



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF T-UPSS-#5-

DATE: JULY 22, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a sole proprietor operating retail shipping stores, seeks to employ the Beneficiary as an administrative assistant. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. See Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Nebraska Service Center, denied the petition. The Director determined that the Petitioner had not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of December 8, 2006, onward. We dismissed the subsequent appeal that came before us, concluding that the Petitioner had not established its ability to pay the proffered wage. The Petitioner filed seven motions to reopen and reconsider. We affirmed our prior decisions regarding the Petitioner's ability to pay the proffered wage. In our latest decision we also noted that, with any further filings, the Petitioner must establish that a *bona fide* job offer exists because it appears that the Beneficiary may have had a familial relationship with the Petitioner.

The matter is now before us on an eighth motion to reopen and reconsider. The Petitioner submitted additional evidence regarding its ability to pay the proffered wage. The Petitioner also provided evidence to demonstrate that the Beneficiary is not related to the Petitioner, including the Beneficiary's birth certificate, his parents' marriage certificate, and a letter from an acquaintance of the Beneficiary correcting a previous statement that the Beneficiary was related to the Petitioner's owner.

We will deny the motion to reopen and reconsider.

I. PROCEDURAL HISTORY

The Director denied the petition on April 13, 2009, concluding that the Petitioner had not established its continuing ability to pay the Beneficiary's proffered wage from the priority date of December 8, 2006, onward. The Petitioner filed seven motions to reopen and reconsider with us. In our last decision on June 8, 2015, we held that the Petitioner had not established its ability to pay the proffered wage for 2009 through 2012. We also stated that in any further filings, the Petitioner must

establish the job offer is a *bona fide* job offer. We specifically noted that a recommendation letter for the Beneficiary referred to the Beneficiary as the Petitioner's owner's nephew.

The matter is again before us on motion to reopen and reconsider. The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the Petitioner is providing new facts with supporting documentation not previously submitted. The Petitioner submitted additional evidence on motion and states it has the ability to pay the proffered wage and that the position offered is a *bona fide* job offer.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the Petitioner asserts that we made an erroneous decision through misapplication of law or policy.

II. LAW AND ANALYSIS

The first step in sponsoring a foreign national for lawful permanent resident status in the skilled worker category is that the petitioner files an ETA Form 9089 (labor certification) with the U.S. Department of Labor (DOL). The date the labor certification is accepted for processing by the DOL establishes the priority date. *See* 8 C.F.R. § 204.5(d). The priority date provides the benchmark for when a visa will become available for the Beneficiary to adjust to lawful permanent status. Once the DOL approves the labor certification, certifying that employment of the foreign national will not negatively affect the U.S. labor market, the petitioner submits to U.S. Citizenship and Immigration Services (USCIS) a Form I-140, Immigrant Petition for Alien Worker, and the approved labor certification. Then, once USCIS approves the Form I-140 and a visa becomes available based upon the priority date, the beneficiary is eligible to become a lawful permanent resident of the United States.

As required by statute, the petition is accompanied by a labor certification approved by the DOL. The labor certification was accepted on December 8, 2006. The proffered wage as stated on the labor certification is \$17.16 per hour, or \$35,692.80 per year.

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.

Thus, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). 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, 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).

USCIS considers three aspects in determining whether a sole proprietor has the ability to pay the beneficiary's proffered wage: (1) the wages paid to the Beneficiary and whether these wages exceeded the proffered wage; (2) the sole proprietor's adjusted gross income (AGI) minus expenses;¹ and (3) the totality of the circumstances under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the issue is whether the Petitioner had the ability to pay the Beneficiary's proffered wage in 2009, 2010, 2011, and 2012. The following chart demonstrates the shortfall that must be covered after subtracting from the sole proprietor's AGI the sole proprietor's household expenses and deficiencies in the Beneficiary's wages paid in the relevant years:

Year	Shortfall the sole proprietor must cover
2009	\$4988.93
2010	\$33,755.11
2011	\$36,824.50
2012	\$51,793.15

This demonstrates that from 2009 through 2012, the Petitioner has a total shortfall of \$127,361.69 after considering the sole proprietor's living expenses and the deficiencies in wages paid for these years. We will consider the Petitioner's assertions in each of these years individually and in the totality of circumstances as to whether it has the ability to pay the proffered wage.

At the outset, the Petitioner states that certain assets before 2009 should be considered toward its ability to pay the proffered wage. The Petitioner states that it had several bank accounts in 2006 which added together had an annual average balance of \$4503.09. It is unclear how those amounts would have remained available to pay any part of the deficiencies from 2009 through 2012. Therefore, we will not view the amounts in these bank accounts toward the deficiencies for the years at issue.

¹ 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. See *O'Conner v. Atty. Gen.*, 1987 WL 18243 (D. Mass. Sept. 29, 1987) (indicating that the personal assets and income of the sole proprietors are relevant to a determination of the ability of the sole proprietorship to pay the proffered wage).

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A. 2009

Counsel asserts in her brief that the shortfall of \$4988.93 in 2009 could be met by the sole proprietor's willingness to sell his car or by utilizing one of the Petitioner's business lines of credit. First, the record contains a declaration from the sole proprietor indicating that in 2013, the [REDACTED] value of his car was \$6085. He states that it would have been worth much more in prior years. However, the record does not contain sufficient evidence of the condition of this car for the relevant years at issue to substantiate its value and whether it would have covered the shortfall from 2009 through 2012. At most, it appears that this would have only overcome the shortfall in 2009, not from 2010 onward. Without additional evidence of the condition and value of the sole proprietor's car in 2009, we cannot consider the potential sale of this car towards the ability to pay the proffered wage.

Second, the Petitioner states that it can utilize business or personal lines of credit to cover the shortfall in 2009. Comparable to the limit on a credit card, the Petitioner's business line of credit cannot be treated as cash or as a cash asset. However, if a petitioner wishes to rely on a line of credit as evidence of ability to pay, it must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase a 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.

The record contains a copy of the Petitioner's [REDACTED] Statement, indicating that as of December 12, 2009, the Petitioner had available credit of \$9669. The Petitioner states that one of his lines of credit averages \$7718. As stated above, we will not treat business lines of credit as cash or a cash asset. The Petitioner has not provided sufficient evidence to demonstrate that its line of credit improves and not weakens its financial position. Therefore, the Petitioner has not established its ability to pay the proffered wage in 2009.

B. 2010

We stated previously that the annual shortfall for 2010 was \$33,755.11. The sole proprietor states that, because he owns multiple stores, this shortfall could have been covered by the average balances in its [REDACTED] store's credit line of \$17,723.58 and the average of the sole proprietor's personal credit line of \$16,912.41.

We do not agree with the Petitioner's statement that the remaining shortfall of \$33,755.11 could have been covered by these credit lines. First, we note that the Petitioner has not established that the Beneficiary will be employed at the store in [REDACTED] California. The Petitioner has not provided documentation that establishes whether the credit lines for the store in [REDACTED] could be used for obligations at another one of the sole proprietor's stores. It appears that a credit line for

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the store in [REDACTED] would be tied to transactions arising within that store. In addition, as stated above, we will not treat the Petitioner's business line of credit as cash or a cash asset. The Petitioner has not submitted documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. The evidence submitted on motion contains the sole proprietor's [REDACTED] personal account which had an average credit line of \$16,912.41 in 2010. The record does not establish how the sole proprietor's bank would allow him to use this personal line of credit to pay the Beneficiary's proffered wage. The record does not establish what this account is generally used for and how the needs ordinarily met by this account could be met in other ways. Even if the evidence in the record resolved the issues noted above, the amount of this credit line is \$16,912.41, which is insufficient to pay the shortfall of \$33,755.11 for 2010. Therefore, the Petitioner has not established that it could cover the shortfall for 2010.

C. 2011

The Petitioner states on motion that he incurred a total of \$41,875.49 for remodeling and buildout costs and an [REDACTED] fee in 2011. 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. 612 (Reg'l Comm'r 1967). On motion, the sole proprietor submitted an invoice for remodeling to his store in [REDACTED] for \$5000, a buildout ledger stating costs of \$18,069.63, and an order workbook stating costs of \$18,0805.86 for store [REDACTED] in [REDACTED] which together equal the \$41,875.49 costs. The record contains the sole proprietor's Form 1040, Schedule C, for 2011 which state repair and maintenance costs of \$6447 at the [REDACTED] store and \$1402 at the store in [REDACTED]. It is unclear why the repair and maintenance costs documented by the Petitioner for 2011 were not included on the Form 1040 for that year.

Under *Sonogawa*, in addition to providing evidence of unexpected costs incurred, the Petitioner would also need to provide evidence of its ability to pay the proffered wage in the surrounding years and additional evidence such as the established historical growth of the petitioner's business, the overall number of employees, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, and evidence that the financial impact of the costs incurred indicating that the financial picture of that year was much different from the prior years. The following chart indicates the gross receipts and expenses stated on the sole proprietor's Forms 1040, Schedule C, for 2009 through 2012.

Year	Store [REDACTED] CA)		Store [REDACTED] CA)	
	Gross receipts	Expenses	Gross receipts	Expenses
2009	\$326,271	\$210,146	\$445,626	\$259,635
2010	\$340,141	\$180,155	\$261,031	\$268,923
2011	\$341,237	\$203,349	\$434,976	\$261,721
2012	\$339,946	\$199,271	\$460,141	\$257,998

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Apart from the amount of gross receipts in 2010 at the store in [REDACTED] these figures indicate that the Petitioner's gross receipts and expenses have remained fairly consistent. The record does not contain sufficient evidence establishing its established historical growth or other pertinent factors similar to *Sonegawa*. Therefore, the Petitioner has not established that it could cover the shortfall of \$36,824.50 for 2011.

D. 2012

On motion, the Petitioner states that the SBA unconditional loan guaranty received from the [REDACTED] in the amount of \$545,000 may be used to cover the \$51,793.15 shortfall in 2012. The Petitioner states that "the loan was approved for payment of operating costs the business may incur, such as lease, payroll, etc., as well as leasehold improvements, equipment and inventory." The sole proprietor has multiple stores in different locations and states that we should consider a loan to its [REDACTED] and [REDACTED] locations in the amount of \$20,069.88 and a loan for working capital to the Petitioner for \$37,823.04. We note that \$316,321.40 of this loan is stated on the statements as "Debt Refinance" and the record does not provide evidence of the purpose of the loans to the [REDACTED] and [REDACTED] stores in the amount of \$20,069.88 at each location. Therefore, the Petitioner has not established that it had the ability to pay the shortfall of \$51,793.15 for 2012.

E. Totality of the Circumstances

As indicated above under *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability in the totality of the circumstances. In the instant case, the sole proprietor has had shortfalls in covering his personal expenses and the Beneficiary's proffered wage in the amounts of \$68,483.76, \$53,356.13, \$36,824.50, and \$51,793.15 for 2009, 2010, 2011, and 2012, respectively. The Petitioner states that we should consider the amounts stated in the business checking accounts. However these amounts would be listed on the Schedule C of the IRS Form 1040. The net profit or loss is carried forward to page one of the Petitioner's IRS Form 1040 and this is included in the calculation of his adjusted gross income. We will not count these amounts twice in our calculation of the Petitioner's ability to pay the proffered wage. The Petitioner indicates that he incurred losses in 2007 after purchasing two stores in the amount of \$645,000. However, the years 2009 through 2012 are the years at issue on motion, not 2007. The Petitioner states that it was approved for an unconditional SBA guaranty loan for \$545,000. However, as noted above, \$316,321.40 of this loan is stated as "Debt Refinance" and the record does not contain specific evidence regarding how the loans are to be used at the [REDACTED] and [REDACTED] stores in the amount of \$20,069.88 for each store.

On motion, the Petitioner cites the court's decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), for the proposition that net income may not accurately reflect a corporation's ability to pay the proffered wage. We do not find the court's decision in *Construction and Design* to be particularly supportive or persuasive of the Petitioner's position in this case. The facts of *Construction and Design* are distinguishable from the instant facts in that *Construction and Design* dealt with an S corporation whereas the instant Petitioner is a sole proprietor. This is a major difference here because a sole proprietor is able to utilize many other avenues for demonstrating the

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ability to pay the proffered wage such as providing evidence of assets compared with personal liabilities. Further, *Construction and Design* dealt with the issue of the conversion of an independent contractor to a permanent employee. *Id.* at 596. This matter did not arise with the same circuit as *Construction and Design*. We are bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). Additionally, the court's holding in *Construction and Design* affirmed the district court's decision in denying the work visa sought by the petitioner. *Id.* at 598.

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.

F. 2013 to 2015

The Petitioner did not submit any evidence regarding its ability to pay the proffered wage for 2013, 2014, and 2015. Therefore, the Petitioner has not demonstrated its continuing ability to pay the proffered wage.

G. Whether the Job Offered is a Bona Fide Job Offer

We indicated in our prior decision that in any further filings the Petitioner must demonstrate that the Beneficiary is not related to the Petitioner's sole proprietor. The record contains an original letter from the Beneficiary's acquaintance referring to the Beneficiary as the sole proprietor's nephew. We noted this fact in our prior decision and indicated that this may be an indication that the instant position offered is not a *bona fide* job offer. On motion, the Petitioner submitted a letter, dated June 30, 2015, from the same acquaintance indicating that he was mistaken about any relationship between the Beneficiary and the sole proprietor and stating that he now understands they are not relatives, just acquaintances. The Petitioner also submitted the Beneficiary's birth certificate and the marriage certificate of his parents. We note that a search of government databases indicates that the Beneficiary entered the United States on a B-1 visa in 2001 and stated his address as [REDACTED] in [REDACTED] California, which was the same address as the sole proprietor. This tends to indicate that the Beneficiary knew the sole proprietor before the job offer was made and the evidence in the record has not demonstrated the extent of the relationship. Thus, although the sole proprietor denies that a familial relationship exists, it appears that the Beneficiary had close ties to the Petitioner's owner prior to the filing of the instant petition.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). USCIS must consider the merits of a petitioner's job offer to determine whether the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). In our previous decision, we cited *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*), regarding

evidence that the Petitioner could submit to demonstrate that the position offered was clearly open to U.S. workers. These factors include whether the Beneficiary is in a position to control or influence hiring decisions; whether he was an incorporator or founder of the company; whether he is involved in the management of the company; or whether he has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application. *Id.* The Petitioner has not provided any evidence regarding these factors to establish that the job offered was clearly open to U.S. workers. The Petitioner has not met its burden of establishing that the instant position is a *bona fide* job offer.

III. CONCLUSION

For the foregoing reasons, we conclude that the Petitioner has not established its ability to pay the Beneficiary's proffered wage from 2009 onward or that the job offered constituted a *bona fide* job offer.

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 motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of T-UPSS-#5-*, ID# 15104 (AAO July 22, 2016)