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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**

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: .
FEB 18 2011

IN RE:

Petitioner:

Beneficiary:

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 \$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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a personal and home care aide pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an 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 denied the petition because 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 requirements of the labor certification.

On April 23, 2009, the AAO dismissed the subsequent appeal affirming the director's denial. The AAO specifically reviewed financial statements from the sole proprietor's CPA, the sole proprietor's individual income tax returns, wages already paid by the petitioner to the beneficiary and cash in the sole proprietor's bank account. The AAO noted that no statement of monthly personal recurring expenses was submitted in 2003, 2005, and 2006 to establish the ability to pay the proffered wage. Additionally, the petitioner's ability to pay was unclear in 2001, 2002, and 2004 without evidence of the sole proprietor's expenses. The AAO considered the CPA's statement of the sole proprietor's personal assets and found them insufficient because there is no statement of the sole proprietor's liabilities/expenses. The AAO also noted that the sole proprietor's real estate property could not be used to establish the ability to pay as a long-term asset not easily converted to cash to pay employee wages. The AAO further specifically determined that the beneficiary was not qualified for the position because she did not have the legal right to work at the time the labor certification was filed and that was a requirement for the proffered position. The AAO also noted the relationship between the petitioner and beneficiary and questioned the bona fides of the petition.

The record shows that the motion is properly filed and timely and provides new audited financial statements to establish the petitioner's ability to pay the proffered wage. The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The instant motion is granted and the AAO will consider it as the motion to reopen. 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.

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.

As noted in the AAO's prior decision, 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 November 16, 2001. The proffered wage as stated on the Form ETA 750 is \$7.76 per hour (\$16,140.80 per year). The petitioner is a sole proprietor. The AAO's prior analysis of the sole proprietor's adjusted gross income and wages paid to the beneficiary is affirmed. On motion, the issue is whether the new financial statements overcome the AAO's prior decision. The AAO notes at the outset that the petitioner has still failed to provide a list of its recurring household expenses even after receiving notice of that deficiency in the AAO's prior decision, and this remains an impediment to a full and conclusive analysis of the petitioner's ability to pay.

USCIS considers the sole proprietor's liquefiable assets and personal liabilities as part of the petitioner's ability to pay. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the petitioning household to pay the proffered wage and/or personal expenses.

On motion, counsel submitted audited financial statements from [REDACTED] the attached accountant's report states that "[w]e have audited the financial statements of [REDACTED] for the years ended December 31, 2001 to December 31, 2008. We have also audited the financial statements for the period ended April 30, 2009." However, the accountant report does not provide detailed information on whether the audit has been conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. Further, the financial statements attached to the accountant's report are the sole proprietor's personal liquid assets statements rather than the financial statements [REDACTED] for 2001 through 2009 which are claimed to be audited in the accountant's report. Therefore, the record does not contain audited financial statements of the petitioner, [REDACTED] nor does the record contain any evidence showing the submitted personal liquid assets statements of the sole proprietor were audited.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$236,591 to pay the proffered wage in 2001, including \$143,500 in cash and \$93,091 in annual

income (adjusted gross income of \$39,351 and non-taxable pension of \$53,740). While the annual income of \$93,091 is supported by the sole proprietor's individual income tax return for 2001, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the sole proprietor's assets in cash for 2001. 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)). Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2001. The petitioner did not pay any compensation to the beneficiary in 2001 and therefore, the sole proprietor must demonstrate that she had sufficient adjusted gross income to pay the full proffered wage of \$16,140.80 that year. The sole proprietor's annual income of \$93,091 was sufficient to pay the full proffered wage. Although the petition did not submit any statement of the sole proprietor's household living expenses for 2001, the AAO finds that the balance of \$76,950.20 after paying the full proffered wage from the total annual income would be sufficient to cover the living expenses for the sole proprietor's family of two after considering the partial expenses of \$37,619 reported on Schedule A to the Form 1040 for 2001. Thus, the petitioner has established the ability to pay the proffered wage and to cover her household living expenses for 2001.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$144,105 to pay the proffered wage in 2002, including \$137,800 in cash and \$6,305 in annual income (adjusted gross income of \$6,197 and non-taxable pension of \$108). The annual income of \$6,305 is supported by the sole proprietor's individual income tax return for 2002, however, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the sole proprietor's assets in cash for 2002. Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2002. The petitioner paid the beneficiary \$13,580 in 2002 and therefore, the sole proprietor needs to have the ability to pay the beneficiary \$2,560.80. The sole proprietor's annual income of \$6,305 was sufficient to pay the difference of \$2,560.80 between wages actually paid to the beneficiary and the proffered wage that year. However, the balance of \$3,744.20 after paying the difference between wages actually paid to the beneficiary and the proffered wage from the annual income would not be sufficient to cover the living expenses of the family of two for 2002 and again, the petitioner failed to submit the statement of the sole proprietor's household living expenses. Therefore, the petitioner failed to establish the ability to pay the proffered wage and to cover her household living expenses with her adjusted gross income for 2002.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$127,544 to pay the proffered wage in 2003, including \$137,800 in cash and (\$10,256) in annual income (adjusted gross income of (\$20,343) and non-taxable pension of \$10,087). The annual income of (\$10,256) is supported by the sole proprietor's individual income tax return for 2003, however, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the

sole proprietor's assets in cash for 2003. Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2003. The petitioner paid the beneficiary \$14,700 in 2003 and therefore, the sole proprietor needs to have the ability to pay the beneficiary \$1,440.80. The sole proprietor's annual income was negative. It was neither sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage, nor sufficient to cover any living expenses occurred for the sole proprietor's household in that year. Therefore, the petitioner failed to establish the ability to pay the proffered wage and to cover her household living expenses for 2003.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$160,114 to pay the proffered wage in 2004, including \$137,800 in cash and \$22,314 in annual income (adjusted gross income of \$22,206 and non-taxable pension of \$108). The annual income of \$22,314 is supported by the sole proprietor's individual income tax return for 2004, however, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the sole proprietor's assets in cash for 2004. Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2004. The petitioner paid the beneficiary \$14,400 in 2004 and therefore, the sole proprietor needs to have the ability to pay the beneficiary \$1,740.80. The sole proprietor's annual income of \$22,314 was sufficient to pay the difference of \$1,740.80 between wages actually paid to the beneficiary and the proffered wage that year. However, it is not clear whether the balance of \$20,573.20 after paying the difference between wages actually paid to the beneficiary and the proffered wage from the annual income would be sufficient to cover the living expenses of the family of two for 2004 because the petitioner did not submit any statement of the sole proprietor's household living expenses for 2004. Without such a statement, the AAO cannot determine whether the petitioning household had sufficient annual income to cover the household's living expenses as well as to pay the beneficiary the proffered wage for this year. The petitioner failed to submit the statement of the sole proprietor's household living expense for 2004, and thus, failed to establish the ability to pay the proffered wage and to cover her household living expenses.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$157,675 to pay the proffered wage in 2005, including \$187,800 in cash and (\$30,125) in adjusted gross income. The adjusted gross income of (\$30,125) is supported by the sole proprietor's individual income tax return for 2005, however, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the sole proprietor's assets in cash for 2005. Further, the CPA includes the balance of \$60,000 in the petitioner's business checking account [REDACTED] as part of liquefiable assets for the sole proprietor to use to pay the proffered wage. The CPA's reliance on the balance in the business checking account in determining the petitioner's ability to pay the proffered wage is misplaced. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, if the accounts represent what appears to be the sole

proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2005. The petitioner paid the beneficiary \$14,400 in 2005 and therefore, the sole proprietor needs to have the ability to pay the beneficiary \$1,740.80. The sole proprietor's adjusted gross income was negative. It was neither sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage, nor sufficient to cover any living expenses occurred for the sole proprietor's household in that year. Therefore, the petitioner failed to establish the ability to pay the proffered wage and to cover her household living expenses for 2005.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$196,455 to pay the proffered wage in 2006, including \$163,300 in cash and \$33,153 in annual income (adjusted gross income of (\$29,989), net operation loss carryover add back of \$36,176, non taxable pension of \$108 and non taxable social security of \$26,860). The record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the sole proprietor's assets in cash for 2006. Therefore, the AAO cannot consider the claimed cash assets of the sole proprietor in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2006. It is also noted that the CPA added back net operation loss carryover of \$36,176, non taxable pension of \$108 and non taxable social security of \$26,860 to the sole proprietor's adjusted gross income for her annual income for 2006. The sole proprietor's 2006 tax return reflects that the sole proprietor had a total of \$4,104 of pensions and annuities, \$3,996 of which was reported as taxable amount included in the adjusted gross income and \$26,860 of social security benefits, none of which was taxable. Therefore, adding non taxable pension of \$108 and non taxable social security benefits of \$26,860 to the adjusted gross income to be considered as the sole proprietor's available income/funds to pay the proffered wage is acceptable. However, without any documentary evidence such as the sole proprietor's amended tax return for that year or an explanation from the CPA, the AAO cannot accept the net operating loss carryover of \$36,176 added back to the adjusted gross income and consider it as extra income for the sole proprietor to pay the proffered wage and to cover her household's living expenses. The petitioner failed to submit documentary evidence to support the CPA's assertion to add back the net operating loss to her adjusted gross income. 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)). Therefore, the AAO will only consider (\$3,021) as the sole proprietor's annual income in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2006. As the sole proprietor's annual income was negative, and it was neither sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage, nor sufficient to cover any living expenses occurred for the sole proprietor's household in that year, the petitioner failed to establish the ability to pay the proffered wage and to cover her household living expenses for 2006.

The CPA states in the personal liquid assets statements that the sole proprietor had total funds of \$165,401 to pay the proffered wage in 2007, including \$135,300 in cash and \$30,101 in annual income. According to the financial statements, the sole proprietor's cash assets include \$75,000 in her IRA retirement account, \$10,000 in CD with Bank of America, \$75,000 in CD with Bank of Stockton, \$20,000 in CD with Wells Fargo Bank, \$6,500 in the savings account with Bank of Hawaii, \$14,300 in bonds and \$2,000 in the business checking account [REDACTED]. If the accounts represent what appears to be the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the CPA's request to consider the balance in the sole proprietor's business checking account [REDACTED] is misplaced.

If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, the record does not contain any documentary evidence such as statements from financial institutions for those CD, savings, investment and retirement accounts in support of the CPA's assertion in the financial statements. Furthermore, the CPA's financial statements contain inconsistent information about the cash balance in the CD account [REDACTED]. As previously discussed, the record of proceeding contains a statement of the sole proprietor's savings account and a CD [REDACTED] for June 2007. The statement states that the sole proprietor had a balance of \$2,502.06 on May 28, 2007 and \$2,502.47 on June 27, 2007. The statement also shows that the sole proprietor had the balance of \$38,369.95 in her CD which matured on September 28, 2007. *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." The record does not contain any independent objective evidence to resolve the inconsistency. 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, the AAO cannot consider the claimed cash assets in the sole proprietor's savings, CD or similar accounts in determining her ability to pay the proffered wage as well as to cover her household living expenses in 2007.

Like the personal liquid assets statements for 2006, the CPA added back net operating loss carryover of \$36,176 to the sole proprietor's adjusted gross income for her annual income for 2007. The record does not contain any documentary evidence such as the sole proprietor's amended tax return for 2007 or the reasonable explanation from the CPA to support adding back the net operating loss to the sole proprietor's adjusted gross income. The CPA also added non taxable pension of \$108 and non taxable social security of \$26,148 to the sole proprietor's adjusted gross income for 2007. In reviewing the sole proprietor's tax returns for previous years, adding the non taxable pensions and social security benefits to the sole proprietor's adjusted gross income reflected on the tax forms may be acceptable if supported by the tax return for 2007. However, the record does not contain the sole proprietor's tax return for 2007. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without the sole proprietor's tax return for 2007, the figures in the personal liquid assets statements for the adjusted gross income or

annual income available for the sole proprietor to pay the proffered wage as well as to cover her household's living expenses cannot be supported, and thus, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income to establish her ability to pay based on these figures. 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 submit the sole proprietor's 2007 tax return although the tax return should be available at the time of filing the instant motion on May 22, 2009. The petitioner failed to establish the ability to pay for 2007 because it failed to submit its 2007 tax return.

In addition, the petitioner also failed to submit the beneficiary's W-2 form for 2007 showing that the petitioner paid the beneficiary a full or partial proffered wage and the statement of the sole proprietor's household living expenses for 2007. Without such documentary evidence, the AAO cannot determine whether the sole proprietor had sufficient adjusted gross income, extra annual income not reported as part of her adjusted gross income or liquefiable assets to pay the proffered wage as well as to cover her household's living expenses that year.

Although the financial statements asserts that the sole proprietor had sufficient income and assets to establish her ability to pay for 2008 and later years, without documentary evidence such as statements of savings, CD, retirement, and investment accounts from the financial institutions, the sole proprietor's individual income tax returns, the statement of her household's living expenses and the beneficiary's W-2 form issued by the petitioner, the petitioner failed to establish the sole proprietor's ability to pay the proffered wage as well as to cover her household's living expenses for these years.

In conclusion, for the reasons above the CPA's personal liquid assets statements counsel submitted on motion have established the sole proprietor's ability to pay for 2001, but failed to do so for 2002 through the present.

On motion, counsel refers to Memorandum from [REDACTED] [REDACTED] *Termination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) (Yates May 4, 2004 memo). The AAO notes that the purpose of the memorandum is to provide guidance to adjudicators on when a request for evidence (RFE) is not required or should not be issued according to the regulation at 8 C.F.R. § 204.5(g)(2). It is guidance to adjudicators to determine ability to pay but guidance to decide whether a RFE should be issued. The memo states in pertinent part that: "[i]n certain instances, petitioners may submit a financial statement in lieu of initial evidence and/or additional evidence such as (1) profit/loss statements, (2) bank account records, or (3) personnel records. ... Acceptance of these documents by [USCIS] is **discretionary**." In the instant case, the petitioner did not demonstrate that the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage was unavailable.

Counsel refers to a decision issued by the AAO on EAC-01-018-50413, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As counsel asserts on motion, USCIS may also 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 petitioner has never paid the beneficiary the full proffered wage since the priority date; the petitioning business has never had sufficient net profits to pay a new employee (\$987 in 2001, (\$1,131) in 2002, (\$23,712) in 2003, (\$20,827) in 2004, (\$36,176) in 2005, and \$0 in 2006); and the sole proprietor's adjusted gross income was not sufficient to pay the beneficiary's full proffered wage for four out of six years for which the petitioner submitted its tax returns and for three of them, the adjusted gross income was negative. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these years except for 2001 were uncharacteristically unprofitable years for the petitioner.

The petitioner did not submit the statement of the sole proprietor household's living expenses for these relevant years. Without such statements, the AAO cannot determine whether the sole proprietor had sufficient annual income to cover the household's living expenses as well as to pay the beneficiary the proffered wage for these years. The petitioner failed to submit documentary evidence to demonstrate that the sole proprietor had extra liquefiable assets in cash which were available for the sole proprietor to establish the ability to pay the proffered wage and

to cover her household living expenses for years 2002 through the present. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the sole proprietor had the continuing ability to pay the proffered wage as well as to support her household for all relevant years from 2002 to the present.

On motion, counsel also requests the case to be reconsidered concerning whether or not the petitioner has demonstrated that the beneficiary met all the special requirements set forth in Item 15 on the Form ETA 750.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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, which as noted above, is November 16, 2001. *Id.*

As noted in the AAO's prior decision, the minimum requirements for the proffered position in this matter, Part A of the labor certification are the following:

Block 14:

Education: four years of high school

Experience: no experience required

Block 15: Other Special Requirements

... .. If hired must speak, read and write English; must know food nutrition, food preparation, food storage, menu planning; must obtain first aid, Health Screening Report issued by the State Health and Welfare Agency; must be willing to be fingerprinted to be submitted to the Department of Justice; must have legal right to work; live on premises; must be available on call 24 hours per day,

The director noted that: "the beneficiary entered the United States on October 24, 2001 as a visitor for pleasure. When the application for labor certification was filed on November 16, 2001, the beneficiary was still in that valid nonimmigrant status, but had no legal authorization for employment. Therefore, she did not meet the requirement of the labor certification that she have a legal right to work at the time the application was filed." Accordingly, the director denied the petition. On appeal, the AAO affirmed the director's decision and dismissed the appeal. On motion, counsel attended that the AAO was in error in agreeing with the director that the special requirements contained in the ETA 750 that the beneficiary "have the legal right to work" must be construed as the beneficiary having the legal right to work at the time the labor certification application was filed.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the

circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309. Counsel's assertion on motion that reliance on the case of *asse K.R.K. Irvine, Inc.*, 699 F.2d 1006 is misplaced is not supported with careful legal analysis.

First of all, it is important that the Form ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

The Item 15 is instructed to provide special requirements not described in item 14. Therefore, reading the Form ETA 750A as a whole, all the requirements set forth both in item 14 and item

15 are the requirements the beneficiary must meet on or prior to the priority date. It is unreasonable to interpret the requirements set forth in item 14 as the requirements the beneficiary must meet prior to the priority date but to construe the other special requirements set forth in item 15 as the requirements the beneficiary does not have to possess on the priority date or later.

The record does not contain any documentary evidence showing that the beneficiary met the special requirement, such as “have the legal right to work,” prior to the priority date. Therefore, the petitioner failed to demonstrate that the beneficiary met the minimum requirements for the proffered position on the Form ETA 750.

Counsel asserted that the requirement of having the legal right to work is intended for the U.S. worker who will apply for a job and that the petitioner knows best on what was intended to be the meaning of the requirement specified on the Form ETA 750.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. 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)(emphasis added). 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 application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification. The court in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006) recognized that 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. Thus, the court concluded that 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.*

Further, the employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner’s intent concerning the actual minimum requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. Such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the employer, results of recruitment, or other forms of evidence relevant and probative to illustrate the employer’s intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

The record of proceeding contains copies of the newspaper advertisements, posting notice and recruitment report. While the newspaper advertisements published on December 31, 2006 through January 2, 2007 respectively do not contain the requirement of "having legal right to work" as minimum requirements for the proffered position, the posting notice posted from December 28, 2006 to January 12, 2007 clearly stated the language "[m]ust have legal right to work" as part of the minimum requirements for the proffered position. The recruitment report indicated that no one responded to the newspaper advertisements and the posting notice. The AAO notes that the petitioner's intent regarding the special requirement of "having legal right to work" is clearly stated on the Form ETA 750 and that the record does not contain any correspondence from the employer requesting DOL delete this part of the special requirements or statements from the employer clearly expressing that the special requirement of having the legal right to work is not part of the minimum requirements for the proffered position except for the assertion from counsel on appeal and motion. 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). This office also notes that DOL approved some corrections made by the employer on the Form ETA 750 on March 12, 2007 before the certification including changing the proffered wage from \$1,120 per month to \$7.76 per hour, and changing the requirement of three months in the job offered to no experience required, etc. However, the final certified labor certification does not show any change, correction, amendment or deletion on the special requirement of "having legal right to work." Although the petitioner asserted that it did not intend to consider the special requirement of "having legal right to work" as part of the actual minimum requirements of the proffered position, the submitted newspaper advertisements, posting notice and recruitment report reflect that such intent was not explicitly and specifically expressed to DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Therefore, counsel failed to establish that the employer/petitioner had the intent to disregard the special requirement of "having legal right to work" as part of the actual minimum requirement for the proffered position as that intent was not explicitly and specifically expressed to DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Counsel's assertion on appeal and motion cannot overcome the director's and this office's interpretation based on the plain meaning of the language of the labor certification job requirements.

In addition, in response to the director's May 11, 2007 RFE, the petitioner submitted a letter dated July 26, 2007 admitting that the beneficiary is her sister and asserting that their family relationship did not affect the recruitment process. The petitioner also submitted recruitment materials to support her assertion. Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). The submitted recruitment materials do not establish that the petitioner informed DOL about her family relationship with the beneficiary in accordance with 20 C.F.R. § 656.17. The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL when submitting the

beneficiary's Form ETA 750. *See Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.¹ The petitioner failed to make these disclosures. Further, it appears that the petitioner attempted to continue to hide the familial relationship from DOL and USCIS. The petitioner did not make the disclosure until the director issued the RFE specifically requesting for the verification. The situation in the instant petition is analogous to the beneficiary in *Matter of Silver Dragon Chinese Restaurant* based on the family relationship between the petitioner's owner and the beneficiary, and the lack of clarity as to the actual relationship of the beneficiary to the petitioner. The familial relationship would have caused the DOL to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job, if any, were rejected solely for lawful job-related reasons. *See id.* at 402. The fact that the beneficiary was employed by the petitioner does not establish that a *bona fide* job opportunity is available to U.S. workers. The petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 failed to establish that its job offer to the beneficiary was realistic on the priority date and has been realistic till the present. Therefore, the petition cannot be approved.

Further, the failure to disclose the beneficiary's family relationship to any owner would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* Section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A material issue in this case is whether the petitioning entity disclosed any family relationship or close or financial relationship between the petitioning entity and the beneficiary. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. *See Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Here, the petitioner claimed on the petition that it employs two workers, and the schedule C of the sole proprietor's 2006 tax return shows that the petitioner paid a total wages of \$18,846. The omission of the beneficiary's status as a relative in such a small business entity is a willful misrepresentation that adversely impacted DOL's adjudication of the Form ETA 750.

¹ The burden rests on the employer to provide clear evidence that a bona fide job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

A finding of misrepresentation may lead to invalidation of the Form ETA 750. *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By concealing the relationship between the petitioner and the beneficiary on the labor certification application, the petitioner has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. We therefore make a finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

Counsel's assertions and evidence submitted on motion cannot overcome the grounds of denial in the director's August 7, 2007 decision and the AAO's April 23, 2009 decision. The petitioner failed to establish that the sole proprietor had the continuing ability to pay the proffered wage as well as to support her household for 2002 through the present. The petitioner failed to demonstrate that the beneficiary met all the requirements including "have the legal right to work" prior to the priority date. The petitioner and the beneficiary also sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact by concealing their family relationship on the labor certification application. Therefore, the petition cannot be approved.

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 motion to reopen is granted and the decision of the AAO dated April 23, 2009 is affirmed. The petition is denied.

FURTHER ORDER: The AAO finds that the petitioner fraudulently and willfully mislead DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.