

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**

Date:

MAY 23 2012

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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 with the field office or service center that originally decided your case by filing a 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 "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a beauty supply and wig repair company. It seeks to employ the beneficiary permanently in the United States as a wig repairer. As required by statute, the petition is accompanied by 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, 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 February 5, 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 at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

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

Here, the ETA Form 9089 was accepted on September 27, 2006. The proffered wage as stated on the ETA Form 9089 is \$27,706.00 per year. The ETA Form 9089 states that the position requires twenty-four months of experience in the job offered as a wig repairer.

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 was first structured as an S corporation and then, according to the most recent information of record, as a sole proprietorship.² On the I-140 petition, the petitioner claimed to have been established in 2006 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 12, 2007, the beneficiary did not claim to have worked for the petitioner.

The evidence submitted with the original filing included the following:

- A copy of the petitioner's 2006 Income Tax Return (IRS Form 1120S).
- A copy of [REDACTED] 2006 jointly filed Individual Income Tax (IRS Form 1040).
- Copies of the petitioner's 2007 bank statements.
- A copy of the certified translation of a "Certificate of Business Closing" related to [REDACTED]

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 Public Records information show that the petitioner [REDACTED] was incorporated on March 1, 2006 and administratively dissolved on May 16, 2008. See [REDACTED] (accessed April 3, 2012). The record of proceeding contains the petitioner's 2006 federal tax return, Form 1120S, indicating that it was the initial and final return for the petitioner. The petitioner also submitted [REDACTED] individual federal income tax, Form 1040, accompanied by its Schedule C, indicating that the petitioner was structured as a sole proprietorship in 2007. The petitioner stated in its January 21, 2009 response to the director's request for evidence, that the petitioner is not incorporated. Although public records reflect that the petitioning company was administratively dissolved in 2008, the petitioner did not submit its 2007 corporate tax returns. Rather, the evidence in the record suggests that the petitioner continued to operate in 2007 as a sole proprietorship before the corporation was dissolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On December 10, 2008, the director issued a Request for Evidence (RFE), requesting that the petitioner submit its 2007 tax return, annual report, or audited financial statement, and, if the beneficiary worked for the petitioner, the beneficiary's 2006 and 2007 IRS Forms W-2. The director also requested evidence to establish that the beneficiary met the experience requirements of the labor certification by September 27, 2006, the priority date.

In response to the RFE, the petitioner submitted the following evidence:

- A copy of [REDACTED] 2007 jointly filed Individual Income Tax (Form 1040), accompanied by its Schedule C.
- A copy of the petitioner's 2008 unaudited financial statement.
- Copies of federal Quarterly Tax and Wage Report (IRS Form 941) for all quarters of 2008 for [REDACTED]³
- Copies of Georgia Quarterly Tax and Wage Reports for all quarters of 2008 for [REDACTED], evidencing wages paid to a single employee, “[REDACTED]”⁴
- A copy of the demand deposit on [REDACTED] bank account, showing an average ledger balance of \$3,174 for December 2008.
- A copy of the demand deposit on [REDACTED] bank account, showing an average ledger balance of \$5,554.74 for December 2008.
- Copies of translations of real estate appraisals related to real estate properties owned by [REDACTED]

On appeal, counsel asserts that the director's denial failed to consider the May 4, 2004 Memorandum, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay, and the fact that the labor certification was filed during the last quarters of the year 2006, which would only require it to show ability to pay $\frac{1}{4}$ of the annual proffered wage for 2006. Counsel relies on previously issued AAO decisions.

³ The Federal Employee Identification Number (FEIN) listed on the Forms 941 for Supply is [REDACTED]. The petitioner's FEIN, as listed on Form I-140 and ETA Form 9089, and shown on the 2006 Form 1120S of record, is [REDACTED]. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁴ The only identifying information for the employee on the state quarterly tax and wage reports is the Social Security Number (SSN) and last name, first initial. Although the quarterly tax and wage reports list the employee as [REDACTED] it is not clear that this individual is the beneficiary. Although no SSN is listed for the beneficiary on Form I-140, Part 3, a SSN is listed for [REDACTED] on the quarterly tax and wage reports. 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 paid the beneficiary the full proffered wage from the priority date or subsequently. Although the petitioner submitted state and federal quarterly tax and wage reports for 2008 evidencing wages paid to a single employee, it is not clear that the single employee listed on the quarterly tax and wage reports is the beneficiary. As mentioned above, there are inconsistencies concerning the petitioner's Federal Employee Identification Number and the beneficiary's Social Security Number. 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).

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record includes the petitioner's 2006 tax return (Form 1120S), which stated a net income⁵ of \$5,774. Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/f1120s.pdf> (accessed April 2, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have any additional income, credits, deductions, or other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on line 21 of its 2006 tax return.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate that in 2006, the petitioner did not have any net current assets. Therefore, for the year 2006 the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, for 2006 the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner's reliance on its 2007 bank statements is also misplaced. First, 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would have been considered above in determining the petitioner's net current assets. The petitioner's 2006 federal income tax return (Form 1120S) does not show any figures on its Schedule L. For the year 2007, the petitioner submitted Jun Bae Kim's individual federal tax return (Form 1040) accompanied by its Schedule C.

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The most current information of record shows that the petitioner is now a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor is married with no dependent children.⁷ The sole proprietor's adjusted gross income (Form 1040, line 37) for 2007 is \$32,891. The sole proprietor's adjusted gross income of \$32,891 would cover the proffered wage of \$27,706.00. However, it is improbable that the sole proprietor could support himself and his wife with only \$5,185 per year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

As mentioned above, if the petitioner is a sole proprietor, it must show that its owner can cover his existing business expenses, pay the proffered wage out of his adjusted gross income or other available funds, and support himself and his dependents. Even though the sole proprietor's adjusted gross income for 2007 is greater than the proffered wage, without considering the sole proprietor's monthly expenses, it is impossible to evaluate the petitioner's ability to pay. The petitioner failed to provide a statement of the sole proprietor's monthly household expenses for all relevant years. Thus, the evidence of record is deficient and the petitioner's ability to pay the proffered wage in 2007 cannot be determined.

In response to the director's RFE, the petitioner submitted a copy of the demand deposit related to [REDACTED] bank account, showing an average ledger balance of \$3,174 for December 2008. The funds located in the sole proprietorship's business checking account are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. The net profit (or loss) is carried forward to page number one of the sole proprietor's IRS Form 1040, and included in the calculation of the petitioner's AGI. The record of proceeding does not contain a copy of the petitioner's or the sole proprietor's 2008 tax return, which prevents the AAO from fully analyzing

⁷ [REDACTED] 2007 jointly filed Individual Income Tax Return (Form 1040) does not list any dependents.

the petitioner's ability to pay for the year 2008, based on the business funds in the business bank account. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In addition, the record of proceeding contains a copy of the demand deposit showing an average ledger balance of \$5,554.74 in December 2008. As in the instant case, where the petitioner has not established its ability to pay the proffered wage based on its adjusted gross income (AGI), the proprietor's statements must show annual average balances of an amount exceeding the proffered wage or difference between the proffered wage and the wages paid to the beneficiary. For December 2008, the sole proprietor's average ledger balance is \$5,554.74, which is less than the proffered wage.

With respect to the appraisals of the real estate properties owned by [REDACTED], while the sole proprietor may realize a gain from the sale of the property in the future, it is unclear whether the sole proprietor will use all or part of those funds to purchase a larger residence, or whether the funds will be deposited into a bank account, which could then be used to either support the sole proprietor and his family, or to pay the proffered wage. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998).

With respect to the application of the language in the memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it should be emphasized that the AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is September 27, 2006. Neither the petitioner's net income, nor its net current assets for 2006 are equal to or greater than the proffered wage. Further, the sole proprietor's adjusted gross income for 2007 is not equal to or greater than the proffered wage.

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

the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel refers to decisions issued by the AAO, but does not provide its published citation. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). 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).

On appeal, counsel claims that USCIS should consider the value of the sole proprietor's home and over \$15,000 of equity. A home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. 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); *Sytronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 (Reg'l Comm'r 1967). 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 claims to be in business since September 2006. The petitioner submitted its tax returns for 2006 (Form 1120S) and 2007 (Form 1040). The figures on its tax returns do not demonstrate the petitioner's ability to pay the beneficiary the proffered wage of \$27,706.00 per year. The petitioner's gross receipts/sales ranged from \$30,279 in 2006 to \$172,544 in 2007. While the gross receipts for these years reflect the petitioner's growth in sales, no evidence was submitted to establish a basis for expected continued growth. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during those years. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.