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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

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 29 2008

WAC-06-003-50620

IN RE: Petitioner:
Beneficiary: [redacted]

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"), denied the preference visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner operates a catering business, and seeks to employ the beneficiary permanently in the United States as a cook, restaurant ("Chef"). As required by statute, the petition 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 July 19, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[1]

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. Further elaboration of the procedural history will be made only as necessary.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also 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

[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).

of Labor 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 for processing by the relevant office within the DOL employment system on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $11.00 per hour, $22,880 per year based on a 40 hour work week. The labor certification was approved on July 1, 2005. The petitioner filed an I-140 Petition for the beneficiary on October 3, 2005.[2] The petitioner listed the following information on the I-140 Petition: date established: September 10, 1995; gross annual income: $23,457.00; net annual income: -$3,900.00; and current number of employees: 0.

On April 21, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide the following information: evidence of the petitioner's ability to pay the proffered wage in the form of federal tax returns, annual reports, or audited financial statements, as well as for the petitioner to submit a copy of its 2005 Quarterly Tax Return along with its State Quarterly Payroll Return, which lists employees and their respective earnings. Further, if the petitioner presently employed the beneficiary, to submit a copy or copies of W-2 Forms issued to the beneficiary. The petitioner responded. On July 19, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. 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. On Form ETA 750B, signed by the beneficiary on March 15, 2001, the beneficiary listed that he has been employed with the petitioner since March 1999. The petitioner did not submit any evidence of prior wage payment to the beneficiary. The petitioner instead indicated that although it employed the beneficiary full-time, the beneficiary was not on the petitioner's payroll based on his current status, and that the petitioner would put the beneficiary on its payroll upon his attainment of permanent residence. Accordingly, as the petitioner did not submit any evidence of wage payment, the petitioner cannot establish its ability to pay the proffered wage based on prior wages paid to the beneficiary.

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,

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[2] The petition was initially filed with the California Service Center, and later transferred to, and decided at, the Texas Service Center in accordance with CIS procedures, which changed filing locations for I-140 petitions.

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.

In the instant case, the sole proprietor supports himself, his wife, and his dependent parents and resides in Panorama, California. The tax returns reflect the following information:

Tax Fling Year	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)
2005[3]	$26,108	$35,988	$0	$2,407
2004	Not provided	$23,547	$0	-$3,900
2003	Not provided	$40,478	$0	-$2,136
2002	Not provided	$39,713	$0	$484
2001	Not provided	$56,918	$0	$1,157

The sole proprietor failed to provide his full tax return for the years 2001 through 2004, which would be necessary to determine the sole proprietor's adjusted gross income (AGI), and whether he could support himself and his family after subtracting the proffered wage due to the beneficiary.

If we reduced the sole proprietor's AGI by the proffered wage that the petitioner must demonstrate that it can pay the beneficiary in 2005, the owner would be left with an adjusted gross income of: 2005: $3,228. The sole proprietor would not be able to pay the proffered wage and support his family on $3,228. As the petitioner showed low or negative net profits in the other years, it is unlikely that the petitioner could demonstrate its ability to pay in these years. The sole proprietor did not submit a list of estimated monthly family expenses to demonstrate the amount required to support himself and his family, or of additional resources for support.

We note that the director's decision determined that since the petitioner could not provide a quarterly tax return for 2005, that it could not establish its ability to pay the proffered wage in that year. Further the

[3] The sole proprietor submitted his 2005 federal tax return on appeal, which would not have been available at the time of filing the I-140 petition, but should have been at the time of response to the RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

decision provided that, "the documents submitted do not clearly establish that [the petitioner] has the ability to pay the proffered wage. Thus, this Service is not convinced that the petitioner has had, or will have the ability to pay the beneficiary the proffered wage." While the petitioner's full tax return, and the petitioner's personal estimate of expenses would assist in making that determination, the low level of net profits, and the petitioner's 2005 tax return would exhibit the petitioner's failure to demonstrate its ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence in accordance with 8 C.F.R. § 204.5(g)(2).

On appeal, counsel provides that 8 C.F.R. § 204.5(g)(2) allows submission of additional evidence such as bank account records. The petitioner provided a copy of a bank account statement dated September 7, 2006, which showed a balance of $7,487.33 for the business checking account, and $22,000 in regular savings for a total of $29,467.33. Counsel asserts that the 2006 one month bank balance, and the sole proprietor's 2005 tax return, which reflects an AGI of $26,232 would reflect the petitioner's ability to pay the proffered wage.

As noted above, 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. Therefore, the business bank account records, as well as individual savings would be considered. However, the petitioner has provided a bank statement that accounts for only one month. The bank statement would represent only the amount that the petitioner had in its account on September 7, 2006, and would, therefore, be insufficient to demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date, April 2001, until the beneficiary obtains permanent residence.

Regarding the sole proprietor's adjusted gross income in 2005, as addressed above 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). The sole proprietor's 2005 AGI would not demonstrate this based on the $3,228 remaining after payment of the proffered wage.

The petitioner submitted no further evidence related to this issue on appeal. Therefore, the petitioner has failed to overcome the basis for the petition's denial.

Further, although not raised in the director's denial, the petitioner has failed to show that the beneficiary meets the experience requirements of the certified Form ETA 750. 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*, 229 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). 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.[4]

[4] 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("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).

On the Form ETA 750A, the "job offer" description for a Chef provides in part:

> Prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption. Reads menu to estimate food requirements and procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers to prepare soups, salads, seasoning to foods during mixing or cooking.

Further, the job offer listed that the position required:

Education:	none
Major Field Study:	none
Experience:	2 years in the job offered, Chef
Other special requirements:	None.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) *Other documentation—*
>
> > (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.

Form ETA 750B lists the beneficiary's prior experience as: (1) the petitioner, March 1999 to the present (date of signature, March 15, 2001), Chef; and (2) Super Aluminum Door, Long Beach, California, June 1996 to January 1999, Manager; (3) Roy Construction Co., Sylmar, CA, December 1994 to May 1996, labor, 40 hours per week; and a position, which was listed as an amendment while the Form ETA 750 was pending with the California State Workforce Agency: (4) Mobile Star Gourmet, Richmond, CA, March 1994 to June 1996, Chef, 40 hours per week.

The petitioner provided the following letter to document the beneficiary's prior experience:

> Letter from [redacted], Mobile Star Gourmet, Richmond, CA, dated June 18, 2003,
> Title: cook
> Dates of employment: March 1994 to June 1996
> Job duties: not listed.

As the time that the beneficiary lists that he was employed with Mobile Star Gourmet overlaps with the time period that the beneficiary lists that he was a full-time employee in labor for a construction company, the beneficiary should obtain a more specific letter with corroborating independent evidence to document the number of hours that he worked for both Mobile Star Gourmet, as well as for the construction company. Further, the letters should address the specific shifts worked. The beneficiary has listed that he was employed full-time at both locations for most of the two year time period that he was employed as a cook. It would be important to verify that the beneficiary did in fact work full-time as a cook. Otherwise, if the beneficiary worked part-time as a cook for any or all of the period with Mobile Star Gourmet, he may have less than the required two years of prior experience. 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. 582, 591-592 (BIA 1988).

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.