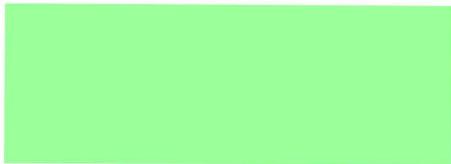
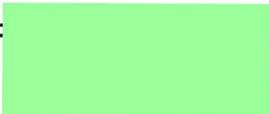


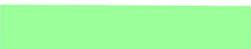
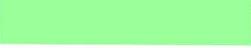


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 06 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

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.

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

Ron Rosenberg
Acting 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 The director's decision will be withdrawn. The matter will be remanded to the director for further action, consideration, and the entry of a new decision in accordance with below.

The petitioner is a self-described hairdresser. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor 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 February 7, 2013 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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 June 23, 2011. The proffered wage as stated on the ETA Form 9089 is \$22,526 per year.¹ The ETA Form 9089 states that the position requires twenty-four months of experience in the job offered, or in the alternative twenty-four months experience as a hairstylist, or within another related field.

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 labor certification, the petitioner claimed to have been established in 2003 and to currently employ 1 employee. On the ETA Form 9089, signed by the beneficiary on February 25, 2012, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established

¹ On appeal, counsel asserts that the proffered wage is \$19,710.60 per year, based on a 35 hour work week. The labor certification does not indicate that the position offered is for a 35 hour work week. The recruitment (advertisements) for the position offered does not indicate that the employment is for 35 hours per week. The prevailing wage request indicates the position offered is a 40 hour per week job, with a schedule from 8am to 5pm. Further, the labor certification states an annual proffered wage of \$22,526. Therefore, the proffered wage is \$22,526 per year.

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 (BIA 1988).

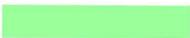
that it employed and paid the beneficiary the proffered wage, or any wages, from the priority date of June 23, 2011 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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'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 supports a family of an unknown number. Although counsel indicates in his brief upon appeal that the sole proprietor shares monthly living expenses with other family members, no further information regarding these shared expenses was provided for the record. 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)). It must also be noted that according to the income tax forms in the record, the sole proprietor has filed as single, and with no dependents for the years 2010, 2011, and 2012. The petitioner states her total expenses for the year 2011 and 2012 as \$31,874.17.



The proprietor's tax returns reflect the following information for the following years:

| | <u>2011</u> | <u>2012</u> |
|---|-------------|-------------|
| Proprietor's adjusted gross income (Form 1040, line 37) | \$44,450 | \$68,808 |

The proffered wage of \$22,526 per year in addition to the sole proprietor's expenses of \$36,361.50 would total more than the sole proprietor's adjusted gross income for 2011. The petitioner has therefore, not demonstrated its ability to pay the proffered wage base on the sole proprietor's adjusted gross income for 2011.

The sole proprietor also lists expenses from January 2012 through December 2012. The total of the expenses listed for 2012 was \$31,874.17. The sole proprietor had sufficient adjusted gross income for the year 2012 to pay the proffered wage in addition to the sole proprietor's personal expenses. However as noted, the sole proprietor's adjusted gross income of \$44,450 minus the personal expenses for the year, fails to cover the proffered wage of \$22,526 in 2011.

On appeal, counsel asserts that the demonstration of an ability to pay the full year of proffered wages for 2011 should not be required because the priority date was June 23, 2011. 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. Therefore, the AAO cannot prorate the wages in this instance.

Counsel also indicates that the petitioner is a cash basis tax payer, and therefore, account receivables are not listed on the income tax returns as assets; however, these account receivables could be reduced to cash to pay the proffered wage. Counsel for the petitioner submits a letter from a certified public accountant (CPA), dated March 3, 2013 to demonstrate this point. The CPA indicates in the letter that the petitioner had net assets of \$20,000 in both 2011 and 2012 which would not show up on its income tax until the business was sold. According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Therefore, if those assets cannot be utilized from the priority date onward, but only on the chance of a sale of the business, which would possibly also void the job offer, they cannot be considered in a calculation to determine the petitioner's current ability to pay the proffered wage to the beneficiary. The petitioner's CPA further indicates that the petitioner's supply expenses and other expenses reflected on Form 1040, Schedule C, line 24a, reflect expenditures to build an inventory and pay

other expenses which are not permanent, but an elected expense which could also be utilized to pay the proffered wage to the beneficiary. However, it has not been sufficiently demonstrated how the petitioner would be able to continue to operate their entity without the purchase of inventory and supplies to operate the business, in order to utilize any funds from these expenses for a proffered wage. The CPA's assertions appear to suggest that the petitioner could achieve its current earnings without an inventory of supplies; however, it is unclear by what mechanism the petitioner would have achieved this in 2011. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner has not submitted any evidence beyond these assertions to indicate that she would be able to continue to conduct her regular level of business and pay the proffered wage if the funds indicated were not used to purchase inventory and pay other business 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)).

The petitioner also indicates that the future profits generated by the beneficiary should be considered in demonstrating its ability to pay the proffered wage. Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a cosmetologist will significantly increase profits for a hairdresser. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. In addition, any determination of future profits generated by the beneficiary would be speculative. The ability to pay the proffered wage must be demonstrated from the priority date, indicating that the day the labor certification was filed there was an ability to pay the proffered wage as stated in the job offer. In addition, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

However, the petitioner indicates that the sole proprietor's bank statements should also be considered in its ability to pay the proffered wage from the priority date onward. The record of proceeding contains monthly statements from the sole proprietor's "[REDACTED] Checking Account" covering the period from June to December 2011, and for 2012. The monthly balance in this account exceeded \$51,125.70 every month from June 2011 onward. By November 30, 2012, the account exceeded \$67,151. As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on the sole proprietor's adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The average annual balances in the sole proprietor's

checking account in both 2011 and 2012 appear to be of a sufficient amount to cover the full proffered wage to the beneficiary in the amount of \$22,526 along with the sole proprietor's own expenses for those years. Therefore, the petitioner has established its ability to pay the proffered wage from the priority date onwards through an examination of the sole proprietor's AGI and available liquid assets. Based on the foregoing analysis, the AAO determines that the petitioner has overcome the ground for the director's decision. Accordingly, the director's February 7, 2013 decision denying the petition, will be withdrawn.

However the petition is not approvable as the record does not demonstrate that the beneficiary possessed the minimum qualifications for the position offered as of the priority date, as discussed below. Therefore, the AAO will remand the case to the director for further action.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience as a cosmetologist, or alternatively 24 months experience as a hairstylist or in any related occupation. The labor certification terms also state: "A California cosmetologist license is also required." On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a hairstylist.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter in Japanese, from [REDACTED], dated November 30, 2006, which indicates the beneficiary worked with the company as a hairstylist from April 21, 1999 to September 20, 2001. The letter lists the CEO of the company as [REDACTED]. The letter does not list the beneficiary's specific duties with the company in order for the AAO to assess the full extent of her experience in line with the job offer listed in the labor certification. Therefore, if this letter were otherwise acceptable, it still would not meet the regulation requirements for an experience letter. *Id.* Further, the translation of the letter did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has

certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Therefore, this purported translation cannot be accepted because the translator did not certify that he or she is competent in either language.

There is also no evidence in the record that the beneficiary has received her cosmetologist license in the state of California as required under the labor certification. Therefore, it has not been sufficiently demonstrated that the beneficiary received sufficient experience to qualify for the position offered.

The evidence in the record does not establish that the beneficiary possessed the required experience and special requirements as set forth on the labor certification by the priority date. Therefore, the petitioner failed to establish that the beneficiary is qualified for the offered position.

In view of the foregoing, the director's denial of the petition will be withdrawn. The petition is remanded to the director for consideration of the issues above and any other issue the director deems appropriate. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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 director's decision of February 7, 2013 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.