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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 30 2011

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 14, 2008 denial, the single issue in this case is 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.

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 other 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 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on May 1, 2007. The proffered wage as stated on the ETA Form 9089 is $8.28 per hour or $17,222.40 annually. The ETA Form 9089 states that the position requires a high school education, no training, and three months of experience for the job.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Relevant evidence in the record includes a statement of monthly household expenses for 2007, deeds and documents relating to three separate real properties, documentation relating to monthly benefits received by the petitioner from the Veteran's Administration (VA) and Social Security Administration (SSA), the petitioner's Form 1040, U.S. Individual Income Tax Return, for 2007, and a letter from the petitioner guaranteeing its ability to pay a proffered annual wage of $17,222.40 to the beneficiary of a separate Form I-140 petition [redacted]

On appeal, counsel asserted that the petitioner's personal assets and pledge to pay the proffered wage should also be considered when determining the petitioner's continuing ability to pay the proffered wage. Counsel stated that a decision issued by the Board of Alien Labor Certification Appeals (BALCA) in *Ohsawa America*, [redacted] (BALCA 1988), and directives contained in the "Yates Memo" support this contention as the petitioner is a sole proprietorship rather than corporate entity. Counsel claims that the petitioner also meets the totality of the circumstances test set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in establishing its continuing ability to pay the proffered wage. Counsel included a Form 1099-MISC, Miscellaneous Income, representing nonemployee compensation paid by the petitioner to the beneficiary in 2007.

Subsequent to counsel's filing of the appeal, the AAO issued a request for evidence on November 17, 2010 requesting evidence establishing that the petitioner has the continuing ability to pay the proffered wage from the priority date. Specifically, the petitioner was asked to provide the following additional evidence:

- Documentation certifying that the $17,300.00 listed on the Form 1099-MISC as nonemployee compensation paid by the petitioner to the beneficiary in 2007 was reported to the Internal Revenue Service and the Social Security Administration;
- Copies of the petitioner's federal tax returns for 2008 and 2009;
- Copies of the beneficiary's federal tax returns for 2007, 2008, and 2009; and
- Copies of any Form 1099-MISC or Form W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary in 2008 and 2009.

In addition, the AAO noted that the petitioner filed another petition for another beneficiary in 2007, [redacted] and therefore, must establish that it could pay the proffered wage for both the instant petition and the other pending petition until the denial of that petition in 2008. Accordingly, the AAO requested that the parties indicate the priority date o[redacted] and provide evidence of any wages having been paid by the petitioner to the beneficiary of the other petition in 2007 and 2008.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations 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).

In response, counsel submits a statement in which he contends that the petition, [redacted] with a priority date of May 1, 2007, should not be considered when determining whether the petitioner had the ability to pay the proffered wage in the instant case because it had been withdrawn by the petitioner prior to its denial, and the petitioner was not pursuing an appeal to that denial. Counsel notes that there is no regulation requiring that the petitioner establish that it has the continuing ability to pay the proffered wages to both the beneficiary in the instant case and the beneficiary of the petition, [redacted] Counsel includes the petitioner's Form 1096, Annual Summary and Transmittal of U.S. Information Returns, for 2007, the petitioner's Form 1040 tax returns for 2008 and 2009, the beneficiary's Forms 1040, U.S. Individual Income Tax Return, for 2007 and 2009, the beneficiary's Form 1040EZ, Income Tax Returns for Single and Joint Filers With No Dependents, for 2008, Form W-2 statements reflecting wages paid by the petitioner to the beneficiary in 2008 and 2009, as well as previously submitted documentation relating to benefits received by the petitioner from the VA and SSA.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1989 and to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on an unspecified date, the beneficiary did not indicate that he had worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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, 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 Sonegawa*, 12 I&N Dec. 612.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains a Form 1099-MISC for 2007 and Form W-2 statements for 2008 and 2009, reflecting compensation paid to the beneficiary by the petitioner as follows:

- 2007 – $17,300.00.
- 2008 – $15,249.00 ($1,973.40 less than the proffered wage of $17,222.40).
- 2009 – $24,225.48.

Although the petitioner established that it paid the beneficiary the full proffered wage in 2007 and 2009, the petitioner did not pay the beneficiary the full proffered wage in 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. Texas 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner is a sole proprietorship, 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 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.

A review of the Form 1040 tax returns reveals that the sole proprietor supported herself in 2007, 2008, and 2009. The petitioner reported annual living expenses[2] of $110,492.88 for each of these respective years.

As previously discussed, the petitioner filed a separate Form I-140, [redacted], on behalf of another beneficiary, [redacted] with USCIS on July 24, 2007. The record contains a letter from the petitioner acknowledging that it was seeking to employ this beneficiary, [redacted] permanently in the United States as a caregiver and to pay this beneficiary an annual proffered wage of $17,222.40. Counsel indicates this separate petition, [redacted] was accompanied by an ETA Form 9089 that was accepted by the DOL on May 1, 2007. While counsel contends that the

[2] Counsel provided a statement listing the petitioner's household expenses as $9,207.74 for an unspecified month in 2007. The monthly expenses listed in this report shall be multiplied by 12 to determine the petitioner' annual living expenses for 2007, 2008, and 2009.

petition, [redacted] with a priority date of May 1, 2007, should not be considered when determining whether the petitioner had the ability to pay the proffered wage in the instant case because it had been withdrawn by the petitioner prior to its denial, and the petitioner was not pursuing an appeal to that denial, a review of the electronic record reveals the petition, [redacted] was denied by USCIS on November 14, 2008 rather than having been withdrawn. Without evidence to the contrary, the counsel's claim that the petition, [redacted] had been withdrawn must be considered to be without merit. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel is incorrect in noting that there is no regulation requiring that the petitioner establish that it has the continuing ability to pay the proffered wages to both the beneficiary in the instant case and the beneficiary of the petition, [redacted], up until its denial. The regulation at 8 C.F.R. § 204.5(g)(2) requires petitioner to establish that it has the continuing ability to pay the proffered wages of immigrant petitions that it has filed. Assessing the petitioner's ability to pay these combined proffered wages is part of an evaluation as to whether the job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See id* at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not established that it had sufficient funds to pay the proffered wage to the beneficiary and the additional sponsored beneficiary with the same and subsequent priority dates. Thus, it is necessary to show that the petitioner had the ability to pay the beneficiary of the instant case the proffered wage of $17,222.40 in 2008, the ability to pay the other beneficiary, [redacted] the proffered wage of $17,222.40 in 2008, plus the petitioner's annual living expense of $110,492.88 in 2008. Line 37 of the proprietor's Form 1040 tax return for 2008 listed adjusted gross income of <$1,441.00>[3]. Consequently, the evidence in the record does not establish that the petitioner had the ability to pay both of the proffered wages, plus her living expenses. in 2008.

Counsel is correct in asserting that as the petitioner is a sole proprietor, her ownership of personal assets should be taken into account when considering her ability to pay the beneficiary the proffered wage. The petitioner provided the deeds of three properties (apparently the petitioner's primary residence and two residences used to conduct the petitioner's business) and a statement relating to monthly benefits received by the petitioner from the VA and SSA. However, this statement reflects that the petitioner receives just over $2,000.00 in monthly benefits from the VA and SSA, an amount

[3] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

that is insufficient to pay the petitioner's monthly expenses of $9,207.74, much less the continuing ability to pay the proffered wage in the instant case. In addition, a review of the deeds and documents relating to three properties reveals that one of the properties is jointly owned by the petitioner and another individual with the same family name and may not be considered as wholly owned asset of the petitioner. Additionally, it is not probable that the petitioner would sell a residential property that is her primary residence and the two residences used to conduct the petitioner's business to pay the proffered wage. It has also not been established that these assets would be readily liquidated or that any liens or encumbrances on the assets would not exceed their value. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance of the claimed assets.

It is noted that the petitioner's 2008 Form 1040 Tax Return shows negative adjusted gross income. It also shows that the two care homes operated by the petitioner reduce their gross incomes by large amounts citing to an exclusion permitted by section 131 of the Internal Revenue Code, 26 U.S.C. § 131. However, as the petitioner appears to rely almost exclusively on these exclusions to reduce gross income, rather than actual, deductable expenses related to the operation of the facility, it is impossible to ascertain the viability of these businesses. The burden of proving eligibility rests on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As noted above, audited financial statements may have shed more light on the petitioner's ability to pay the proffered wage. However, the petitioner has instead chosen to rely on its tax returns, which show the petitioner to have negative adjusted gross income in the year in question, 2008. The petitioner also claims monthly expenses which wildly exceed the adjusted gross income on the Form 1040 and is obligated to establish its ability to pay a wage to a beneficiary of a second petition which was pending for most of 2008. The petitioner has not established its eligibility for the benefit sought.

In some cases, 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 Sonegawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, no specific detail or documentation has been provided similar to *Sonegawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are persuasive in this

matter. The AAO cannot conclude that the petitioner has established that she had the continuing ability to pay the proffered wage of both of the beneficiaries in addition to her household expenses.

Based on a review of the underlying record and argument submitted on appeal, the petitioner has not established her continuing financial ability to pay the proffered wage.

Beyond the decision of the director and relevant to the Form ETA 750's requirement that the beneficiary possess three months of employment experience in the proffered position, the next issue to be examined in this proceeding is whether the beneficiary possessed the required three months of experience as a caregiver as of the priority date of May 1, 2007.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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, Madany* 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. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff,* 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

As noted previously, the ETA Form 9089 states that the proffered position requires three months of experience as a caregiver. Thus, the beneficiary must establish that he possessed the required experience before the May 1, 2007 priority date. The ETA Form 9089, signed by the beneficiary under penalty of perjury, indicates that the beneficiary was employed as a "nurse aide" by [redacted] located in Tubao, Philippines, from December 19, 2005 to March 31, 2006. However, the record contains an affidavit signed by [redacted] who stated that beneficiary was employed by [redacted] from December 19, 2005 to May 31, 2006. The record is absent any explanation resolving the conflict between the representation that the beneficiary was employed by [redacted] from December 19, 2005 to March

31, 2006 on the ETA Form 9089 and [redacted] attestation in her affidavit that the beneficiary worked for this enterprise from December 19, 2005 to May 31, 2006.

The discrepancy noted above seriously impairs the credibility of the claim that the beneficiary has the required three months of experience in the offered job of caregiver. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The regulation at 8 C.F.R. § 204.5(g)(1) also states, in part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Taking into account all of the evidence in this case, it is concluded that the petitioner has not established that it is more likely than not that the beneficiary possessed the required experience as a caregiver with [redacted] prior to the priority date. An affidavit that is

inconsistent with representations made on the ETA Form 9089 relating to the dates of the beneficiary's claimed employment with [redacted] is not sufficient to establish the beneficiary's prior employment experience. Therefore the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position as set forth on the labor certification, and the petition must be denied for this reason as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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*, 229 F. Supp. 2d at 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.