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U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 06 2009

WAC 06 067 51150

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based 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 an elderly caregiver facility. It seeks to employ the beneficiary permanently in the United States as an elderly caregiver. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. The director also determined that the petitioner had failed to demonstrate that the beneficiary acquired the requisite amount of employment experience and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its financial ability to pay the proffered salary and that the beneficiary has acquired the requisite work experience.

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).

At the outset, it is noted that this petition was not eligible for approvable at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

> (a) Filing applications.
>
> > (1) . . . . 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.[1]

Although an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien or the attorney. As such, the preference petition should have been rejected. An application or petition

[1] Similar instructions are found on page 8 of the ETA Form 9089.

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 at 1002 n. 9.

Because the director's denial rested on his determination that the petitioner had not established its continuing financial ability to pay the proffered wage, and that the beneficiary did not possess the required work experience, this office will also review the merits of that decision.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 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 [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on September 27, 2005. The proffered wage as stated on Part G of the ETA Form 9089 is $7.77 per hour, which amounts to $16,161.60 per year.[2] The ETA Form 9089 does not indicate that the beneficiary worked for the petitioner.

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[2] The director misstated the proffered wage as $16,171 per year and misstated the filing date as

On Part 5 of the I-140, filed on December 23, 2005, the petitioner states that it was established on November 1, 1998, currently employs three workers, reports an annual gross income of $429,935, and a net annual income of $24,923.

In support of its ability to pay the proffered wage, with the petition and in response to the director's request for evidence issued on April 19, 2006, the petitioner provided a copy of a Form 1040, individual tax return filed by and for the 2004 tax year; copies of a payroll register covering November and the first two weeks of December 2005 issued for as a couple; a copy of a state license issued to a copy of an Internal Revenue Service (IRS) application for extension of time to file an individual (Form 1040) tax return for 2005, accompanied by a copy of an undated check drawn on " with ' directly underneath;[3] a copy of a payroll register covering May and June 2006 issued for a copy of a payment register indicating that a check for $35.00 was issued on December 31, 2005 by ' with ' " appearing directly underneath; and copies of a quarterly tax summary prepared for and for the first quarter of 2006 accompanied by a state quarterly wage and withholding report prepared for the same quarter for and listed at an address of This address is not the same as the petitioner's specified on the I-140 and the ETA Form 9089. That address is

The director denied the petition on October 12, 2006. Relevant to the petitioner's ability to pay the proffered wage, the director treated the petitioner as a sole proprietorship and noted that she had requested evidence from the petitioner that included a list of monthly expenses to show that the sole proprietor could pay the beneficiary's wage and support their personal expenses, and evidence that the petitioner could pay the proffered wages of all pending beneficiaries. The director noted in her denial that the petitioner had two other pending petitions and that the petitioner had failed to provide a list of monthly expenses.

On appeal, counsel provides additional evidence in the form of a copy of and ' individual Form 1040 for 2005, which contains two Schedules C, Profit or Loss from Business. The first Schedule C refers to a board and care giving service located at the same address as given for the petitioner. The second Schedule C claims a house rental income business operating at the same address. Counsel further supplies copies of W-2s issued to the each of the couple by themselves as employers. Finally, counsel provides copies of an unaudited financial statement covering 2006 with the heading of " and ' appearing directly underneath.

August 9, 2005 instead of September 27, 2005.

[3] California state corporation records indicate that a corporation identified as ' ., ' was filed on April 26, 2005. *See* http://www.sos.ca.gov/business/.

Other than claiming that it is "obvious" that the employer has the ability to pay the proffered wage, counsel offers no explanation is offered on appeal that explains why the financial evidence offered is both for the corporation, , and for , individually. It is noted that no evidence was provided that specifically mentioned . Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). USCIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft* 2003 WL 22203713 (D.Mass. Sept. 18, 2003). As the evidence points more to the operation of as a corporation, the petitioner's documentation related to the individual incomes or assets of will not be considered. Without more information related to it is unknown if this business must be treated as a separate entity.

The financial statements provided on appeal related to are not accompanied by any evidence that they are audited. 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 rather than internally generated documents. 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.

Moreover, as referenced by the director, the petitioner failed to establish that it could cover the other two pending petitions that were filed. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record does not indicate that the petitioner has employed the beneficiary.

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 (or net current assets)[4] as reflected on the petitioner's federal income tax return. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the USCIS should have considered income before expenses were paid rather than net income.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, corporate income tax returns, audited financial statements or annual reports were not provided as required by regulation. The petitioner also failed to clarify the organizational structure or existence of [redacted] The petitioner's evidence did not establish its continuing financial ability to pay the proffered wage as of the priority date of September 27, 2005.

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[4]Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

[5]Even if we considered [redacted] individual Form(s) 1040 and viewed the petitioner as a sole proprietor, the petitioner could not establish its ability to pay. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner cannot demonstrate its ability to pay for two beneficiaries and show the sole proprietor's family can support itself. The Gutierrez' did not submit any evidence of personal expenses as requested by the director.

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in 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 the present matter, as set forth above, the petitioner has failed to provide the pertinent corporate tax returns, audited financial statements or annual reports as required by the regulation at 8 C.F.R. § 204.5(g)(2) and has also failed to describe the organizational structure of [redacted]. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2005 was an uncharacteristically unprofitable year for the petitioner.

The director also denied the petition based on the petitioner's failure to establish that the beneficiary had obtained 12 months of work experience in the offered job of elderly caregiver as specified on Part H, 6 of the ETA Form 9089. Item 8 of Part H of the ETA Form 9089 also permits an alternate combination of education and experience that is defined in Item 8-A as a bachelor's degree and in Item 8-C as 1 year of experience.[6] We interpret this requirement as 1 year of experience in the job offered as elderly caregiver.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) provides that a petitioner must provide evidence that the beneficiary meets any educational, training and experience, and other requirements of the labor certification for an unskilled (other worker). 8 C.F.R. § 204.5(l)(3)(ii)(A) also requires that such experience must be supported by letters from trainers or employers specifying the name, address, author's title, and a description of the experience or training acquired.

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[6] Item 10 of Part H additionally indicates that 6 months of work experience in an alternate occupation defined as personal aide to students is also acceptable. As the evidence submitted corroborating the beneficiary's work experience failed to include such verification, it will not be considered. Additionally, the petitioner filed under the "other worker" category. The petitioner's alternate requirements of a bachelor's degree and 1 year of experience would result in a different visa classification of a professional/skilled worker.

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 Dragon Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986).

In this matter, two letters were provided to support the beneficiary's experience as an elderly caregiver. One letter, dated April 20, 2006 was from a Filipino care giving facility named which certified that the beneficiary worked as a volunteer taking care of elderly residents. The period of work was specified as October 2005 to April 2006. The other document was signed by an individual named He certified that the beneficiary gratuitously took care of his elderly grandmother, while she was bedridden from 2001 until she passed away on April 13, 2003. We do not find either of these letters to be sufficiently probative of the issue whether the beneficiary's acquired sufficient employment experience as an elderly caregiver as of the September 27, 2005, priority date. The letter from the care giving facility failed to specify whether the beneficiary's work was full-time or part-time. The letter from failed to identify his title and relationship to either or the beneficiary. As concluded by the director, this letter appears to be self-serving as it does not establish that the work was rendered in an employee/employer context. 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)).

Based on the above, the petitioner failed to establish its continuing financial ability to pay the proffered wage and failed to demonstrate that the beneficiary had acquired the requisite employment experience as of the priority date.
As initially discussed, the petition was also not approvable in any case due to the lack of signatures on the ETA Form 9089.

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.