

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **JAN 30 2015**

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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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 Director, Nebraska Service Center, (director) denied the immigrant visa petition and dismissed the petitioner's motion to reopen as untimely. The director treated the petitioner's appeal from the motion's dismissal as a motion and dismissed it. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. We granted the petitioner's first motion to reopen and reconsider, and affirmed our appellate decision. We dismissed the petitioner's second, third, and fourth motions to reopen and reconsider. The matter is again before us on motion to reopen and motion to reconsider. The case will be reconsidered, our prior decisions will be affirmed, and the petition will remain denied.

The petitioner operates a retail shipping business. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. The petition requests classification of the beneficiary as a skilled worker or professional under section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3). The director concluded that the petitioner did not establish its continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, he denied the petition on April 13, 2009.

We affirmed the director's decision and dismissed the petitioner's appeal on May 31, 2013. We also concluded that the petitioner did not establish a continuing intention to employ the beneficiary at the stated location. On November 26, 2013, we reopened the matter on the petitioner's motion. After a thorough discussion of the record we affirmed our previous decision and again dismissed the appeal. The petitioner filed a second motion to reopen and reconsider and on March 13, 2014, we dismissed the motion because it did not satisfy the requirements of a motion to reopen or the requirements of a motion to reconsider.<sup>1</sup> The petitioner filed a third motion to reopen and motion to reconsider, which we dismissed as untimely on June 20, 2014. On a fourth motion to reopen and motion to reconsider, the petitioner asserted that the delay in the filing of the previous motion was reasonable and beyond its control. We denied the fourth motion to reopen and motion to reconsider on August 20, 2014, because we determined that the petitioner had failed to establish that its delay in filing the third motion was beyond its control.

On a fifth motion to reopen and motion to reconsider the petitioner asserts that we erred in not accepting new evidence submitted with its second motion to reopen and motion to reconsider. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that we made an erroneous decision through misapplication of law or policy.<sup>2</sup>

---

<sup>1</sup> In addition, we noted that the petitioner had not established that the petitioner satisfied the educational requirements stated in the labor certification. We further noted that the sole-proprietor petitioner sold the business in 2008 and we questioned the petitioner's continuing intent to employ the beneficiary at the location identified on the labor certification. Finally, we noted that the beneficiary had been licensed in California as a registered nurse since 2009 and questioned the beneficiary's continuing intent to be employed in the job offered on the labor certification.

<sup>2</sup> The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." In this matter, the petitioner presented no new facts or evidence on motion that could be considered a proper basis for a motion to reopen. Therefore, the filing will not be considered a proper basis for a motion to reopen.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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). The submitted Internal Revenue Service (IRS) Forms W-2 state the following wages were paid to the beneficiary<sup>3</sup> by the petitioner:

	Wages Paid
2006	None submitted
2007	None submitted
2008	\$11,908.27
2009	\$14,884.04
2010	\$18,167.67
2011	\$17,533.30
2012	\$19,367.65

The petitioner did not establish that it paid the beneficiary any wages in 2006 or 2007, but it did establish that it paid partial wages from 2008 through 2012. As the proffered wage is \$35,692.80 per year, the petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the beneficiary.

<sup>3</sup> The petitioner indicated that the beneficiary will replace several part-time workers. The record does not, however, name these workers, state their wages, verify their employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *See 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. 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. *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 petitioning entity structured as a sole proprietorship 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's tax returns state that he supported a family of two in 2006 and 2007, a family of three in 2008 and 2009, and a family of four since 2010.

	Difference between proffered wage and wages paid to beneficiary	Claimed Annual Household Expenses	Total obligation	Sole proprietor's Adjusted Gross Income (AGI)	Annual Shortfall
2006	\$35,692.80	\$38,988.00	\$74,680.80	\$7,829.00	\$66,851.80
2007	\$35,692.80	\$38,988.00	\$74,680.80	\$52,087.00	\$22,593.80
2008	\$23,784.53	\$45,240.00	\$69,024.53	\$1,558.00	\$67,466.53
2009	\$20,808.76	\$48,000.00	\$68,808.76	\$325.00	\$68,483.76
2010	\$17,525.13	\$50,520.00	\$68,045.13	\$14,689.00	\$53,356.13
2011	\$18,159.50	\$51,240.00	\$69,399.50	\$32,575.00	\$36,824.50
2012	\$16,325.15	\$53,160.00	\$69,485.15	\$17,692.00	\$51,793.15

The petitioner submitted documentation regarding his investment portfolio and counsel asserts on motion that the correct balance in that portfolio is \$65,454.07, not \$64,738 as we had calculated in a previous decision. Nevertheless, the shortfall in the petitioner's adjusted gross income (AGI) (as compared to the total obligation as reflected in the chart above) would have depleted the funds in the investment account in 2006 and investment funds would not be available to make up the shortfall in subsequent years. Specifically, to pay the proffered wage and household expenses in 2006, the petitioner would have needed to use all of the AGI and all of the \$65,454.07 from the investment account. Accordingly, the balance on the account in 2007 would not have been \$76,076.46 as the

statement suggests, but would instead have been \$10,622.39.<sup>4</sup> The petitioner's AGI in 2007 was \$52,087.00, so the total of the investment account balance and AGI combined is less than the total of the proffered wage and claimed household expenses. The deficit would thus continue in subsequent years as the account balance would have been depleted in 2006 and 2007, leaving no additional resources to make up required funding in 2008 or any further years.

The petitioner has asserted that amounts claimed as depreciation on its taxes "would have been available as cash flow" and should have been considered in the determination of its ability to pay the proffered wage. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added). Accordingly, these funds will not be considered in the determination of the petitioner's ability to pay the proffered wage.

The petitioner emphasized that it could have used loans to pay the proffered wage. However, as stated in our previous decisions, 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 overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Counsel contests our

<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.

conclusion and asserts that “paying the salary of an employee who produces value for the business by providing essential services would in fact improve the overall financial position of the Petitioner.” However, it is noted that the shortfalls detailed above all occurred with the beneficiary in place as an employee since 2008. Counsel did not explain how the beneficiary could have produced more “value for the business” beyond what he was already producing there while the shortfalls were happening.

The petitioner asserts that all of his assets should be taken into account and has proposed numerous alternative ways of overcoming the shortfalls in AGI, as compared to the total obligation of his claimed household living expenses and the difference between the proffered wage and the wages actually paid to the beneficiary since the priority date. The sole-proprietor petitioner cited his bank account balances (the petitioner claimed average account balances of \$4,503.09 in 2006) and stated that he would have been willing to sell his automobile and motorcycle (total claimed value of \$8,940), withdraw (or take a loan against) his 401(k) account (claimed value of \$33,988.01), and access his home equity (claimed value of \$46,143.43) in order to overcome the shortfall between AGI and the sole-proprietor’s total obligations. The petitioner also pointed out that it paid down the principal loans on two stores in 2008 by a total of \$30,000 and asserted that that money could have been used to pay the proffered wage.

We are not persuaded that the sole-proprietor petitioner would have emptied his bank accounts, sold his vehicles, emptied his retirement account, and depleted his home equity in order to pay the proffered 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 (5<sup>th</sup> 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). Moreover, even if we believed that the sole-proprietor petitioner would have used all of the claimed resources to pay the proffered wage, it is noted that the claimed resources total \$123,574.53 and would not have been sufficient to overcome the total shortfall of \$367,369.67 for all relevant years.

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.

Unlike the petitioner in *Sonegawa*, the petitioner in the current case has not established the historical growth of its business or its reputation within its industry. In fact, the current petitioner claimed a significant decrease (more than 50% decrease, from \$118,779 in 2007 to \$57,794 in 2008) in gross income from 2007 to 2008, and almost no gain from 2009 through 2012. Nor has the current petitioner claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question.<sup>5</sup> The petitioner's revenues, payroll, and other financial information contained on its tax returns are not sufficient to establish its ability to pay the proffered wage despite its shortfall in AGI. 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 from the priority date onwards.

Furthermore, as we stated in our prior decision and as 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 indicate on the labor certification that the offered job would involve travel or work at multiple locations. This issue must be addressed in any further filings.

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 reconsider is granted, our previous decisions are affirmed, and the petition remains denied.

<sup>5</sup> The petitioner asserted that money spent on remodeling in 2011 should have been considered in the determination of its ability to pay the proffered wage. However, while the petitioner claimed to have spent \$47,875.49 for remodeling, no evidence has been submitted to substantiate that claim. Furthermore, even if the petitioner did document that expense, it is noted that these funds would have been insufficient to overcome the total shortfall of \$367,369.67. Unlike the petitioner in *Sonegawa*, the current petitioner did not suffer uncharacteristic setbacks in a single year, but has experienced shortfalls in every year since the priority date.