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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 31 2007

LIN 05 006 50691

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an Indian/Nepali and Tibetan restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, specialty foreign food. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The petitioner wishes to substitute the beneficiary for the alien listed on the Form ETA 750. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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

As set forth in the director's March 10, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is September 2, 2003. The proffered wage as stated on the Form ETA 750 is $2,005 per month or $24,060 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes counsel's brief, copies of the petitioner's 2003 through 2005 Forms 1040, U.S. Individual Income Tax Returns including Schedule C, Profit or Loss from Business, copies of the petitioner's 2003 through 2005 monthly income and expenses, a copy of the petitioner's 2005 Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return, copies of the petitioner's 2005 Unemployment Insurance Tax Reports for the state of Colorado, and a copy of the petitioner's net worth[2] as of February 2006. Other relevant evidence in the record includes a copy of a statement of the petitioner's 2002 Form 1040 including Schedule C, copies of two articles regarding the petitioner from the Denver Post, dated June 12, 1998, and from Nepalnews.com, dated February 8, 2000, copies of pay statements for the beneficiary for part of 2005, and copies of bank statements for the petitioner, the petitioner's spouse, the petitioner's spouse's business, and the petitioner and his spouse. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 through 2005 Forms 1040 reflect adjusted gross incomes of $23,475, $61,280, $73,711, and $90,861, respectively. The petitioner's 2002 through 2005 Schedule Cs reflect net profits of $25,260, $30,222, $20,564, and $52,247, respectively.

The petitioner's net worth statement as of February 2006 reflect current assets of $595,965.80, fixed assets of $940,000, current liabilities of $807,598, and fixed liabilities of $283,367.80.

The petitioner's 2003 through 2005 monthly expenses were $3,715 per month or $44,580 annually in 2003, $3,940 per month or $47,280 annually in 2004, and $3,795 per month or $45,540 annually in 2005.

The petitioner's business bank statements for the period February 28, 2005 through February 28, 2006 reflect balances ranging from a low of $225.43 to a high of $40,661.69.

The petitioner's spouse's personal bank statements for the period February 23, 2005 through February 23, 2006 reflect balances ranging from a low of $1,677.45 to a high of $9,642.59.

The bank statements for the spouse's business for the period May 2, 2005 through December 31, 2005 reflect balances ranging from a low of $1,195.84 to a high of $8,254.51.

The petitioner's personal bank statements from Premier Bank for the period April 1, 2005 through January 19, 2006 reflect balances ranging from a low of $433.18 to a high of $48,577.56.

The petitioner's personal bank statements from U.S. Bank for the period February 16, 2005 through July 18, 2005 reflect balances ranging from a low of -$95.44 to a high of $1,844.86.

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[1] 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).

[2] It is noted that the copy of the petitioner's net worth is unaudited and unsupported by objective evidence. Therefore, it has little probative value in determining the petitioner's ability to pay the proffered wage of $24,060. *See* 8 C.F.R. § 204.5(g)(2). In addition, 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)).

The pay statements for the beneficiary reflect wages of $1,950 month to date and $5,850 quarter to date for March 2005; $1,950 month to date and $5,850 quarter to date for April 2005; $1,950 month to date and $5,850 quarter to date for May 2005; and $500 month to date and $1,075.10 quarter to date for July 2005. No explanation was provided with regard to the absence of the June 2005 statement. In addition, no explanation was submitted as to why the pay statements reflect a quarter to date balance beginning with $5,850 and ending with $5,850 for the second quarter of 2005 (April, May, and June). Furthermore, the July 2005 statement shows a year to date balance of only $2,756.78. Without an adequate explanation of this discrepancy or a Form W-2, Wage and Tax Statement, or a Form 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary, CIS cannot conclude that the beneficiary was actually paid the claimed salary. *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.
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> * * *
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> 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.

The petitioner's 2005 Unemployment Insurance Tax Report for Colorado reflects that the petitioner employed the beneficiary in the 1st, 2nd, and 4th quarters of 2005. There is no evidence in the record that shows that the petitioner employed the beneficiary in the 3rd quarter of 2005. The beneficiary was compensated a total of $6,132.31 for the three quarters in 2005.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of $24,060 based on the petitioner's Schedule C income, income from other sources, and on the fact that the petitioner has tripled its sales from 2003 to 2005.

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'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, CIS 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on August 26, 2004 (as a substituted beneficiary), the beneficiary did not include the petitioner as a past or present employer. In addition, counsel has submitted only a limited number of pay statements for the beneficiary in 2005 (March, April, May, and

July), which does not corroborate the beneficiary's full-time employment with the petitioner from 2003 through 2005. Furthermore, the pay statements' validity, as stated above, is questionable. *See Matter of Ho.*

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

The petitioner represents itself as a sole proprietorship,[3] 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.[4] *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

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[3] Information obtained by CIS at http://www.sos.state.co.us/ indicates that at the time of filing of the labor certification, the petitioner was organized as a corporation. The corporation was dissolved on May 1, 2004, and the business was then organized as a limited liability corporation (LLC) on August 10, 2004. While the director did not deny the petition for this reason and while the AAO is not dismissing the appeal for this reason, any further correspondence with CIS regarding this petition would need to discuss the petitioner's qualifications as a successor-in-interest and why the petitioner filed his federal tax returns in 2002 and 2003 as a sole proprietorship instead of a corporation. In addition, the validity of the current labor certification would be questioned as the petitioner and beneficiary have subsequently relocated to a new address. CIS would have to determine if the new address is within the same Standard Metropolitan Statistical Area (SMSA) or commuting area as the address under which the labor certification was filed. *See* 20 C.F.R. § 656.3.

[4] Please see footnote 2 above and note that the petitioner currently appears to be a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

In the instant case, the sole proprietor supported a family of four in 2003 through 2005. In 2003, the petitioner's adjusted gross income of $61,280 was $37,220 more than the proffered wage of $24,060. However, the petitioner's monthly personal expenses were $3,715 per month or $44,580 annually in 2003 or $7,360 more than the $37,220 remaining after paying the proffered wage to the beneficiary in 2003. Therefore, the petitioner has not established its ability to pay the proffered wage and support a family of four in 2003.

In 2004, the petitioner's adjusted gross income of $73,711 was $49,651 more than the proffered wage of $24,060. The petitioner's monthly person expenses were $3,940 per month or $47,280 annually in 2004 or $2,371 less than the $49,651 remaining after paying the proffered wage to the beneficiary in 2004. While it appears that the petitioner has established its ability to pay the proffered wage and support a family of four in 2004, it is noted that Schedule C of the petitioner's tax return shows no wages paid for the year even though CIS internal records reflect several additional petitions submitted by the petitioner for both immigrant and nonimmigrant positions in 2004. As such, the petitioner is obligated to show that it had sufficient funds to pay all the wages petitioned for, not just the beneficiary. Therefore, the AAO is not convinced that the petitioner has established its ability to pay the proffered wage of $24,060 and to support a family of four in 2004. *See Matter of Ho,* 19 I&N Dec. at 591-592.

In 2005, the petitioner's adjusted gross income of $90,861 was $66,801 more than the proffered wage of $24,060. The petitioner's monthly personal expenses were $3,795 per month or $45,540 annually in 2005 or $21,261 less than the $66,801 remaining after paying the proffered wage to the beneficiary in 2005. While it appears that the petitioner has established its ability to pay the proffered wage and support a family of four in 2005, the director informed the petitioner that it had filed three additional petitions in 2005; and, therefore, the petitioner is obligated to show that had sufficient funds to pay all the wages petitioner for, not just the beneficiary. The three additional cooks' salaries would result in an additional $72,180 per year. Therefore, the petitioner has not established its ability to pay the proffered wage of $24,060 and to support a family of four in 2005.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of $24,060 based on the petitioner's Schedule C income, income from other sources[5], and on the fact that the petitioner has tripled its sales from 2003 to 2005. However, as stated above, the business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. CIS looks to the petitioner's total adjusted gross income when determining the petitioner's ability to pay the proffered wage, not just the profit from the business income. With regard to the petitioner having tripled its sales from 2003 to 2005, CIS will consider the increase in business, but not without also considering the increase in liabilities. Ultimately, even with an increase in sales, the petitioner is still required to establish its ability to pay the proffered wage of $24,060 to the beneficiary and any additional employees petitioned for. In this case, the petitioner has not succeeded in this undertaking.

[5] Counsel has not indicated where the income from other sources would come or the extent to which it could be used to pay the proffered wage of $24,060 to the beneficiary and the additional employees petitioned for and still support a family of four. CIS will not consider real property when determining the petitioner's ability to pay the proffered wage as personal residences and other real property are considered to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary.

On appeal, counsel has also submitted bank statements for the petitioner, the petitioner's spouse, the petitioner's spouse's business, and for the petitioner and his spouse. It is noted that all of these bank statements are primarily for 2005. While CIS will consider the personal bank accounts, the sole proprietor's business checking account is usually shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis. In addition, in the present case, as noted above, the personal bank statements are for 2005 only and cannot be considered when determining the petitioner's ability to pay the proffered wage of $24,060 to the beneficiary and any additional employees petitioned for from the priority date of September 2, 2003 and continuing through 2005.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has provided four tax returns (2002 through 2005), which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2002 through 2005 were uncharacteristically unprofitable years for the petitioner. Furthermore, the petitioner is obligated to show that it had sufficient funds to pay not only the beneficiary's wage, but also those of any additional employees petitioned for from the priority date of September 2, 2003 through 2005.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence along with those additional salaries of the additional employees petitioned for. The decision of the director to deny the petition was appropriate, based on the evidence in the record before the director.

In addition, 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). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

Given that the beneficiary has the same last name as the owner and is currently residing with the owner, the facts of the instant case suggest that she too is a family member.[6] The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of the this beneficiary.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.

[6] It should be noted that CIS has determined that other petitions including one where the beneficiary has the same parents as the owner have beneficiaries with the same last name. A further review of those petitions may be necessary to determine if those beneficiaries are indeed relatives of the owner.