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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 1 3 2015 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner describes itself as a law practice. It seeks to permanently employ the beneficiary in the United States as a law clerk. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] 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 denial and subsequent motions, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Further, the director found that the petitioner had failed to file its latest motion within 33 days. However, upon review of the record at hand, we find that the petitioner has timely filed its motions and instant appeal.

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, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

Here, the ETA Form 9089 was accepted on December 23, 2010. The proffered wage as stated on the ETA Form 9089 is $31,262 per year. The ETA Form 9089 states that the position requires a master's degree in law or a related field.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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 2002 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on October 13, 2011, the beneficiary claimed to have worked for the petitioner since October 1, 2009.

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, 144 (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 Sonegawa*, 12 I&N Dec. 612, 614-15 (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 onwards.

The director noted that the petitioner has sponsored multiple beneficiaries. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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[2] 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, 766 (BIA 1988).

We have reviewed the record at hand and find the following, which is based on the petitioner's response to the director concerning its multiple beneficiaries:

Proffered Wage for Multiple Beneficiaries				
Beneficiaries	2010	2011	2012	2013
Mr.	$31,262	$31,262	$31,262	$31,262
Additional Bene 1	$33,300	$33,300		
Additional Bene 2	$23,000	$23,000		
Additional Bene 3	$31,262	$31,262		
Additional Bene 4		$31,262	$31,262	$31,262
Additional Bene 5		$31,500	$31,500	$31,500
Total	**$118,824**	**$181,586**	**$94,024**	**$94,024**

Therefore, the petitioner must establish its ability to pay the proffered wage of all of its beneficiaries. The table above provides the total proffered wages for 2010 through 2013 in the "Total" row.

While the petitioner has not established that it has paid the full proffered wage to all of its beneficiaries, it has paid some wages for the following beneficiaries based on Forms 1099 submitted to the director. See table below:

Wages Paid to Multiple Beneficiaries		
1099	2010	2011
Mr.	$22,000	$22,000
Additional Bene 1	$40,908	$40,908
Additional Bene 2	$20,625	$20,625
Additional Bene 3	$22,000	$22,000
Additional Bene 4	$3,600	$15,360
Total	**$109,133**	**$120,893**

The record is silent concerning the wages paid to the petitioner's beneficiaries for 2012 and 2013. Therefore we find that the petitioner must establish an ability to pay the proffered wage or the difference between wages paid for the following years; 2010 ($9,961), 2011 ($60,693), 2012 ($94,024), and 2013 ($94,024).

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d

1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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*, 539 F. Supp. at 650.

In *Ubeda*, 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. *Id.*

In the instant case, the sole proprietor supports a family of two. We note that even though the director has sought evidence from the sole proprietor concerning his federal income tax returns, the sole proprietor has only provided Schedule C for 2010 and copies of his complete federal income tax returns for 2011 and 2012. The sole proprietor has not provided complete federal income tax returns for 2010 and 2013. The proprietor's tax returns reflect the following information for the following years:

Tax Year	Proffered Wages	Wages Paid	Adjusted Gross Income	Yearly Expenses	Total
2010	$118,824	$109,133	$0	$0	-$9,961
2011	$181,586	$120,893	$249,764	$0	$189,071
2012	$94,024	$0	$270,715	$0	$176,691
2013	$94,024	$0	$0	$0	-$94,024

The director also requested evidence of the petitioner's sole proprietor's monthly expenses. The petitioner provided a statement asserting that he had no mortgage or rent and estimated his monthly expenses to be approximately $1,275 per month, including utilities, gas, lawn services, and food. In support of the sole proprietor's assertion, he submitted monthly bank statements from January 2011 to May 2012. On appeal, the petitioner's sole proprietor submits evidence that his mortgage with was paid off effective February 21, 2011.

The sole proprietor has submitted no additional evidence concerning his monthly expenses, including any evidence of expenses in 2010 (a year in which he still had a mortgage). Further, the sole proprietor's bank statements demonstrate payments and debits from the checking account of approximately $3,500 to $4,000 each month. This is far below the sole proprietor's claimed $1,275 in monthly expenses. 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)). USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Upon review of the record at hand, and because of the petitioner's failure to provide its complete federal income tax returns for 2010 and 2013, as well as evidence concerning the monthly expenses of the sole proprietor, we cannot clearly ascertain the petitioner's ability to pay the total proffered wages of its beneficiaries. 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). If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007).

Therefore, we find that the petitioner has not established its ability to pay the proffered wage in 2010, 2011, 2012, and 2013.

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 Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 2002 and claims to employ five workers. The petitioner's tax returns appear to demonstrate growth in its business, as evidenced in the increase of its gross sales and net profit from 2010 to 2012. However, the record is absent evidence of the sole proprietor's adjusted gross income in 2010, as well as an accurate estimate of monthly expenses in any year. Thus, in 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 or established a fact pattern similar to *Sonegawa*.

Beyond the decision of the director, although not a basis for this decision, the petitioner must establish that the petition is supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). In the instant case, the labor certification and the petition list the work location for the proffered position as the petitioner's address, which is also the sole proprietor's residence in [redacted] County), New York. The petitioner's website indicates that its office until July 31, 2013 was located at [redacted] County), New York, and that its office as of August 1, 2013 is located at [redacted] County), New York. *See* http:/[redacted] (accessed January 5, 2015). As the work location listed on the petition and the underlying labor certification is outside the metropolitan statistical area for the petitioner's actual place of business, with any further filings, the petitioner must demonstrate that the intended work location of the beneficiary is at its address in [redacted]

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.