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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE: [REDACTED]  
LIN-07-219-53620

Office: NEBRASKA SERVICE CENTER

Date: **AUG 26 2010**

IN RE: Petitioner: [REDACTED]  
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:



**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 \$585. 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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter was 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 direct care staff (caregiver) pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director noted that the petition was filed without all of the required initial evidence to establish the petitioner's ability to pay the proffered wage from the priority date through the present, and therefore, denied the petition.

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.

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

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.<sup>1</sup>

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<sup>1</sup> 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). The AAO notes that the petitioner filed a motion to reconsider with the director prior to the instant appeal on the basis of ineffective assistance of counsel and will adjudicate the instant appeal on its merits.

As set forth in the director's September 4, 2008 denial, the primary 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 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 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 Form ETA 750 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 Form ETA 750 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 Form ETA 750 was accepted on June 12, 2003. The proffered wage as stated on the Form ETA 750 is \$1,523.58 per month (\$18,282.96 per year). On the petition, the petitioner claims that it has been in the business since 2003 and currently has two employees. The petitioner did not provide any information on its gross annual income and net annual income on the form. On the Form ETA 750B, signed by the beneficiary on June 10, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, 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, United States Citizenship and Immigration Services (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 (Reg. Comm. 1967).

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. The petitioner did not claim that the beneficiary has worked for the petitioner and did not submit any documentary evidence such as the beneficiary's W-2 forms, paystubs for any relevant years. The petitioner failed to demonstrate that it paid the beneficiary the proffered wage from the year of priority date to the present, and therefore, the petitioner must demonstrate that it could pay the beneficiary the proffered wage for years 2003 through the present with its net income, net current assets or adjusted gross income if it is a sole proprietorship.

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 (1<sup>st</sup> Cir. 2009). 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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner in the instant matter 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 (7<sup>th</sup> 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.

On appeal, counsel submits the sole proprietor's tax returns for 2003 through 2007. The proprietor's tax returns show that the sole proprietor supports a family of six and reflect the following information for the following years:

	Proprietor's adjusted gross income (Form 1040, line 34 <sup>2</sup> )
2003	\$157,649
2004	\$205,983
2005	\$186,897
2006	\$238,203
2007	\$233,062

The sole proprietor had sufficient adjusted gross income to pay the beneficiary the proffered wage in the years 2003 through 2007. However, a petitioning entity structured as a sole proprietorship must establish that it could support himself, his spouse and four dependents on a gross income and therefore, the AAO must determine whether the sole proprietor had sufficient adjusted gross income to support his family first. The record does not contain any statements or information about how much the sole proprietor's family of six spent for living during the relevant years. Considering the sole proprietor has a family of six and reported a large amount of deductions on their Schedule A of the Form 1040, the AAO cannot determine whether the sole proprietor could pay the beneficiary the proffered wage with the remaining balance after reducing the adjusted gross income by the amount of living expenses for the sole proprietor's family of six. 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)). 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). The petitioner failed to establish its ability to pay the proffered wage for the years 2003 through 2007 because it failed to submit statements of monthly expenses for the sole proprietor's family for those relevant years.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed additional I-140 immigrant petitions for two more beneficiaries. Both of them were approved.<sup>3</sup> Therefore, the petitioner was obligated to pay three

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<sup>2</sup> Adjusted gross income reflects on Line 34 of the Form 1040 for 2003, but on Line 36 for 2004, and on Line 37 for 2005, 2006, and 2007.

proffered wages in 2008 and 2009.<sup>4</sup> The record does not contain any documentary evidence showing that the petitioner paid the pending and approved beneficiaries in the relevant years and does not contain any financial documents showing that the petitioner had sufficient net income or net current assets to pay all proffered wages in these years. Therefore, the petitioner failed to establish its continuing ability to pay all proffered wages as of the priority dates to the present.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2003, the petitioner established that it had continuing ability to pay all proffered wages.

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 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the sole proprietor's tax returns show that most of the sole proprietor's adjusted gross income are the spouse's salary income from another entity. The petitioner started the business

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<sup>3</sup> USCIS records show that the two approved immigrant petitions are as follows:

- LIN-08-235-50708 filed for Balignasay on August 22, 2008 with the priority date of April 29, 2008, and approved on May 1, 2009.
- LIN-09-057-51255 filed for Ambrosio on December 23, 2008 with the priority date of May 15, 2008, and approved on July 10, 2009.

<sup>4</sup> The number of the proffered wages the petitioner was obligated to pay is based on the priority dates and the approval dates of these cases. The number might be larger if it were based on the priority dates and the times the beneficiaries obtain lawful permanent resident status pursuant to the regulation.

in 2003 and filed the labor certification application in the same year. The Schedule C of the sole proprietor's tax return for 2003 shows that the petitioning entity had only net profit of \$544. It raises doubt whether the job offer the petitioner offered to the beneficiary was a realistic and bona fide one as of the priority date. Given the record as a whole, the history of filing immigrant petitions and the fact that the number of approved immigrant petitions reflects one hundred percent (100%) of the petitioner's current workforce, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 all proffered wages for the approved and pending petitions as well as the instant petition. Therefore, the petition cannot be approved. Accordingly, the director's September 4, 2008 decision is affirmed.

Beyond the director's decision and counsel's assertions on certification, the AAO has identified additional grounds of ineligibility. 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, 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).

Here, the Form ETA 750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of direct care staff. Item 14 reflects that the proffered position requires six years of grade school, four years of high school and three months of experience in related occupation, however, the employer/petitioner typed none in the block for specifying the related occupation.

The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name on December 12, 2002 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the beneficiary's schools attended, she represented that she attended [REDACTED] from June 1961 to March 1967, Bulacan National Agricultural School from June 1967 to March 1971 and Leghaspi Vocational College from June 1976 to March 1977. On Part 15, eliciting information of the beneficiary's work experience, she represented that she was the full-

time owner/manager of [REDACTED] from May 1992 to April 2002, and that she worked 8-10 hours per week as a caregiver for Rosalina Serapio from October 1996 to April 2002.

With the initial filing and on appeal, counsel submitted a document alleged beneficiary's high school diploma as evidence regarding mandated education requirement. However, the document was written in a foreign language and submitted without an English translation. If any document is in a foreign language it must be submitted along with a certified English translation. The regulation at 8 C.F.R. § 103.2(b)(3) provides in pertinent part that:

*Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The education document submitted for the beneficiary did not comply with the terms of 8 C.F.R. § 103.2(b)(3). Therefore, the petitioner failed to demonstrate that the beneficiary meets the educational requirement for the proffered position as set forth on the Form ETA 750, and thus failed to establish the beneficiary's qualifications.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent 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.

The instant I-140 petition was submitted without any evidence of the beneficiary's qualifying employment experience. On appeal, counsel submits a letter of employment as her experience in the offered position. The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer and must 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. The experience letter in the record is dated April 1, 2009, on a plain paper, addressed to USCIS from Angelito Oliva. While the letter contains the writer's contact number and address, there is no evidence showing that Angelito Oliva is in a position to issue such an experience letter as required by the regulation at 8 C.F.R. § 204.5(g)(1). Instead, the petition lists Angelito Oliva as the spouse of the beneficiary.

The letter states concerning the beneficiary's work experience in pertinent part that:

This is to verify that [the beneficiary] had taken care of her mother-in-[l]aw Rosalina Serapio from October 1996 to April 2002.

[The beneficiary] assisted her mother-in-[l]aw with personal care like bathing, dressing, grooming, personal and oral hygiene. She assisted her with medications. Cooked, prepared and served meals. Accompanied to doctor[']s appointments.

This letter is not from the beneficiary's current or former employer, and it does not verify that the beneficiary was ever employed as a caregiver anywhere in any period. Instead, the letter is from the beneficiary's spouse and describes the beneficiary's personal assistance to her family member. In addition, the letter does not indicate the number of hours per week the beneficiary provided to her mother-in-law while the beneficiary verifies on the Form 750B that she took care of her mother-in-law 8-10 hours per week. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Furthermore, the fact that the letter is formatted exactly same as a letter for another beneficiary also represented by this counsel causes doubt on the authenticity of the letter and experience verified in the letter. "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.* Therefore, this letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The record of proceeding does not contain any evidence to support the beneficiary's qualifications. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite three months of experience in a related occupation as required by the ETA 750.

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.