



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 15 2014** OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
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:

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 preference visa petition was denied by the Director, Nebraska Service Center. The director granted a subsequent motion and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a general manager. 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 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 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 March 4, 2013 and May 16, 2013 decisions, the primary 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.

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).

Here, the ETA Form 9089 was accepted on July 27, 2012. The proffered wage as stated on the ETA Form 9089 is \$164,299 per year. The ETA Form 9089 states that the position requires a bachelor's degree in business administration and five years of experience as a general manager or in the alternative a master's degree and three years of experience as a general manager.

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.

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.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 2011 and to currently employ 10 workers. On the ETA Form 9089, signed by the beneficiary on October 2, 2012, the beneficiary does not claim to have been employed by the petitioner.

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, 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 Sonogawa*, 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.

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).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into 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).

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 (AGI), 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 (IRS 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 AGI 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.³ *Id.*

In the instant case, the sole proprietor supports himself, his wife and his son. Counsel indicates that the sole proprietor's household expenses were \$54,000 in 2012. The sole proprietor's 2012 individual income tax return reflects an AGI of \$70,054.⁴ The sole proprietor's AGI of \$70,054 fails to cover the proffered wage of \$164,299. It is improbable that the sole proprietor could support himself, his wife and his son on a deficit, which is what remains after reducing the AGI by the amount required to pay the proffered wage.

Thus, the petitioner has not established that the sole proprietor could have covered his existing expenses of \$54,000 and paid the proffered wage of \$164,299 out of his AGI of \$70,054 in 2012.

On appeal, counsel asserts that if the sole proprietor's retrospective net income is sufficient to meet his personal expenses, then the prospective net current assets, if and when there is no overlap in numbers, should be considered in the determination of the petitioner's ability to pay the proffered wage.⁵ Counsel states that since the petitioner's retrospective net income in 2011 and 2012 was

³ The director accepted counsel's assertion in response to the Request for Evidence dated December 6, 2013 that the sole proprietor's personal expenses in 2012 were \$54,000. The record, however, does not contain a statement from the sole proprietor detailing his personal household expenses and documentation supporting those expenses. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any further proceeding, the sole proprietor must establish the amount required to meet his personal household expenses for all relevant years.

⁴ IRS Form 1040, page 1, line 37.

⁵ The director rejected the petitioner's attempt to combine the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. In his brief, counsel

sufficient to meet his family's expenses in 2011 and 2012, then the net current assets of the petitioner as of October 31, 2012 (based on audited financial statements), or December 31, 2012 (based on unaudited financial statements), should be considered sufficient to pay the proffered wage.

Specifically, counsel states that the petitioner's net income of \$66,138 in 2011 was sufficient to cover his personal household expenses of \$54,000. Further, he states that the petitioner's net income of \$75,379 in 2012 was sufficient to cover his personal expenses in 2012. However, counsel failed to consider payment of the proffered wage of \$164,299 in his analysis. Further, he improperly considered the petitioner's net profit from line 31 of Schedule C, instead of the sole proprietor's AGI, in his analysis.

Next, counsel states that the petitioner's net current assets of \$201,213 as of October 31, 2012 based on audited financial statements were sufficient to pay the proffered wage of \$164,299. He further states that the petitioner's net current assets of \$221,668 as of December 31, 2012 based on unaudited financial statements were sufficient to pay the proffered wage of \$164,299.⁶

We disagree with counsel's conclusion that the petitioner has established its ability to pay the proffered wage. In this case, we use a 3-prong analysis to determine the petitioner's ability to pay the proffered wage in 2012. First, if the petitioner had established that it paid the beneficiary a salary equal to or greater than the proffered wage in 2012, the petitioner would have established its ability to pay the proffered wage in 2012. The petitioner did not establish that it paid the beneficiary any wages in 2012. Therefore, the petitioner did not satisfy the first prong of the ability to pay analysis.

noted that USCIS has found this approach to be unacceptable because net income and net current assets are not cumulative. Net income and net current assets are two different methods of demonstrating a petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of a petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, a petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the two figures cannot be combined in a meaningful way to illustrate a petitioner's ability to pay the proffered wage during a single tax year. Moreover, counsel noted that the AAO has recognized that combining net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

⁶ Counsel'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. 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.

Second, the petitioner, a sole proprietorship, must establish that the sole proprietor can cover his existing expenses *and* pay the proffered wage out of his AGI in each relevant year. *See Ubeda*, 539 F. Supp. at 650. The petitioner in this case failed to establish its ability to pay the proffered wage based on the second prong of the ability to pay analysis. As previously noted, the petitioner did not establish that the sole proprietor could have covered his existing expenses of \$54,000 and paid the proffered wage of \$164,299 out of his AGI of \$70,054 in 2012.⁷

Third, we will review the sole proprietor's assets and liabilities to determine his ability to pay the proffered wage. In the instant case, the petitioner did not establish that the proprietor had any personal, liquefiable assets that could be used to pay the proffered wage. Instead, counsel asserts that the petitioner's business assets could be used to pay the proffered wage and that there are "no overlap in numbers" with the net income calculation.

The Schedule C to the sole proprietor's 2011 IRS Form 1040 was prepared using the accrual basis of accounting. The Schedule C to the sole proprietor's 2012 IRS Form 1040 was prepared using the cash basis of accounting. Thus, the petitioner changed its method of accounting on its federal tax returns in 2012 from accrual to cash. It is not clear if the petitioner properly filed IRS Form 3115, Application for Change in Accounting Method, to request a change in its accounting method, as the Form was not submitted to the record.⁸ Further, it is not clear why the petitioner changed its accounting method in 2012. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The petitioner requested the use of its tax return to satisfy the second prong of the ability to pay analysis, and its audited balance sheet to satisfy the third prong of the ability to pay analysis. However, the petitioner's 2012 tax return and audited balance sheet use different methods of accounting. As noted, the Schedule C to the sole proprietor's 2012 IRS Form 1040 was prepared using the cash basis of accounting, and the petitioner's 2012 audited balance sheet was prepared using the accrual basis of accounting.⁹ Because the two methods of accounting can produce

⁷ Similarly, in 2011, the year prior to the priority date, the petitioner did not establish that the sole proprietor could have covered the proffered household expenses of \$54,000 and paid the proffered wage of \$164,299 out of his AGI of \$61,466.

⁸ Once a taxpayer sets up an accounting method, it must generally get IRS approval before changing to another method. *See* http://www.irs.gov/publications/p334/ch02.html#en_US_2013_publink1000313270 (accessed March 4, 2014).

⁹ Generally Accepted Accounting Principles (GAAP) generally require the use of the accrual basis of accounting. The basic difference between the cash and accrual methods of accounting is related to the timing of revenues and expenses. Under the cash method of accounting, income is recognized when it is received, and expenses are recognized when they are paid. Cash basis does not recognize accounts receivable or payable. Under the accrual method of accounting, income is recognized when it is earned, and expenses are recognized when they are incurred. *See* <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed March 4, 2014). We note that the method used to value inventory differs on the 2012 tax return and 2012 audited balance sheet. On the 2012 tax return, inventories are valued at cost. The petitioner did not fully complete Part III

different results for a taxpayer in a single period, in this case, the petitioner's 2012 tax return must have been prepared and filed using the accrual basis of accounting in order for the petitioner to use its tax return for the for the second prong of the ability to pay analysis and its audited balance sheet for the third prong of the ability to pay analysis. The 2012 tax return was not prepared and filed in this manner.

Finally, counsel asserts there is "no overlap in numbers" with the net income calculation, but he has provided no evidence to support this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 2011 and claims to employ 10 workers. Unlike the petitioning entity in *Sonegawa* who had been in business for over 11 years, the petitioner in this case has been in business for only three years. The petitioner's gross sales increased from 2011 to 2012; however, an increase in one year does establish a pattern of growth of its business. Further, although the petitioner claims that it employs 10 employees, the petitioner's total wages of \$100,539 in 2011 and \$119,277 in 2012 were insignificant in relation to its claimed employment, and the proffered wage for the instant job opportunity is greater than the petitioner's total wages paid

of Schedule C to its 2012 tax return and, therefore, the calculation of its 'Costs of Goods Sold' is unclear. On the 2012 audited balance sheet, inventories are calculated at the lower of cost and net realizable value.

in 2011 and 2012.¹⁰ The record is silent concerning the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. The petitioner has not shown that its inability to pay the wage in 2012 was due to extraordinary circumstances. 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.

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.

¹⁰ Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).