

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

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**

[REDACTED]

B6

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

MAR 04 2011

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

ON BEHALF OF PETITIONER:

[REDACTED]

**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of [REDACTED]. 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 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.

On August 26, 2010, the AAO dismissed the subsequent appeal affirming the director's denial. The AAO specifically reviewed the sole proprietor's individual income tax returns for 2003 through 2007 and the petitioner's immigrant petition filing history. The AAO noted that no statement of monthly personal recurring expenses was submitted for all of these relevant years to establish the ability to pay the proffered wage. The AAO further specifically determined that the beneficiary was not qualified for the position because the record did not contain the English translation of the beneficiary's high school diploma and the experience letter dated April 1, 2009 from [REDACTED] does not comply with requirements set forth by the regulation.

The record shows that the motion is properly filed and timely and provides the sole proprietor's tax return and a new experience letter as new evidence to establish the petitioner's ability to pay the proffered wage and the beneficiary's qualifications. 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* [REDACTED], 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (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 [REDACTED] where the beneficiary's proposed salary was [REDACTED] or approximately thirty percent [REDACTED] of the petitioner's gross income.

On motion, counsel's assertion that the sole proprietor's personal monthly household expenses should no longer be considered in determining the petitioner's ability to pay as the sole proprietor's business expenses and personal exemptions/deductions have already been included in her income tax returns is misplaced. As previously discussed, the United States Citizenship and Immigration Services (USCIS) considers the sole proprietor's adjusted gross income as the petitioner's net income in determining its ability to pay. While the sole proprietorship's business income and expenses are reported on Schedule C and carried forward to the first page of the tax return, the sole proprietor's personal exemptions or deductions are never included in her adjusted gross income. The AAO's prior analysis of the sole proprietor's adjusted gross income is affirmed. 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.

On motion, counsel submitted the sole proprietor's 2009 tax return, and therefore, the issue is now whether the sole proprietor's 2009 tax return overcome the AAO's prior decision. The

proprietor's 2009 tax return shows that the sole proprietor had adjusted gross income of [REDACTED] in 2009. On motion, counsel did not submit any statements or information about how much the sole proprietor's family of six spent for living in 2009. However, the AAO notes that the sole proprietor reported a total of expenses of [REDACTED] including medical and dental expenses of [REDACTED], taxes of [REDACTED], home mortgage interests of [REDACTED] gifts to charity of [REDACTED] and job and certain miscellaneous expenses of [REDACTED]. While the amount reported on Schedule A does not include all living expenses for the sole proprietor's household for that year, it is impossible for the petitioner to pay the beneficiary the full proffered wage of [REDACTED] with the balance of [REDACTED] after covering the household's expenses reported on Schedule A from the adjusted gross income.<sup>1</sup> Therefore, the petitioner failed to establish its ability to pay for 2009 with the sole proprietor's tax return for that year. The petitioner failed to submit an annual report, tax return or audited financial statements for 2008, and therefore, also failed to establish its ability to pay the proffered wage for 2008. The sole proprietor's 2009 tax return cannot establish the petitioner's ability to pay the instant beneficiary for 2009, for 2008 and for all other relevant years, nor does the 2009 tax return establish the petitioner's ability to pay all beneficiaries of the approved and pending petitions filed by the petitioner for these relevant years.

On motion, counsel contends that the AAO should have issued a request for evidence giving the beneficiary an opportunity to provide the English translation of her high school diploma. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, counsel did not submit the English translation of the beneficiary's high school diploma to USCIS, on appeal, or even now, on motion.

Counsel also asserts on motion that the beneficiary's former employer, [REDACTED] is deceased and [REDACTED] is related to her, and therefore, [REDACTED] is the only person who can attest to the beneficiary's experience. However, counsel did not submit any documentary evidence to support her assertion. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

On motion, counsel submitted a letter undated from [REDACTED] as a licensee/administrator of [REDACTED] at [REDACTED] certifying the beneficiary's employment as a direct care staff/care giver from September 2002 to February 2003. While the labor certification clearly requires listing all jobs held during past three years, the beneficiary did not indicate this employment on the Form ETA 750B and signed her name

---

<sup>1</sup> If the expenses not reported on Schedule A are also considered, the balance which is available to pay the beneficiary the proffered wage would be much less.

under penalty of perjury the foregoing is true and correct on June 10, 2003. This letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. See Matter of Leung, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. 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.

Counsel's assertions and evidence submitted on motion cannot overcome the grounds of denial in the director's September 4, 2008 decision and the AAO's August 26, 2010 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 2003 through the present. The petitioner failed to demonstrate that the beneficiary met all the requirements including high school education and three months of experience prior to the priority date. 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 August 26, 2010 is affirmed. The petition is denied.