U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 25 2008

WAC 06 067 51132

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a licensed elderly caregiver. It seeks to employ the beneficiary permanently in the United States as an elderly caregiver. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. 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 and that the beneficiary met the training requirements of the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original October 11, 2006, decision, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary met the training requirements of the labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is August 9, 2005. The proffered wage as stated on the Form ETA 9089 is $7.77 per hour or $16,161.60 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes counsel's brief; a copy of the petitioner's 2005 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business; copies of the 2005 Forms W-2, Wage and Tax Statements, for the petitioner's owners; a copy of the petitioner's unaudited profit and loss statement for the period January 2006 through October 2006;[2] a partial copy of Form 9089; a copy of a certificate presented to the beneficiary for completing 120 hours of on the job training from January 23 through February 1, 2006 in child and handicapped care exposure; a copy of a certificate presented to the beneficiary on October 8, 2005 for having attended a seminar on hotel operations; a certificate presented to the beneficiary on February 3, 2006 for completing on the job training at Estrella Hospital in relation to his caregiver course for 120 hours; a copy of a certificate of attendance presented to the beneficiary by the Philippine National Red Cross for having attended the basic life support course on August 8 – 9, 2005; a certificate presented to the beneficiary by the Philippine National Red Cross for having attended the first aid training standard on August 10 - 13, 2005; a copy of a class certificate presented to the beneficiary by Sunrise Caregiver Training Center, Dasmarinas, Cavite, on December 16, 2005, for completing the six months caregiver training course; a copy of Form 9089 filed by Frank Nin on behalf of [redacted] and copies of newspaper ads for the petitioner and F&J Tutoring, LLC. Other relevant evidence includes copies of the petitioner's 2002 through 2004 Forms 1040; copies of the petitioner's payroll records that indicates that the petitioner has not employed the beneficiary; a copy of the petitioner's license; and a copy of the beneficiary's certificate from St. James School Of Mute in Makati City stating that the beneficiary completed the sign language course from September 15, 1990 through August 20, 1992. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage or to the beneficiary's training.

The petitioner's 2002 through 2005 Forms 1040 reflect adjusted gross incomes of $53,661, $48,331, $69,589, and $45,039, respectively.

Although specifically requested by the director in a request for evidence (RFE) dated April 19, 2006, it is noted that the petitioner failed to submit a list of the owner's personal recurring monthly expenses in response to the RFE and on appeal.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. **Unaudited financial statements are the representations of management.** The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's January through October 2006 unaudited financial statement when determining the petitioner's ability to pay the proffered wage from the priority date of August 9, 2005 and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel states:

1. ABILITY TO PAY

Please enclosed find a complete financials from [the petitioner] including: 2005 Federal Income Tax Returns for the employer. In addition, complete financial statements for the employer for the year 2006 from 1/01/2006 thru 10/31/2006. We regret that the employer did not have his 2005 returns or 2006 financials at the time that we responded to your Request for Evidence, earlier. Now that we have enclosed these documents, it is obvious that the petitioner has the ability to pay the beneficiary the stated prevailing wage. Please see copies of these documents as Exhibit "A".

2. 24 MONTH EXPERIENCE & SIGN LANGUAGE: CLERICAL ERROR

The 24-month experience requirement and knowledge of sign language were in error. We apologize for this clerical error. The correct requirement for this position was only for training as caregiver and related services, as was indicated in the original EDD Application Form ETA-9089. In addition, the 24-month training, as we interpreted was to be obtained within consecutive 24 months of training of different types. This beneficiary possesses the training requirement as indicated on said Form. Please see a copy of this form and copies of training evidence that this beneficiary possesses as Exhibit "B".

The requirement for 24 months of training and knowledge of sign language were for another petitioner and another beneficiary, who, ironically, was the brother of the owner of [the petitioner]! In addition, the last names of both beneficiaries are the same! (The beneficiary of [the petitioner] is [redacted] and the beneficiary of F & J Tutoring is [redacted]). This is how the confusion occurred and entered mistakenly in the application by our legal secretary. A copy of said latter application is attached hereto for reference as Exhibit "C".

The position advertised by [the petitioner] [is] for [a] caregiver position. The position for a tutor for handicap adult was for the employer named as F & J Tutoring in Mission Viejo. Please see copies of these ads attached hereto as Exhibit "D".

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 9089, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, to show that the petitioner employed the beneficiary in the pertinent years (2005 and 2006). Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of $16,161.60 from the priority date of August 9, 2005 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by federal case law. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The petitioner is organized as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately

$20,000 where the beneficiary's proposed salary was $6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of two in 2002 through 2005. The sole proprietor's adjusted gross incomes in 2002 through 2005 were $53,661, $48,331, $69,589, and $45,039, respectively. Although it appears that the sole proprietor may have had sufficient funds to pay the proffered wage of $16,161.60 in the pertinent years (2005 and 2006), the petitioner failed to provide a list of the sole proprietor's monthly personal recurring expenses. Therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage of $16,161.60 and support a family of two in 2005 and 2006. Thus, the petitioner has not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel provides a copy of the petitioner's 2005 Form 1040, including Schedule C, and a copy of the petitioner's financial statement for the period January through October 2006. Counsel makes no further argument but merely states, "it is obvious that the petitioner has the ability to pay the beneficiary the stated prevailing wage."

Counsel is mistaken. Without the requested personal recurring monthly expenses of the sole proprietor, the AAO is unable to determine if the petitioner has sufficient funds to pay the proffered wage and support a family of two in the pertinent years (2005 and 2006). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of the sole proprietor's personal monthly recurring expenses. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The second issue in this case is whether or not the beneficiary meets the training requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* – (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> *(D) Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is August 9, 2005.

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-9089 Part H) describes the terms and conditions of the job offered. In this case, Part H, Question 5-A requires that the beneficiary must possess two years of training in the job offered. Part H, Question 6-A requires no experience, and Part H, Question 14-A requires that the beneficiary be trained to give care for the elderly deaf to include knowledge of sign language.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of elderly caregiver must have two years of training in the job offered of elderly caregiver and must have knowledge of sign language.

In the instant case, counsel submitted a certificate for the beneficiary from St. James School of Mute, Makati City, that states the beneficiary completed the sign language course from September 15, 1990 through August 20, 1992, or 23 months and 5 days. Counsel also submitted certificates for the beneficiary showing that the beneficiary obtained 120 hours of on the job training in child and handicapped care exposure from January 23 through February 1, 2006, that the beneficiary obtained 120 hours of on the job training in relation to a caregiver course (presented on February 3, 2006), that the beneficiary completed a six months caregiver training course (presented December 16, 2005), and that the beneficiary received certificates for attendance for hotel operations, basic life support (18 hours), and first aid training standard (36 hours).

The 120 hours of on the job training in child and handicapped care exposure, the 120 hours of on the job training in relation to the beneficiary's caregiver course, the certificate for basic life support, and the certificate for first aid training standard all occurred after the priority date of August 9, 2005.[3] Therefore, the beneficiary did not meet the training requirement of the labor certification at the time of filing of the visa petition, August 9, 2005. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel states:

> The requirement for 24 months of training and knowledge of sign language were for another petitioner and another beneficiary, who, ironically, was the brother of the owner of [the petitioner]! In addition, the last names of both beneficiaries are the same! . . . This is how the confusion occurred and entered mistakenly in the application by our legal secretary.

Simply asserting that the reported training requirements were a clerical error does not qualify as independent and objective evidence. 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. 1998). The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 9089 was certified by the Department of Labor, but was not done so in this case. Again, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of*

[3] The AAO notes that the certificate for basic life support took place on August 8 and 9, 2005, the priority date.

Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Even though counsel states that the 24 months of training and knowledge of sign language were for another beneficiary and provided newspaper ads for the two different positions, counsel has not shown why the requirements for the beneficiary's position of elderly caregiver and the other position of tutor/teacher should be switched. The two positions are different, and neither newspaper ad lists the training requirements for either position. Counsel has not provided any probative evidence that a clerical error was made. 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). Therefore, the petitioner has not established that the beneficiary met the training requirements of the labor certification at the time of filing, August 9, 2005.

Beyond the decision of the director, the record in this case reveals that the ETA 9089 was not signed in accordance with 20 C.F.R. § 656.17(a)(1). In addition, the ETA 9089 appears to have been altered after the Department of Labor certified the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 20 C.F.R. § 656.17(a)(1) states in pertinent part:

> Except as otherwise provided by §§ 656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor Application for Permanent Employment Certification form (ETA 9089). The application must be filed with an ETA application processing center. Incomplete applications will be denied. Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.

In the instant case, the ETA 9089 was not signed by the attorney of record or the alien beneficiary. In addition, the ETA 9089 appears to have been altered under parts J, Alien Information, and L, Alien Declaration (the altered parts appear under the alien's name). Therefore, the ETA 9089 does not appear to be an original certified ETA 9089, and the visa petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.