(b)(6)

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

DATE: OCT 10 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a French restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had failed to demonstrate that: 1) the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and 2) the beneficiary met the minimum requirements as set forth on the labor certification. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 1, 2009 denial, an 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 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.

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 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on June 2, 2003. The proffered wage as stated on the Form ETA 750 is $500 per week ($26,000.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered of chef.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1996 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on May 28, 2003, the beneficiary claimed to work for the petitioner since November 1998.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards. Forms W-2 were submitted indicating that the petitioner paid the beneficiary wages according to the table below.

- In 2003, the Form W-2 stated wages paid to the beneficiary of $12,000.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of $12,000.00.
- In 2006, the Form W-2 stated wages paid to the beneficiary of $12,000.00.
- In 2007, the Form W-2 stated wages paid to the beneficiary of $12,000.00.

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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).

- In 2008, the Form W-2 stated wages paid to the beneficiary of $12,000.00.

In addition, a pay stub for the period of February 16, 2009, to February 28, 2009, indicates year-to-date payments to the beneficiary of $1,821.00.

Therefore, as the proffered wage was $26,000.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 but would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2003	$26,000.00	$12,000.00	$14,000.00
2004	$26,000.00	$0	$26,000.00
2005	$26,000.00	$12,000.00	$14,000.00
2006	$26,000.00	$12,000.00	$14,000.00
2007	$26,000.00	$12,000.00	$14,000.00
2008	$26,000.00	$12,000.00	$14,000.00
2009	$26,000.00	$1,821.00	$24,179.00

However, the AAO notes that research conducted in all available databases revealed that the beneficiary's Social Security number on the Forms W-2 has been used by other individuals. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.[2]

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[2] The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states: "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."

Therefore, absent evidence in the record of proceeding which explains why the beneficiary received payment using a Social Security number in use by other individuals, the AAO will not consider the above Forms W-2 in calculating the amount of wages paid by the petitioner.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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'r 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

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• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

sustain themselves and their dependents. *See 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 petitioner 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 a family of two. The record before the director closed on April 13, 2009, with the receipt of the proprietor's submissions in response to the director's request for evidence (RFE). As of that date, the 2007 tax return was the most recent tax return due to be filed. The proprietor's tax returns reflect the following information for the following years[3]:

The proprietor's tax returns reflect the following information for the following years:

- In 2002, the Form 1040 stated adjusted gross income[4] of $56,311.00.
- In 2005, the Form 1040 stated adjusted gross income of $58,230.00.

The proprietor failed to submit federal tax returns or other regulatory-prescribed evidence for 2003, 2004, 2006, and 2007. In addition, the Forms 1040 provided were incomplete and did not include copies of Schedule C, which reflect the income and expenses of the business. The record includes copies of California sales and use tax returns for two quarters in 2003, three quarters in 2005, four quarters in 2006, and three quarters in 2007. State sales and use tax returns do not reflect the same income and expense items as those on a federal tax return's Schedule C and they are not among the regulatory-prescribed items at 8 C.F.R. § 204.5(g)(2) required to establish the ability to pay the proffered wage.

In 2002 and 2005, the sole proprietor's adjusted gross income of $56,311.00 and $58,230.00, respectively, exceeds the proffered wage of $26,000.00 by $30,311.00 in 2002 and by $32,230.00 in 2005. However, the proprietor failed to provide a listing of monthly recurring household expenses for any years to enable USCIS to determine that the proprietor had sufficient funds available to support himself and his family and pay the proffered wage to the beneficiary. Absent evidence of the proprietor's adjusted gross income for and monthly recurring household expenses, the evidence in the record does not demonstrate that the proprietor had sufficient funds available to pay the proffered wage on the priority date of June 2, 2003, or in any year thereafter.

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[3] The petitioner's tax return from 2002 was submitted, but it represents a year prior to the year in which the priority date falls, and thus is of little probative value concerning the petitioner's continuing ability to pay the proffered wage beginning on the priority date but may be considered generally.

[4] The adjusted gross income on the proprietor's Forms 1040 is found on line 35 in 2002, line 34 in 2003, and line 37 in 2005.

On appeal, counsel asserts that the director failed to consider the proprietor's personal assets and income. Counsel asserts that the proprietor has a personal residence with over $1 million dollars in equity. The record includes copies of the proprietor's mortgage statement and title company records.

Regarding the sole proprietor's property values, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also asserts that the proprietor and his wife receive Social Security income and a pension which was not considered in the director's analysis. The record contains copies of a bank book, two bank statements from 2009, and a County of Los Angeles deferred compensation and thrift plan statement showing the proprietor's pension. The AAO notes that the only tax return filed after the priority date of June 2, 2003, and submitted into evidence is the 2005 Form 1040. The 2005 Form 1040 submitted reflects $29,412.00 in Social Security benefits, of which $16,538.00 was taxable, and $26,587.00 in pension income, of which $19,410.00 was taxable. As the taxable amounts of the Social Security income and the pension were both accounted for in calculating the proprietor's adjusted gross income, the proprietor at most would have received $12,874.00 in Social Security benefits and $7,177.00 in pension payments that were not included in the proprietor's adjusted gross income on the Form 1040. The AAO notes that this additional $20,051.00 in 2005 added to adjusted gross income does not demonstrate the proprietor's ability to pay the proffered wage in 2005 absent a listing of recurring household expenses for that year. Further, the lack of documentation of recurring household expenses and copies of federal income tax returns for 2003, 2004, 2006, and 2007 in the record fail to demonstrate the proprietor's continuing ability to pay the proffered wage beginning on the priority date.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*,

USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the proprietor failed to submit copies of the federal tax returns for 2003, 2004, 2006, and 2007. The 2002 and 2005 Forms 1040 submitted into the record were incomplete and lacked copies of the Schedule C. The proprietor's amount of gross receipts earned during the relevant years is unknown as is the amount spent on salaries and wages. The proprietor's written statement of April 8, 2009, in the record states that he has not concluded his income tax returns for 2003, 2004, 2006, 2007, and 2008. The proprietor indicated on the Form I-140 that he employs six people, but the copies of the quarterly wage reports included for 2007 indicate that the proprietor employed between two to four people. While the proprietor has been in business approximately fifteen years, it does not appear that he earns substantial compensation from the business. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which he has since recovered, or of the proprietor's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the proprietor has not established that he had the continuing ability to pay the proffered wage.

As set forth in the director's May 1, 2009 denial, another issue in this case is whether or not the beneficiary met the minimum requirements as set forth on the labor certification as of the priority date.

The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 2, 2003. *See* 8 C.F.R. § 204.5(d). The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) 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 Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret

the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: Not required
High School: Not required
College: Not required
College Degree Required: None
Major Field of Study: None
TRAINING: None Required
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: None

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a chef working 40 hours per week for the petitioner, in Monrovia, California beginning in November 1998. The labor certification also states that the beneficiary qualifies for the offered position based on experience as an assistant chef and as a chef working 40 hours per week with in Arcadia, California from June 1995 until April 1999. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a dishwasher, cook, and then eventually a chef working 40 hours per week with the in Arcadia, California from September 1988 until June 1995. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The record does not contain any experience letters as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Thus, the proprietor has failed to submit required evidence of the beneficiary's experience. In addition, the AAO notes that the claimed employment with the proprietor and

overlap such that the beneficiary is claiming to have worked 40 hours per week for the proprietor beginning in November 1998, while still claiming to have worked for 40 hours per week until April 1999. Thus the beneficiary is claiming to have worked full-time, 40 hours per week for two different entities at the same time for six months from November 1998 to April 1999. No explanation to clarify this inconsistency was submitted into the record.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel asserts that the beneficiary's pay statements from and from the in the record demonstrate that the beneficiary has in excess of the required two years of experience. The AAO notes that the pay statements fail to meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) which require 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.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.