



U.S. Citizenship
and Immigration
Services

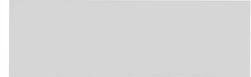
(b)(6)



DATE: JUN 08 2015

OFFICE: NEBRASKA SERVICE CENTER

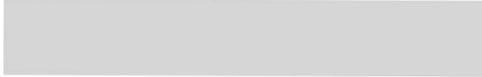
FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(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 denied the petitioner's motion to reopen as untimely. The Director treated the petitioner's appeal from the motion's dismissal as a motion and denied it.¹ The Administrative Appeals Office dismissed the petitioner's subsequent appeal. The petitioner filed six motions to reopen and reconsider with our office, two of which we granted and four of which we denied.² Before us now is the petitioner's seventh motion to reopen and reconsider. The motion will be granted, our prior decisions will be affirmed in part and withdrawn in part, the appeal will be dismissed, and the petition will remain denied.

The petitioner is a sole proprietor who operates retail shipping stores. He 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 under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i). An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition.

The Director concluded that the record did not establish the petitioner's continuing ability to pay the proffered wage from the petition's priority date of December 8, 2006 onward. Accordingly, he denied the petition on April 13, 2009.

On May 31, 2013, we affirmed the Director's decision and dismissed the petitioner's appeal. We also concluded that the record did not establish the petitioner's intention to employ the beneficiary in the offered position specified on the accompanying labor certification.

On November 26, 2013, we reopened the matter on the petitioner's motion, affirming our prior decision and again dismissing the appeal. We denied the petitioner's second motion on March 13, 2014, finding that it did not satisfy regulatory requirements. We denied the petitioner's third motion as untimely on June 20, 2014. We denied his fourth and fifth motions on August 20, 2014 and November 18, 2014, respectively, finding that he failed to establish that the delay in filing his third motion was beyond his control. We granted the petitioner's sixth motion on January 30, 2015 and affirmed our prior decisions.

In his current motion, the petitioner asserts that we erred in determining his ability to pay the proffered wage by disregarding assets and substituting our business judgment for his. He submits additional evidence in support of his ability to pay and argues that we erred in finding that he does not intend to employ the beneficiary in the offered position.

¹ The Director's decision erroneously states that the petitioner lacked the right to appeal from the motion's denial. The Director also applied the wrong standard of proof, finding that the record did not provide "irrefutable evidence" to excuse the motion's untimeliness. Petitioners in visa petitions need only establish facts by a preponderance of evidence. See, e.g., *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). However, the record shows that the errors did not prejudice the petitioner because the Director forwarded the petitioner's following appeal to our office, and we found the petitioner's delay in filing the untimely motion to be reasonable and beyond his control. See 8 C.F.R. § 103.5(a)(1)(i) (describing the circumstances under which we may excuse the untimely filing of a motion).

² In our most recent decision, we miscounted the number of motions filed by the petitioner.

The motion states new facts, which are supported by affidavits and documentary evidence. It also alleges that we incorrectly applied law or U.S. Citizenship and Immigration Services (USCIS) policy. We therefore grant the motion to reopen and reconsider. *See* 8 C.F.R. §§ 103.5(a)(2), (3) (stating the requirements for motions to reopen and reconsider).

We exercise review on a *de novo* basis. *See* 5 U.S.C. § 557(b) (stating that an administrative agency generally has all the powers on review that it would have in making the initial decision).

The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate his or her continuing ability to pay a proffered wage from a petitioner's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the petitioner's priority date is December 8, 2006, the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The ETA Form 9089 states the proffered wage for the offered position of administrative assistant as \$17.16 per hour, or \$35,692.80 per year for a 40-hour work week.

A petitioner's continuing ability to pay a proffered wage is an essential element in evaluating whether his or her job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). We generally require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage. However, we also consider the totality of the circumstances affecting a petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the record contains copies of the petitioner's federal income tax returns, Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements, payroll records, and statements of numerous bank and investment accounts from 2006 through 2012. Because the petitioner is a sole proprietor, we consider his personal assets and income in determining his ability to pay the proffered wage. *See O'Conner v. Att'y Gen. of U.S.*, Civ. A. No. 87-0434-Z, 1987 WL 18243, *1 (D. Mass. Sept. 29, 1987); *see also Matter of Ranchito Coletero*, 2002-INA-105, 2004 WL 192974, *3 (BALCA 2004) (*en banc*) (holding that a sole proprietorship's overall financial circumstances should be considered when assessing an employer's ability to pay the wage of the alien). A sole proprietor must demonstrate continuing abilities to pay the proffered wage and to support him- or herself and any dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647, 650 (D. Ill. 1982), *aff'd by*, *Ubeda v. Palmer*, 703 F.2d 571 (7th Cir. 1983) (finding a sole proprietor's ability to pay an annual proffered wage of \$6,000 "highly unlikely" where his annual net taxable income was \$13,000 and he supported himself, his wife, and his five children, one of whom was severely disabled).

In determining sole proprietors' abilities to pay, we first examine whether they employed the beneficiaries during the relevant time periods. Sole proprietors establish their abilities to pay if they demonstrate that their payments to the beneficiaries during the periods equaled or exceeded the proffered wages.

In the instant case, the Forms W-2 state that the petitioner paid the beneficiary the following annual amounts:

- \$11,908.27 in 2008;
- \$14,884.04 in 2009;
- \$18,167.67 in 2010;
- \$17,533.30 in 2011; and
- \$19,367.65 in 2012.

The petitioner did not submit any evidence that he paid the beneficiary in 2006 or 2007. Also, none of the annual amounts stated on the Forms W-2 from 2008 through 2012 equal or exceed the annual proffered wage of \$35,692.80. The record therefore does not establish the petitioner's ability to pay the proffered wage based solely on the wages he paid the beneficiary.

However, the petitioner need only demonstrate an ability to pay the annual differences between the amounts he paid the beneficiary and the proffered wage. Thus, the petitioner must demonstrate an ability to pay the full proffered wage of \$35,692.80 in 2006 and 2007, but need only establish an ability to pay: \$23,784.53 in 2008; \$20,808.76 in 2009; \$17,525.13 in 2010; \$18,159.50 in 2011; and \$16,325.15 in 2012.

If sole proprietors do not establish that they paid beneficiaries amounts equal to or greater than the proffered wages, we next examine the annual adjusted gross income amounts on their tax returns and their stated annual living expenses. If sole proprietors' annual adjusted gross incomes equal or exceed the sums of the annual proffered wages and their annual living expenses, then they establish their abilities to pay the annual proffered wages.³

As indicated in our most recent decision, the following table shows the petitioner's annual living expenses, the annual differences to be paid between the proffered wage and the amounts he paid the beneficiary, his total annual obligations to demonstrate an ability to pay, his annual adjusted gross income amounts, and the annual shortfalls in his ability to pay.⁴

³ The petitioner's tax returns for 2006 through 2012 indicate that he filed joint returns with his wife. Because the petitioner and his wife live in California, a "community property" state, we consider assets and liabilities in either or both of their names in determining the petitioner's ability to pay. *See See v. See*, 64 Cal. 2d 778 (1966) (holding that most property acquired during a marriage in California is legally presumed to be owned jointly by both spouses). The tax returns indicate that the couple had no dependents in 2006 and 2007, one dependent in 2008 and 2009, and two dependents in 2010, 2011, and 2012.

⁴ As the petitioner argues on motion, our most recent decision misstated the petitioner's adjusted gross income and annual shortfall in 2006. The following table correctly states his adjusted gross income as \$7,826 and the annual shortfall as \$66,854.80 in 2006.

Year	Wage Differences	Living Expenses	Total Obligation	Adjusted Gross Income	Annual Shortfall
2006	\$35,692.80	\$38,988.00	\$74,680.80	\$ 7,826.00	\$66,854.80
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	\$69,399.50	\$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 asserts that a variety of accounts demonstrate his ability to pay the annual shortfalls reflected in the table from 2006 through 2012.

2006

To overcome the \$66,854.80 shortfall in 2006, the petitioner argues that funds in a “Portfolio Management Account” (PMA) in his wife’s name were available to pay the proffered wage.⁵ The record indicates that the PMA held \$77,674.93 in assets at the end of 2006. The petitioner’s 2006 tax return does not reflect the receipt of any interest income from the PMA. Notwithstanding this discrepancy, the preponderance of the evidence establishes the petitioner’s ability to pay the proffered wage in 2006 based on the PMA.⁶

2007

The petitioner first argued that his wife had another PMA with an average balance of \$76,076.46 that was available to pay the 2007 shortfall of \$22,593.80. However, in deciding the petitioner’s first motion, we found that the 2006 and 2007 PMA statements referred to the same account.⁷ We therefore found that the petitioner would have largely depleted the PMA to pay the proffered wage in 2006 and that insufficient PMA funds would be available to pay the proffered wage in 2007 and later years.

The petitioner apparently concedes that the 2006 and 2007 PMA statements reflect funds in the same account. Since our decision on the petitioner’s first motion, the petitioner has not argued that the 2007 PMA statements refer to another account. The record therefore indicates that the PMA statements refer to the same account.

⁵ The record indicates that the PMA included checking and savings accounts and renewable, three-month certificates of deposits (CDs). The early withdrawal penalties on the CDs were three months’ interest on the amount of principal withdrawn.

⁶ In prior decisions, we applied the average balance of the PMA in 2006, which was \$65,454.07. However, because the record shows little fluctuation in the PMA’s monthly balances in 2006, we find that the PMA’s year-end balance more accurately reflects the total available funds for the year.

⁷ The 2007 monthly PMA statements include some, but not all, of the individual account numbers stated on the 2006 monthly PMA statements.

After applying funds from the PMA to pay the proffered wage in 2006, \$10,820.13 would have remained in the account in 2007.⁸ If the petitioner used the PMA's remaining assets toward the proffered wage in 2007, he would still need to demonstrate an ability to pay the remaining required amount of \$11,773.67.

The petitioner argues that he owned a car and a motorcycle that he could have sold to pay the remaining required amount. The record contains copies of a vehicle registration renewal notice regarding the car and a registration card regarding the motorcycle. The record also contains documentation, as of 2013, valuing the car at \$6,508 and the motorcycle at \$2,855. The petitioner argues that the vehicles would have been worth more in 2007.

The car's registration renewal notice does not identify the petitioner as the car's registrant or owner. The record therefore does not establish that the petitioner owned the car and could have sold it. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972) (stating that uncorroborated statements are insufficient to meet the burden of proof in visa petition proceedings).

The motorcycle registration card identifies the petitioner. However, the record does not establish that the motorcycle's sale would have generated enough revenue to pay the entire remaining required amount in 2007. Estimating the motorcycle's value at \$4,000 in 2007, the petitioner would still need to demonstrate an ability to pay an additional \$7,773.67.

The petitioner argues that he had available funds in two credit union accounts. However, the record contains only 2006 statements from these accounts. The record does not establish the account balances or the petitioner's ownership of the accounts after 2006. The record establishes that the petitioner had an average balance of \$2,011.28 in his personal bank account in 2007. Crediting that amount would leave a remaining required amount of \$5,762.39.

The record indicates that the petitioner could have used funds in his 401(k) retirement account from a prior employer to pay the proffered wage. The record indicates that the 401(k) account held \$35,319.44 at the end of 2007. The IRS imposes an additional 10 percent tax on early IRA withdrawals before the age of 59½. *See Internal Revenue Serv.*, "Topic 424 – 401(k) Plans," available at <http://www.irs.gov/taxtopics/tc424.html> (accessed Apr. 13, 2015). Therefore, no more than \$31,787.50 would have been available from the petitioner's 401(k) in 2007 to pay the proffered wage.⁹ However, that amount would have been more than sufficient to pay the proffered wage that year.

Counsel asserted that the petitioner could have avoided early withdrawal penalties by obtaining a low-interest loan for most of the 401(k)'s value. However, the record does not contain evidence of the petitioner's ability to obtain such a loan. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984)

⁸ In past decisions, we incorrectly stated the remaining PMA balance in 2007 as \$10,622.39. The corrected figure of \$10,820.13 does not include any lost interest or valuation of assets.

⁹ USCIS records indicate that the petitioner was less than 59½ years old in 2008.

(noting that a counsel's unsupported assertions do not establish facts of record). The record therefore does not establish that option.

2008

To fund the annual shortfall of \$67,466.53 in 2008, the petitioner could have used the remaining \$26,025.11 from his 401(k) account. This would have reduced the shortfall to \$41,441.42.

The petitioner argues that \$30,000 he used in 2008 to pay down principal on two loans for his stores could have been available to pay the proffered wage. The record contains evidence indicating that the petitioner paid two \$15,000 loan-reduction amounts on August 12, 2008. Although foregoing the loan reduction payments would have presumptively resulted in additional interest payments in later years, the documentation indicates that the \$30,000 in loan-reduction amounts was available to pay the proffered wage. However, the petitioner would still need to establish an ability to pay a remaining amount of \$11,441.42 in 2008.

The petitioner also argues that he received \$30,000 in capital gains from selling his store in [REDACTED] California in 2008. The petitioner's 2008 tax return reflects a long-term capital gain of \$30,000 in goodwill from a sale on August 1, 2008. The petitioner states that he deposited the funds from this gain in a business checking account, a statement of which shows a substantial deposit in August 2008. The record therefore establishes sufficient money available from the proceeds of the sale and the petitioner's ability to pay the proffered wage in 2008.

2009

In a March 1, 2015 affidavit, the petitioner attested that he employed three part-time workers – including the beneficiary – in the full-time, offered position in 2009 and 2010. The petitioner stated that he would not have needed the other two part-time workers if he employed the beneficiary full-time in the position.¹⁰ The record contains Forms W-2 showing that the petitioner paid the two other workers a total of \$26,965.33 in 2009. Thus, after applying these available funds to the annual shortfall of \$68,483.76 in 2009, the petitioner would still need to demonstrate an ability to pay \$41,518.43 in 2009.

The petitioner argues that an average balance of \$39,439.17 was available in a business checking account. However, the record shows that this is the same checking account into which the petitioner deposited the proceeds from the sale of the [REDACTED] store. Thus, \$11,441.42 used from the sale proceeds to pay the proffered wage in 2008 would not have been available in 2009. Therefore, this account would have contained no more than \$27,997.75. The petitioner would still need to demonstrate an ability to pay a remaining \$13,520.68 in 2009.

¹⁰ The petitioner asserts that his operations would realize significant efficiencies by employing one full-time worker in the offered position.

The petitioner argues that \$24,737 in depreciation amounts purportedly reflected on his 2009 tax return was available to pay the proffered wage. However, as we have indicated in previous decisions, we do not recognize depreciation amounts as funds available to pay a proffered wage. Rather, we consider depreciation to represent actual business costs – the annual wear and tear, deterioration, or obsolescence of buildings, machinery, vehicles, furniture, and equipment. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009) (holding that we have “a rational explanation” for not recognizing depreciation as amounts available to pay wages). Thus, while depreciation does not reflect cash expenditures in a given year, we do not consider it as available to pay wages.

The petitioner also asserts that an average balance of \$2,558.81 in his personal bank account was available to pay the proffered wage in 2009. However, that amount would be insufficient to pay the remaining annual shortfall of \$13,445.79. That account also appears to be the same account from which \$2,011.28 would have been taken to pay the proffered wage in 2007. The record therefore does not establish what the account’s balance would have been in 2009. Thus, the record does not establish the petitioner’s ability to pay the proffered wage in 2009.

2010

To overcome the annual shortfall of \$53,356.13 in 2010, the petitioner asserts that the amounts he paid the two other part-time workers in the offered position would have been available to pay the full-time, proffered wage to the beneficiary. The record contains copies of Forms W-2 indicating that the petitioner paid a total of \$19,601.02 to the two other workers in 2010. After including these wage amounts, the petitioner must demonstrate an ability to pay a remaining annual shortfall of \$33,755.11.

The petitioner also argues that he had an equity line of credit available to pay the proffered wage. As we have stated in prior decisions, because lines of credit are unenforceable commitments to loan, we do not recognize them as establishing an ability to pay as they are not available and/or guaranteed. *See Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009) (holding that we reasonably disregarded a petitioner’s line of credit in determining its ability to pay a proffered wage). Also, although the record contains 2007 statements indicating available credit from a home equity line, the record does not contain evidence of an available equity line in 2010. Thus, the record does not establish the petitioner’s ability to pay in 2010.

2011

To overcome the annual shortfall of \$36,824.50 in 2011, the petitioner argues that he could have foregone \$41,875.49 he purportedly spent on business remodeling and construction-related costs. However, the petitioner does not point to any evidence of record to corroborate these costs, and we are unable to find any. *See Matter of Soffici*, 22 I&N Dec. at 165 (citation omitted) (stating that assertions uncorroborated by documentary evidence are insufficient to meet the burden of proof in visa proceedings). The record therefore does not establish the petitioner’s ability to pay the proffered wage in 2011.

2012

In 2012, the petitioner argues that he received an unconditional loan guaranty of \$545,000 through the U.S. Small Business Administration, a portion of which he purportedly could have used to overcome the annual shortfall of \$51,793.15. However, the petitioner does not refer to any corroborating evidence of record regarding the loan guarantee, and we are unable to find any. See *Matter of Soffici*, 22 I&N Dec. at 165 (stating that assertions uncorroborated by documentary evidence are insufficient to meet the burden of proof in visa petition proceedings). Therefore, the record does not establish the petitioner's ability to pay the proffered wage in 2012.

Thus, based on examinations of the wages the petitioner paid the beneficiary, the petitioner's adjusted gross income, and his personal assets, the record does not establish his continuing ability to pay the proffered wage from 2009 through 2012.

As previously indicated, we may consider the overall magnitude of the petitioner's business activities in determining his ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. at 614-15. In *Sonogawa*, the petitioner conducted business for more than 11 years, routinely earning a net annual income of about \$100,000. However, its most recent federal tax return did not reflect its ability to pay the proffered wage. During the year of the petition's filing, the petitioner relocated its business, causing it to pay rent on two locations for five months, incur substantial moving costs, and briefly cease business. Despite these difficulties, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The petitioner was a fashion designer whose work was featured in national magazines. Her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The petitioner also lectured at design and fashion shows throughout the United States and at California universities.

As in *Sonogawa*, we may consider evidence of the petitioner's ability to pay beyond the figures stated on his tax returns. We may consider such factors as: the number of years he has conducted business; the established historical growth of his business; his number of employees; the occurrence of any uncharacteristic business expenditures or losses; his reputation within his business's industry; and any other evidence of his ability to pay the proffered wage.

In our prior decisions, we viewed the petitioner's business activities too narrowly, focusing on the store indicated on the petition and the accompanying labor certification. However, as previously discussed, the petitioner sold that store in 2008 and his business has expanded to include three stores. Since starting the business in 2005, the record shows that the petitioner's number of employees, annual gross incomes, and annual wages paid have substantially increased.

However, unlike the petitioner in *Sonogawa*, whose tax returns reflected an insufficient ability to pay in one year because of uncharacteristic expenses, the petitioner has not demonstrated his ability to pay for a four-year period and has not established uncharacteristic expenses in those years. Also, the IRS Schedules C, Profit or Loss from Business, in the petitioner's tax returns indicate that his individual stores reported losses as often as profits from 2006 through 2012.

Thus, assessing the totality of the circumstances in this case, the record does not establish the petitioner's continuing ability to pay the proffered wage. After careful reconsideration, we will therefore affirm our dismissal of the appeal.

The Petitioner's Intention to Employ the Beneficiary in the Offered Position

A labor certification remains valid only for the particular job opportunity, the alien, and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). The term "area of intended employment" means "the area within normal commuting distance of the place (address) of intended employment." 20 C.F.R. § 656.3. Any place within the Metropolitan Statistical Area (MSA) of the place of intended employment is deemed to be within normal commuting distance. *Id.*

A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of the accompanying labor certification. See *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (upholding the denial of a visa petition because the petitioner did not intend to employ the beneficiary in the geographic area of intended employment stated on the labor certification); see also *Che-Li Shen v. INS*, 749 F.2d 1469, 1472-73 (10th Cir. 1984) (finding a beneficiary ineligible for a visa petition where the petitioner moved its business outside the geographic area of intended employment stated on the labor certification).

In the instant case, the accompanying labor certification states the area of intended employment for the offered position of administrative assistant as [REDACTED] California. However, the record indicates that, after filing the labor certification application on December 8, 2006 and the petition on August 16, 2007, the petitioner sold his store in [REDACTED] in August 2008. In his March 1, 2015 affidavit, the petitioner attested that he now intends to employ the beneficiary in the offered position at his store in [REDACTED] California, which he bought in 2007.

Online DOL information indicates that [REDACTED] which are both located in [REDACTED] are within the same MSA. See U.S. Dep't of Labor, Foreign Labor Data Center, at <http://www.flc.data.center.com/OesWizardStep2.aspx?stateName=California> (accessed Mar. 18, 2015).¹¹ Therefore, the record indicates that the job offer is in the geographic area of intended employment stated on the labor certification.

In our most recent decision, we mistakenly faulted the petitioner for not demonstrating his current employment of the beneficiary at one of his stores in the geographic area of intended employment. Our regulations do not require a petitioner to currently employ a beneficiary. See 8 C.F.R. § 204.5(a)(c) (stating that any U.S. employer "desiring and intending" to employ an alien may file a petition). Moreover, as the petitioner argues on motion, the record establishes that he has employed the beneficiary in the geographic area of intended employment since 2008.

¹¹ The record indicates that all of the petitioner's stores – including his two others in [REDACTED] California - are in the same MSA.

A labor certification employer must also maintain a U.S. location to which domestic workers may be referred for employment. 20 C.F.R. § 656.3 (defining the term “employer” for labor certification purposes). However, the record establishes that the petitioner has continuously operated his business in the U.S. since filing the labor certification application and that all of his stores have the same federal employer identification number (FEIN). See 20 C.F.R. § 656.3 (stating that a labor certification employer must possess an FEIN); see also Internal Revenue Serv., “Understanding Your EIN,” 3, available at, <http://www.irs.gov/pub/irs-pdf/p1635.pdf> (accessed Mar. 26, 2015) (stating that a sole proprietor does not need a new FEIN to change or add locations). The petitioner therefore satisfies the definition of an “employer” for labor certification purposes.

We also faulted the petitioner in our most recent decision for failing to state on the labor certification that the offered position involves travel or work at multiple locations. See 20 C.F.R. § 656.17(f)(4) (requiring print advertisements to indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements and where applicants would likely have to reside to perform the job opportunity). However, the record does not indicate that the offered position involves travel or work at multiple locations. In a declaration dated January 14, 2014, the petitioner stated that his store in [REDACTED] became his “headquarters” after he sold the [REDACTED] store and that he now intends to employ the beneficiary in [REDACTED]. The record therefore does not indicate that the job opportunity involves work at multiple locations or travel beyond a normal commute to and from [REDACTED].

In our March 13, 2014 decision, we found that the beneficiary’s licensure in the unrelated occupation of registered nurse cast doubt on the petitioner’s intention to employ him in the offered position. However, the record establishes that the petitioner has employed the beneficiary, albeit on a part-time basis, at one of his retail shipping stores since 2008. The petitioner also attested to his intention to employ the beneficiary in the offered position.

The record establishes that the petitioner meets the definition of an “employer” for labor certification purposes and that the job opportunity and the geographic area of intended employment are as stated on the labor certification. We will therefore withdraw the portions of our prior decisions finding that the job opportunity had changed.

Bona Fides of the Job Opportunity

A labor certification employer must attest that “[t]he job opportunity has been and is clearly open to any U.S. worker.” 20 C.F.R. § 656.10(c)(8). “This provision infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market.” *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA July 16, 1991) (*en banc*) (referring to the former, identical regulation at 20 C.F.R. § 656.20(c)(8)). We may deny a petition accompanied by a labor certification that does not comply with DOL regulations. See *Sunoco Energy Dev.*, 17 I&N Dec. at 284 (upholding a petition’s denial where the accompanying labor certification was invalid for the area of intended employment).

To provide an “opportunity to evaluate whether the job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any familial relationship(s) between the foreign

worker and the owners, stockholders, partners, corporate officers, and incorporators by marking 'yes' to Question C.9 on the ETA Form 9089." U.S. Dep't of Labor, Office of Foreign Labor Certification, "OFLC Frequently Asked Questions & Answers," "Familial Relationships," <http://www.foreignlaborcert.doleeta.gov/faqsanswers.cfm> (accessed May 4, 2015). "A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. ... It also includes relationships established through marriage, such as in-laws and step-families." *Id.*

In the instant case, the petitioner attested on the accompanying labor certification that "[t]he job opportunity has been and is clearly open to any qualified United States worker." ETA Form 9089, Question N.8.; 20 C.F.R. § 656.10(c)(8). Also, in response to Question C.9 on the ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" the petitioner indicated: "No."

However, despite the petitioner's negative response to Question C.9 on the ETA Form 9089, he submitted a letter that identifies the beneficiary as the nephew of a woman with the same last name as the petitioner. The April 10, 2014 letter from [REDACTED] states that the beneficiary helped the woman care for Mr. [REDACTED] father during the last years of his life.

The record does not indicate whether the woman to which the letter refers has a familial relationship with the petitioner. In any future filings regarding this petition, the petitioner must indicate whether the beneficiary is related to him. If so, the petitioner must document the relationship. *See* 20 C.F.R. § 656.17(l) (detailing documentation required by DOL if an alien has a familial relationship with an employer). He may also submit additional evidence regarding whether the offered position was clearly available to U.S. workers. *See Modular Container Sys.*, 1991 WL 223955 at *8 (stating that a determination of a *bona fide* job opportunity requires consideration of a variety of factors, including whether the alien: was in a position to control or influence hiring decisions regarding the job opportunity; was an incorporator or founder of the company; is involved in the company's management; or has qualifications that are identical to specialized or unusual job duties or requirements stated on the labor certification).

Conclusion

The petitioner's motion to reopen and reconsider will be granted. The record does not establish the petitioner's continuing ability to pay the proffered wage from the petition's priority date. We will therefore affirm the appeal's dismissal.

The appeal will be dismissed for the reason stated above. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. The instant petitioner has not met that burden.

(b)(6)



Page 13

NON-PRECEDENT DECISION

ORDER: The motion to reopen and reconsider is granted. Our prior decisions are affirmed in part and withdrawn in part. The appeal is dismissed, and the petition remains denied.