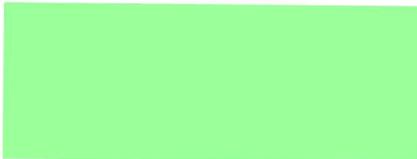


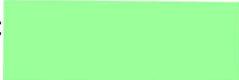
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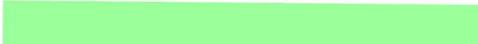
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

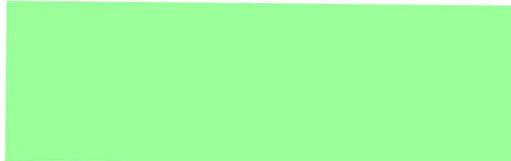


DATE: **NOV 26 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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 (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,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (director). The petitioner subsequently filed a motion to reopen and motion to reconsider which were dismissed by the director as untimely filed. The petitioner then appealed this decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on the merits. The matter is now before the AAO on a motion to reopen and reconsider.

The petitioner is a shipping/retail business. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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. On May 31, 2013, the AAO affirmed the director's decision, holding that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards and noted further, beyond the decision of the director, that the job offer was not *bona fide* in that the petitioner no longer operates the petitioning business and, therefore, has no job to offer. The petitioner then filed a motion to reopen and reconsider the AAO decision. We will accept the motion to reopen the matter based on the new information submitted. Thus, the instant motion is granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(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.

As noted in the prior AAO decision, 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on December 8, 2006. The proffered wage as stated on the ETA Form 9089 is \$17.16 per hour (\$35,692.80 per year).

In the AAO's May 31, 2013 decision, we specifically reviewed the petitioner's tax returns for 2008 to 2012. The AAO also noted that the entity listed as the petitioner, the [REDACTED] was no longer owned by the sole proprietor and that the IRS Forms W-2 issued by the petitioner to the beneficiary from 2008 to 2012 had a different address than the petitioner although the Federal Employer Identification Number (FEIN) was the same.<sup>1</sup> As stated in the previous decision, the discrepancy as to whether the sole proprietor continues to operate [REDACTED] raised doubt about the integrity of the documents submitted and the accuracy of the information reported.

With the motions to reopen and reconsider, counsel stated that the sole proprietor sold [REDACTED] in 2008, but that he operates other [REDACTED] stores in the same geographical area.<sup>2</sup> Counsel further stated that the beneficiary continued to be employed by the sole proprietor and that an oversight with the payroll company caused the store number to remain the same on the Forms W-2 instead of reflecting the actual store number where the beneficiary is employed. Counsel states that the FEIN listed on the Forms W-2 correspond to the sole proprietor and his personal Social Security Number and submits a statement from the IRS assigning the FEIN on the Forms W-2 to the sole proprietor. In addition, the petitioner submitted its Quarterly Federal Tax Returns covering the period January 2009 through March 2013 with a business address matching the one on the beneficiary's Forms W-2. The evidence submitted resolves the discrepancy in the FEINs noted in the prior decision and demonstrates that the petitioner did issue the Forms W-2, thus these amounts may be credited to the petitioner in determining its ability to pay the proffered wage. The Forms W-2 state the following wages paid:

- The 2008 Form W-2 states that the petitioner paid the beneficiary \$11,908.27.
- The 2009 Form W-2 states that the petitioner paid the beneficiary \$14,884.04.
- The 2010 Form W-2 states that the petitioner paid the beneficiary \$18,167.67.
- The 2011 Form W-2 states that the petitioner paid the beneficiary \$17,533.30.
- The 2012 Form W-2 states that the petitioner paid the beneficiary \$19,367.65.

Because the amounts paid were less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2008 was \$23,784.53, in 2009 was \$20,808.76, in 2010 was \$17,525.13, in 2011 was \$18,159.50, and in 2012 was \$16,325.15.

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<sup>1</sup> As stated in the previous AAO decision, the sole proprietor filed a Schedule C for this entity in 2006 through 2008 but did not file this schedule for the [REDACTED] in 2009 through 2012. However, the IRS Forms W-2 submitted by the sole proprietor reflect that the beneficiary was employed by the [REDACTED] FEIN [REDACTED] from 2008 through 2012, but the employer's address is listed as [REDACTED]

<sup>2</sup> The [REDACTED] locations claimed by the sole proprietor are all in the Los Angeles metropolitan area. As a result, the DOL had notice of the actual geographic area of intended employment and could accurately determine the prevailing wage for the position. 8 U.S.C. § 204.5(1)(3)(i).

The previous AAO decision also reviewed the sole proprietor's 2006 through 2012 yearly expenses and Adjusted Gross Income in determining that he did not demonstrate the ability to pay the proffered wage. On motion, counsel noted an error in the prior AAO decision concerning the average annual balance of the sole proprietor's wife's [REDACTED] Account.<sup>3</sup> As counsel states however, the average balance, when added to the sole proprietor's AGI, is still less than the amount needed for household expenses and the proffered wage, so the numerical error, when corrected, does not change the conclusion that the sole proprietor did not demonstrate his ability to pay the proffered wage. Counsel states that the remaining amount "is so miniscule (\$1,400.73), it could be easily overcome." Nothing in the regulations allows USCIS to overlook a difference between funds available and the proffered wage plus household expenses of any amount. Instead, a sole proprietor and any other petitioner must demonstrate its ability to pay the full proffered wage and meet his household expenses in every year from the priority date onwards. The AAO will consider the total factual circumstances in its analysis of the totality of the circumstances section below.

Even if the petitioner had submitted evidence of additional available funds to make up the \$1,400.73, the amount in the Management Account would be depleted in 2006 and the funds would not be available to pay the proffered wage in subsequent years. Specifically, to pay the proffered wage and household expenses in 2006, the petitioner would use all of the AGI and all of the \$65,454.07 from the account. So the balance on the account in 2007 would not have been \$76,076.46 as currently appears, but would have instead been \$10,622.39.<sup>4</sup> The petitioner's AGI in 2007 was \$52,087, so the total of the account balance and AGI combined is less than the total of the proffered wage and claimed household expenses. The deficit would thus continue in other years as the account balance would have been depleted in 2006 and 2007, leaving no additional funding to make up required funding in 2008 or any further years.

The following list takes into account the evidence of funds available and wages paid to the beneficiary:

**2006**

No wage paid to the beneficiary	\$35,692.80
Household expenses	+ \$38,988.00
Total obligation	<u>\$74,680.80</u>
Petitioner's AGI	\$7,829.00
PMA amount available	- <u>\$65,454.07</u>
Amount remaining to be paid	\$1,397.73

<sup>3</sup> The AAO decision stated an average annual balance of \$64,738. The corrected annual balance is \$65,454.07.

<sup>4</sup> This figure does not consider any reduction of loss of interest or valuation of assets, so the true value on the account may be less.

**2007**

No wages paid to the beneficiary	\$35,692.80
Household expenses	+ \$38,988.00
Total obligation	\$74,680.80

Petitioner's AGI	\$52,087
PMA amount available	- \$0 (used in 2006)
Amount remaining to be paid	\$22,593

**2008**

Difference between actual wage paid and proffered wage	\$23,784.53
Household expenses	+ \$45,240.00
Total obligation	\$69,024.53

Petitioner's AGI	\$1,558.00
PMA amount available	- \$0 (used in 2006)
Amount remaining to be paid	\$67,466.53

**2009**

Difference between actual wage paid and proffered wage	\$20,808.76
Household expenses	+ \$48,000.00
Total obligation	\$68,808.76

Petitioner's AGI	\$325.00
PMA amount available	- \$0 (used in 2006)
Amount remaining to be paid	\$68,483.76

**2010**

Difference between actual wage paid and proffered wage	\$17,525.13
Household expenses	+ \$50,520.00
Total obligation	\$68,045.13

Petitioner's AGI	\$14,689.00
PMA amount available	- \$0 (used in 2006)
Amount remaining to be paid	\$53,356.13

**2011**

Difference between actual wage paid and proffered wage	\$18,159.50
Household expenses	+ \$51,240.00
Total obligation	\$69,399.50
Petitioner's AGI	\$32,575.00
PMA amount remaining	- \$0 (used in 2006)
Amount remaining to be paid	\$36,824.50

**2012**

Difference between actual wage paid and proffered wage	\$16,345.15
Household expenses	+ <u>\$53,160.00</u>
Total obligation	\$69,505.15
Petitioner's AGI	\$17,692.00
PMA amount remaining	- <u>\$0 (used in 2006)</u>
Amount remaining to be paid	\$51,813.15

The petitioner's AGI and PMA were insufficient in each year to demonstrate the ability to pay the proffered wage or the difference between the actual wage paid and the proffered wage and the household expenses of the sole proprietor.

Counsel suggests that by using either the sole proprietor's tax refund or property including automobiles, the proffered wage could have been met. The petitioner submitted no evidence to demonstrate that the tax refund reflected on the 2006 Form 1040 constituted additional funds not reflected in the AGI for that year.<sup>5</sup> In addition, the petitioner submitted a statement that he owns two automobiles with a combined value of \$15,000. He submitted no evidence of his actual ownership or what the cars are actually appraised for. In addition, although counsel indicates that the petitioner would be willing to sell those automobiles to meet his wage obligations, no such statement from the sole proprietor was submitted. 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 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). As a result, these additional claims cannot form the basis of the sole proprietor's ability to pay the proffered wage.

Counsel also states that the sole proprietor paid \$20,547 in total wages in 2006 and that all or part of that amount would have been available to pay the proffered wage to the beneficiary. The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. If the petitioner replaced any worker with the beneficiary, it should submit evidence of the identity of the worker(s), wages paid, employment status, and other evidence pertaining to their replacement in any further filings.

As considered in the previous AAO decision, Counsel further asserts that funds available in the petitioner's [redacted] business bank accounts should be considered. The funds in the sole

<sup>5</sup> Tax refunds constitute money paid out of a petitioner's net income that is then returned by the government to the taxpayer upon the realization that a greater amount has been paid than the petitioner's tax obligation for the year. As a result, it does not constitute "income" as the money returned was that claimed as income elsewhere on the tax return.

proprietorship's business bank account would appear as gross receipts listed on the Schedule C to IRS Form 1040. The net profit (or loss) is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's AGI. The funds with the business checking account will not be considered for a second time in the analysis of the petitioner's bank accounts.

The [REDACTED] cited by counsel as containing assets available to pay the proffered wage is a rollover IRA account. Withdrawals from a traditional IRA before age 59 ½ are considered early withdrawals. The sole proprietor submitted no evidence to demonstrate that he was age 59 ½ or older in each relevant year or that he would be willing to take an early withdrawal from the account. If an individual takes an early withdrawal from a traditional IRA, then in addition to any regular federal income or state income tax due on the withdrawal, the individual may also be required to pay a 10% tax penalty, with certain exceptions. See 26 U.S.C. § 72(t); 26 U.S.C. § 408. So, for example, if the sole proprietor withdrew the \$25,524.92 (average balance) from the Merrill Lynch account to meet the wage obligations and is in the 15% federal income tax bracket and the 5% state income tax bracket, the tax burden of the withdrawal would be \$3,828 for federal income taxes, \$1,276 for state income taxes, and \$2,552 for the 10% tax penalty, totaling \$7,656. Therefore, a withdrawal of the \$25,524.92 would have been valued at \$17,868 (total amount less the tax obligation). Therefore, taking into account the tax burden that would result from the sole proprietor's proposed early IRA withdrawals, the average annual balance in 2010<sup>6</sup> is not sufficient to cover the full proffered wage or household expenses so would be insufficient to demonstrate the ability to pay the proffered wage in that year.

Counsel further states that the value of the UPS stores purchased by the petitioner has increased over the course of the years and that the resulting equity should be considered in determining the sole proprietor's ability to pay the proffered wage. Regarding the sole proprietor's property values, a piece of real property is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant business 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); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). To the extent that counsel claims that the petitioner could obtain an equity line loan against the values of those properties, the sole proprietor submitted no evidence to demonstrate that any sort of equity line loan would be available to pay the proffered wage. In addition, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the

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<sup>6</sup> The petitioner submitted [REDACTED] statements pre-dating 2010, but counsel on motion argues the amount should be used specifically towards the sole proprietor's 2010 financial obligations. In addition, should the [REDACTED] IRA funds be used to satisfy the financial obligations of the sole proprietor in 2009 instead, then the amount available in 2010 would be reduced accordingly. As a result, counsel's assertion that the IRA funds can be used in 2010 and again in 2011 is unsustainable.

overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Finally, 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 Sonogawa*, 12 I&N Dec. at 612. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

As stated in the previous AAO decision, the sole proprietor's business intending to employ the beneficiary routinely lost money showing a net loss of (\$97,796), (\$51,442) and (\$54,604) for 2006 through 2008 respectively. While the proprietor has been in business approximately eight years, it does not appear that he earns substantial compensation from the business. On motion, the petitioner submitted evidence that he purchased additional [REDACTED] stores and counsel states that the sole proprietor spent \$42,000 remodeling one of the newly acquired stores, however, no evidence was submitted 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). Counsel also cites start-up costs associated with a new store purchased in 2012. No evidence has been submitted to demonstrate those uncharacteristic expenses. Furthermore, while a one-time loss in 2012 might qualify the petitioner under the terms of *Sonogawa*, the petitioner has not demonstrated extraordinary circumstances for 2006 through 2011. 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.

Furthermore, as stated in the prior AAO decision and noted above, it appears that the job location for the proffered position is no longer owned by the sole proprietor. As such, the sole proprietor does not intend to employ the beneficiary at this location. Although the petitioner submitted records that it purchased additional locations in the same metropolitan area, no evidence was submitted regarding

whether the beneficiary is currently employed at any of the locations. In addition, the petitioner did not sell the petitioning location until 2008, but purchased another location in 2007. As a result, it is unclear whether the petitioner offered the beneficiary a position at the newly purchased location or at the petitioning location. It is unclear whether an open position would have been available at any of the new locations or whether, as discussed above, the beneficiary would be displacing another worker at one of the new locations. In any further submissions, the petitioner should also demonstrate that the beneficiary's employment at the newly purchased location will not displace U.S. workers and that it is a *bona fide* job offer.<sup>7</sup>

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion to reopen is granted, the previous AAO decision is affirmed, and the petition remains denied.

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<sup>7</sup> As noted above, the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.