would be subject to penalties and taxes if such funds were withdrawn from these retirement accounts. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel includes statements from the dated January 31, 2001, December 31, 2001, January 31, 2002, December 31, 2002, January 31, 2003, December 31, 2003, January 30, 2004, December 31, 2004, January 31, 2005, December 30, 2005, January 31, 2006, December 29, 2006, January 31, 2007, and December 29, 2007. These statements reflect balances in the petitioner's business checking account, mutual fund account, and the previously discussed business line of credit. The

checking account had a balance of $195,167.25 on January 31, 2001, $25,000.00 on December 31, 2001, $24,775.74 on January 31, 2002, $7,049.91 on December 31, 2002, $25,123.85 on January 31, 2003, $70,085.35 on December 31, 2003, $29,002.52 on January 30, 2004, $13,061.41 on December 31, 2004, $37,959.00 on January 31, 2005, $12,219.00 on December 30, 2005, $16,676.86 on January 31, 2006, $60,649.46 on December 29, 2006, and $3,074.66 on January 31, 2007. The mutual fund had a balance of $48,738.14 on December 31, 2001, $63,972.99 on January 31, 2002, $21.06 on December 31, 2002, and $9,916.44 on January 31, 2003 with no further reference to this account after this date. Further, the record contains a statement dated December 31, 2007 that reflects the conversion of the business checking account into a business checking account with a balance of $23,337.15. Nevertheless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in these accounts are variable with balances fluctuating above and well below the proffered wage. Finally, the bank records are incomplete. Many of the statements are missing pages, and there are many intervening months which are omitted. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date.

The record contains statements from for a joint saving account held by the petitioner's owner and that are dated September 17, 2000 and November 17, 2003 with respective balances of $18,049.26 and $18,761.59. The record also contains statements from for a savings account held by the petitioner dated January 13, 2005 with a balance of $20,304.66, January 16, 2006 with a balance of $20,578.61, January 15, 2007 with a balance of $24,913.38, December 13, 2007 with a balance of $25,335.16, and July 14, 2008 with a balance of $32,732.75, as well as a separate checking account with a balance of $1,300.00 on December 13, 2007 and July 14, 2008. However, for the same reasons as stated above, these records are not persuasive in establishing a sustained ability to pay the proffered wage

Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Finally, the petitioner has declined to provide evidence of its monthly expenses for the entire relevant period including, but not limited to, lease payments, mortgage payments, vehicle payments, insurance payments, utility payments, child care expenses, etc. The petitioner's failure to submit these documents cannot be excused. 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 a detailed listing of the petitioner's assets and personal liabilities for each relevant year from 2001 onward and evidence of the petitioner's monthly expenses for the entire relevant period, the petitioner cannot establish its continuing ability to pay the proffered wage.

Counsel is correct in asserting that 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 Sonegawa,* 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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 this matter, the petitioner failed to demonstrate its ability to pay the proffered wage of $16,640.00 per year through an examination of the sole proprietor's adjusted gross income in 2002, 2004 and 2005. In addition, it cannot be determined whether the petitioner's adjusted gross income was sufficient to pay the difference between wages paid to the beneficiary and the full proffered wage of $16,640.00 in 2009 and 2010, as the petitioner did not include its federal tax returns for comparison for those years. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are persuasive in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay 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.

Based on a review of the underlying record and arguments submitted on motion, the petitioner has not established his continuing financial ability to pay the proffered wage. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The prior decisions of the AAO dated January 28, 2009 and January 26, 2011 dismissing the appeal are affirmed.