U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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File: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 2 4 2007

SRC-03-018-50263

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:

[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 Director, Texas Service Center ("director") initially approved the employment-based preference visa petition. Following approval, the director served the petitioner with a Notice of Intent to Revoke the Approval of the Petition ("NOIR"). Subsequently, the director revoked the Form I-140 approval. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is a Chinese restaurant and seeks to employ the beneficiary permanently in the United States as a cook, specialty, foreign food ("Chinese Specialty Cook"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's April 13, 2005 decision, the petition's approval was revoked based on a determination of fraud, after the beneficiary was interviewed at the U.S. Department of State ("DOS") Embassy in Suriname.[1] Further, we find that the petitioner has not demonstrated that it can pay the beneficiary the proffered wage, and that the petition should have been denied on this basis as well.

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.[2]

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 the decision.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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

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[1] The beneficiary resides outside the U.S. and sought to consular process through the U.S. Embassy in Suriname to obtain his immigrant visa following approval of the I-140.

[2] 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).

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.

The history of the case follows:

- On September 1, 2000, the petitioner filed Form ETA 750 on behalf of the beneficiary for the position of cook, 40 hours per week, at a pay rate of $10.10 per hour, equivalent to an annual salary of $21,008. The petitioner additionally listed an overtime rate of $15.15;
- On October 2, 2002, the Form ETA 750 was approved;
- On October 24, 2002, the petitioner filed the I-140 Petition on behalf of the beneficiary, and listed the following information: established: June 27, 2000; gross annual income: $108,629; net annual income: not listed; and current number of employees: 2.
- On April 16, 2003, the director approved the I-140 petition;
- The beneficiary resides in Suriname, and applied for consular processing to obtain his permanent residency based on the approved I-140. On February 4, 2004, the beneficiary attended an interview at a the U.S. Embassy in Paramaribo, Suriname;
- On January 18, 2005, following the beneficiary's interview with the Embassy, the director issued a Notice of Intent to Revoke ("NOIR").

The NOIR outlined issues raised based on the beneficiary's Embassy interview. The DOS Consular Report provided that the petitioner had filed three petitions for Chinese cooks. All three beneficiaries relied on experience obtained with the [redacted] Restaurant[3] located at [redacted], Paramaribo, Suriname to show that they met the experience requirement of the certified Forms ETA 750 respective to their petition. Further, the NOIR indicated that the Embassy was familiar with the [redacted] Restaurant, as the restaurant and its owner were "well known" to the Embassy for providing false documents and job letters to Chinese individuals seeking to enter the U.S. on visas. The experience letters provided to all three applicants indicated that they worked for the Sharaton during the same time frame. A Consular Officer visited the restaurant and concluded that based on the size of the restaurant, and number of patrons, that the restaurant would not require the services of three full-time Chinese cooks during the same time period. In addition, based on information obtained from one of the beneficiaries' interviews, the Consular Officer concluded that the experience letters were false.

Additionally, the NOIR addressed information obtained from the beneficiary's interview. The beneficiary indicated at the interview that he was no longer employed with the [redacted] but was employed at another restaurant. He could not provide the exact address of the other restaurant, and failed to provide a job letter from the employer. The beneficiary was unable to provide an estimate of the number of tables that the restaurant had. He was further unable to estimate the number of food orders that he prepared in a day. When questioned and asked to name twenty different Chinese dishes, the beneficiary could only name fried rice. The beneficiary was unable to identify any Chinese desserts prepared when asked to name five. The beneficiary was questioned regarding how he learned of the employment opportunity with the petitioner and whether he was related to the petitioner in any way, to which the beneficiary replied no.

The NOIR and decision refer to the restaurant as the "[redacted] In the experience letters provided, the spelling is listed as the "[redacted]

The NOIR notes that the petitioner's lawyer contacted the Embassy by phone and informed the officer that the beneficiary was related to the petitioner's owner. Further, counsel provided that the beneficiary had eleven years of experience in preparing a menu of one hundred ninety nine items for the Sharaton restaurant.

Counsel responded to the NOIR on behalf of the petitioner. Counsel provided in response to the NOIR that he personally knew the petitioner's owner, a sole proprietor and his wife, and believed that the petitioner had a "genuine need" for an additional four or five Chinese cooks. Counsel provided that the petitioner conducted bona fide recruitment in the form of advertising and posting, and that there were no responses.

Further, counsel believed the information that the beneficiary provided to him was "credible," and that the beneficiary was an experienced cook. In support of the beneficiary's experience, the former owner of the [redacted], [redacted] submitted an affidavit attesting to the beneficiary's experience. Attached to the affidavit was a menu, and the former owner provided that the beneficiary was an "expert" at preparing all the dishes listed on the menu. The beneficiary additionally provided an affidavit similarly attesting that he worked for the [redacted] Restaurant from May 1996 to April 1998 full-time, and from May 1998 to February 2003 part-time. The beneficiary stated that he currently owned and operated a grocery and small Chinese restaurant in Suriname.

Counsel contended that the beneficiary had more than the required two years of experience and that "in the absence of an indication of fraud, the U.S. Visa Section official should have given some deference to the declaration of [redacted]." Further, counsel provided citations to case law that the existence of a familial relationship should not automatically bar the labor certification.

On April 13, 2005, the I-140 was denied and accordingly revoked.[4] The decision raised many of the same points addressed in the NOIR: that the petitioner filed for three beneficiaries and all three beneficiaries provided an experience letter from the same employer. Further, they all claimed to have worked for that employer during the same time period; that the present beneficiary was unable to answer basic questions regarding his current employment, and further could not answer basic questions related to Chinese food dishes; and that the beneficiary denied he was related to the petitioner's owner when asked directly whether he was related to the owner.[5] As the beneficiary's prior work experience was in question, the director found that the petitioner failed to establish that the beneficiary met the qualifications of the certified ETA 750.

The director additionally cited *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), and noted that:

> An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation,

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[4] Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988). Accordingly, the director has the authority to revoke the petition at any time for good and sufficient cause. Whether the beneficiary is in the United States or not, has no bearing on this issue.

[5] The decision further noted that during the interview the beneficiary was asked whether he knew Mr. Hu Zhi Chao, another beneficiary that the petitioner filed an application for, and if the two were related. The beneficiary replied that they were friends. When questioned why he was living at the same address as Hu Zhi Chao, the beneficiary replied again only that they were friends.

> however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR 656.30(d)(1986).

The director found that it was not clear that the petitioner informed DOL that the beneficiary was the owner's brother-in-law, and that the close relationship called into question whether the position was truly available to other qualified applicants. The director distinguished *Matter of Silver Dragon Chinese Restaurant*: that while the present case did not involve ownership interest, the director found that the issue of whether the position was truly available to qualified workers was similar to the issue in *Matter of Silver Dragon Chinese Restaurant*. The director concluded that the position was not truly available, and had all the information been presented to DOL, that the labor certification would not have been approved.

The regulation at 20 CFR § 656.30(d) provides:

> After issuance, labor certifications are subject to invalidation by [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

Further, 20 CFR § 656.31(d) provides:

> (d) 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.

Based on 20 CFR § 656.30(d), the director invalidated the labor certification. Without a valid labor certification, the petitioner failed to meet the requirements of 8 C.F.R. 204.5(l)(3), and the petition was revoked for good and sufficient cause on the basis of fraud. The petitioner appealed and the matter is before the AAO.

The instant petition raises a number of issues. We will first address the issue related to the beneficiary's work experience, and then the issues related to fraud and the beneficiary's relationship to the petitioner's owner. Finally, we will address the question of the petitioner's ability to pay, which was not raised in the director's decision.

In examining the issue of the beneficiary's experience, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16

I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years experience in the job offered, as a Chinese specialty cook with job duties partially including: "plans menus and cooks Chinese-style dishes, dinners, desserts and other foods according to recipes. Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Employed in restaurant specializing in Chinese cuisine." The petitioner listed no education requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the beneficiary on August 21, 2000, the beneficiary listed his prior experience as: (1) [redacted] Restaurant, Suriname, October 1998 to present, Chief Cook; and (2) [redacted] Restaurant, [redacted] Suriname, July 1996 to October 1998, Cook.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (ii) *Other documentation*—
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> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner submitted:

> "Declaration" from the [redacted], Suriname, unsigned, dated July 28, 2000;
> Position title: Cook; Chief Cook;
> Dates of employment: 1996 to 1998; 1998 to 2000;
> Description of duties: not listed.

The "Declaration" is not on letterhead, and provides: "the undersigned "[redacted] Restaurant" . . . declares that [the beneficiary] . . . has worked in [redacted] Restaurant as a cook." The copy of the declaration provided has no signature, and does not provide the position or title of the individual that wrote the declaration. Further, the declaration does not include the beneficiary's job duties as required by regulation.

In response to the questions raised regarding beneficiary's experience in the NOIR, the petitioner provided two additional affidavits:

Affidavit from [redacted] Suriname, signed and dated February 6, 2004. [redacted] attested that he was the owner of a Chinese restaurant, the [redacted], between the years 1996 and 2003. He sold the [redacted] in 2003 and presently owned the [redacted] Restaurant.
He confirmed the following related to the beneficiary's employment:
Position title: full-time assistant cook; part-time first class cook;
Dates of employment: May 1996 to April 1998; May 1998 to February 2003;
Description of duties: not listed. The beneficiary "became an expert at preparing all of the dishes listed on my menu, which is attached to the affidavit."[6]

Affidavit from the beneficiary, [redacted], Suriname, signed, dated February 10, 2005. The beneficiary attested to the following regarding his **employment at the** [redacted]
Position title: full-time assistant Chinese cook; part-time first class cook;
Dates of employment: May 1996 to April 1998; May 1998 to February 2003;
The affidavit further provided that the beneficiary owned and operated a grocery and a small Chinese restaurant in Suriname. Further the beneficiary provided: "I do not own any interest in, nor do I control in any way the operations of China Capital."

The director noted that despite the affidavits, counsel did not address the issue of the first letter, which the U.S. Embassy concluded was fraudulent. Further, the petitioner did not provide any additional evidence related to the beneficiary's experience to overcome the presumption of fraud.

On appeal, counsel did not provide any further documentation to overcome the presumption of fraud based on the U.S. Embassy determination. Further, counsel did not address any of the points raised in the director's denial regarding the deficiencies in the beneficiary's documented experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592. The petitioner has not resolved the inconsistencies in the evidence. Accordingly, the petitioner has failed to demonstrate that the beneficiary has the required two years of experience to meet the requirements of the certified ETA 750.

Regarding the issue of the beneficiary's relationship to the petitioner's owner, the director determined that based on *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986), as the petitioner had not disclosed the relationship to DOL, that the position was not truly available and invalidated the labor certification based on 20 CFR § 656.30(d). Without a valid labor certification, the petitioner failed to meet the requirements of 8 C.F.R. § 204.5(l)(3).

On appeal, counsel contends that: the petitioner did not omit or misrepresent any facts of the case; the fact that the beneficiary and the petitioner's owner are related would not bar the labor certification where the beneficiary does not own a controlling interest in the petitioning restaurant; that the director erroneously revoked the petition based on *Matter of Silver Dragon*; and the director's opinion should be reversed.

Counsel provides that the beneficiary is the brother of the petitioning owner's wife, and that the beneficiary does not have any controlling or ownership interest in the petitioner. Further, counsel contends that the

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[6] The menu attached listed 182 items with each dish listed in Chinese characters, Dutch, and in English.

relationship is not material unless the beneficiary holds an actual ownership interest or "control over the petitioning employer." Counsel cites to numerous cases in support: *Matter of Altobeli's Fine Italian Cuisine,* 90 INA 130 (1991); *Matter of Guven Fine Jewelry,* 92 INA 52, 434 (1993); *Matter of Modular Container Systems, Inc.,* 89 INA 228 (BALCA 1991); and *Matter of Paris Bakery Corporation*, 88 INA 337 (1990).

Counsel cites to *Matter of Paris Bakery Corporation*, 88-INA-337 (1990) and contends that the beneficiary's relationship would not warrant automatic denial, but would be one factor for consideration. *See Paris Bakery Corporation,* 1998-INA-337 (Jan. 4, 1990) "We did not hold nor did we mean to imply in Young Seal that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification."

Counsel asserts that in *Matter of Altobeli's Fine Italian Cuisine,* 90-INA-130 (1991), the panel relied on the test elaborated in *Matter of Modular Container Systems, Inc.,* 89-INA-228 (BALCA 1991), and found that the employer was independent from the alien, despite the family relationship because the alien had no ownership interest, was not an incorporator or founder, was not on the board of directors, and was not currently an employee. The panel also noted that the job duties did not seem tailored to the beneficiary, and that the employer's recruitment effort appeared to have been conducted in good faith.

Counsel provides that in *Matter of Guven Fine Jewelry,* 92-INA-52, 434 (1993) a BALCA panel overturned the certifying officer's denial of a labor certification as the beneficiary's brothers owned the company. The BALCA panel found that the alien did not have substantial control over the employer since the alien was not yet employed in the position; the alien had no ownership interest in the employer, and the alien was not in a position of control.

While the cases that counsel cites focus on the issue of ownership, the director's decision distinguished that her concern was not ownership, but that position was truly available to U.S. workers based on the relationship. 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). Counsel contends that the recruitment was "diligent and in good faith," and provides an affidavit from the owner attesting to that fact.

We agree with the director and question whether the position was truly available. The petitioner filed applications for five beneficiaries. Three of five beneficiaries have the same surname as the petitioner's owner's wife. One has been identified as the owner's brother-in-law. A second beneficiary with the same surname resides with the present beneficiary in Suriname, and is also likely related. Whether the third beneficiary with the same surname is related would be a matter of speculation, but we would presume it to be likely. The relationship of three individuals to the owner, where the petitioner only employs two people, would be a material fact to be disclosed to DOL.

Counsel did not provide any documentation to show that the petitioner disclosed to DOL any of the beneficiaries' relationships to the owner. Further, based on the revenue that the petitioner generates, and the fact that the petitioner currently only employs two people, it is questionable that the petitioner would have five full-time positions for employees.

Additionally, DOS determined that the beneficiary relied on a fraudulent experience letter to document his prior experience.[7] The labor certification may have been revoked on this basis as well, regardless of the issue of ownership. 20 C.F.R. § 656.30(d).

Based on the foregoing, the petitioner has not overcome the grounds for revocation. We find that the director had good and sufficient cause to revoke the petition's approval and invalidate the labor certification.

Further, although not raised in the director's decision, the application should have been denied as well on the basis that the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The beneficiary has not been employed with the petitioner, and resides outside the U.S. as indicated on Form ETA 750B, signed by the beneficiary on August 21, 2000, and the I-140 Petition. Therefore, the petitioner is unable to establish its ability to pay the beneficiary based on prior wage payment.

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. 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 is a sole proprietor, 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

[7] We note that in the interview the beneficiary additionally misrepresented his relationship to the petitioner's owner, as well as to the other beneficiary that he resided with. *See* INA Section 212(a)(6)(c), [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."

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.

In the instant case, the sole proprietor supports himself, his wife, and child,[8] and resides in Tupelo, Mississippi. The tax returns reflect the following information for the following years:

[redacted]	**Sole Proprietor's AGI (1040)**	**Petitioner's Gross Receipts (Schedule C)**	**Petitioner's Wages Paid (Schedule C)**	**Petitioner's Net profit from business (Schedule C)**
2002	$18,726	$249,973	$12,155	$20,060
2001	$33,878	$242,183	$0 ($22,090 costs of labor)	$19,602
2000	$14,707	$94,252	$15,040	$6,582

If we subtracted the beneficiary's proffered wage ($21,008) from the sole proprietor's AGI in each year, the sole proprietor would be left with the following amounts to support himself and his family: 2002: -$2,282; 2001: $12,870; and 2000: -$6,301. While the sole proprietor did not provide a list of estimated expenses for himself and his family, the figures reflect that the sole proprietor would not be able to pay the proffered wage and support himself and his family in the years 2002 and 2000. Further, it is unlikely that the petitioner could pay the proffered wage and support himself and his family in 2001.[9]

Additionally, we note that the petitioner filed I-140 petitions on behalf of four other beneficiaries. The petitioner would need to demonstrate that it could pay all the beneficiaries the proffered wage. From the foregoing, the petitioner has not demonstrated this. We also note that it is questionable based on the petitioner's staffing (two employees) and gross receipts listed that the petitioner could support, or would need, five additional employees.

Based on the foregoing, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the time of permanent residence. Accordingly, the petition should have been denied on this basis as well.

Accordingly, the petition's approval was properly revoked for good and sufficient cause. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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[8] The sole proprietor listed a dependent child on the 2001, and 2002 tax returns, but in the year 2000, the sole proprietor supported only himself and his wife.

[9] The record of proceeding does not contain any information regarding the sole proprietor's unencumbered and liquefiable personal assets, which would be considered in the case of a sole proprietorship.

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.