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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 2 6 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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 Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi chef. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 4, 2009 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 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on March 1, 2006. The proffered wage as stated on the ETA Form 9089 is $16.75 per hour ($34,840.00 per year based on 40 hours per week).

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 May 28, 2002 and to currently employ four to five workers. On the ETA Form 9089, signed by the beneficiary on April 21, 2006, the beneficiary does not claim to have worked for the petitioner.

At the outset, the petitioner indicates that the sole proprietor, sold the business to a new owner, in 2008. were married from 2002 to 2008. The record contains evidence to establish the marriage and the divorce. The record also contains a buyer's final settlement statement dated September 19, 2008, that indicates that purchased including furniture, fixtures, equipment, leasehold improvements, covenant not to compete, goodwill and ABC license. The settlement statement, however, does not state the petitioner's name, the sole proprietor's name, or give any indication that the property referenced on the statement was purchased from the petitioner.

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner and labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A successor employer may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Although the record contains evidence of the purchase of the location of the business, the record does not contain evidence to describe and document the transaction transferring the business. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[2] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

---

[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] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

The evidence in the record does not satisfy all three conditions described above because it does not describe and document the transaction transferring ownership of the predecessor. A successor-in-interest relationship has not been established between and

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 submitted evidence of wages paid to the beneficiary in 2008 and 2009. Copies of two IRS Forms W-2 were submitted for 2008. Copies of purported pay stubs for the beneficiary for January to March 2009 were also submitted.

The employer on the first 2008 IRS Form W-2 is The federal employer identification number (EIN) on the first 2008 IRS Form W-2 is The employer on the second IRS Form W-2 for 2008 is The EIN on the second IRS Form W-2 is The pay stubs do not indicate the name of the employer or the EIN. The petitioner's name on the Form I-140, the labor certification and the federal tax returns is The petitioner's EIN on the Form I-140, labor certification and federal income tax returns is

The EIN on the second 2008 W-2 is inconsistent with the petitioner's EIN on the Form I-140, labor certification and federal income tax returns.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

As previously discussed, the petitioner indicates that the sole proprietor, [redacted] sold the business to a new owner, [redacted] in 2008. However, the record does not contain evidence to establish a successor-in-interest relationship. The record does not contain evidence to reconcile the inconsistencies. Without evidence to reconcile the inconsistencies, it has not been established that the second 2008 IRS Form W-2 is evidence of wages paid by the petitioner. The AAO will not consider the wages paid on the second 2008 IRS Form W-2. Additionally, without evidence to establish that the pay stubs were from the petitioner, the AAO will not consider the 2009 pay stubs.

The first IRS Form W-2 for 2008 reflects wages paid by the petitioner in the amount of $24,684. The petitioner paid the beneficiary less than the proffered wage in 2008. Thus, for 2008, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in the amount of $10,156.

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 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 supported a family of two in 2006 and 2008 and a family of one in 2007. The proprietor's tax returns reflect the following information for the following years:

- In 2006, proprietor's adjusted gross income[3] of $52,333.
- In 2007, proprietor's adjusted gross income of $27,769.
- In 2008, proprietor's adjusted gross income of $110,654.

In 2007, the sole proprietor's adjusted gross income fails to cover the proffered wage of $34,840. It is improbable that the sole proprietor could support herself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The proprietor's adjusted gross income in 2006 and 2008 exceeds the amount of the proffered wage. However, the sole proprietor's adjusted gross income would also be expected to support her family of two. The difference between the proffered wage and the proprietor's adjusted gross income in 2006 and the difference between the wages paid and the proffered wage and the proprietor's adjusted gross income in 2008 left to support the proprietor's family is reflected in the table below.

- In 2006, difference of $17,493.
- In 2008, difference of $100,498.

The petitioner provided an estimate of monthly expenses to support her family. The estimated monthly expenses were $2,161. Based on that estimate, the proprietor's expenses for a year would be $25,932. However, the AAO notes that the proprietor's estimate of monthly expenses appears to be understated. The proprietor's estimated monthly expenses include:

$461.00	Mortgage payments (including property tax)
$0.00	Automobile payment
$0.00	Installment loan
$750.00	Credit card payment
$950.00	Household Expenses
$2,161.00	Total

The proprietor's estimate for mortgage and property tax was $451 per month or $5,412 per year. The proprietor's 2006 federal income tax return reflects payment of home mortgage interest in the amount of $36,684 and real estate taxes in the amount of $5,159. The proprietor's 2008 federal income tax return reflects payment of home mortgage interest in the amount of $1,930 and real estate taxes in the amount of $4,332. Further, the proprietor's estimate did not include medical or dental expenses. The proprietor's 2008 federal tax return reflects medical and dental expenses in the amount of $11,900. Additionally, the proprietor's estimate did not include gifts. The proprietor's 2006 federal income tax return reflects gifts in the amount of $600. The proprietor's 2008 federal

[3] The proprietor's adjusted gross income is found on Form 1040 line 37.

income tax return reflects gifts in the amount of $1,850. Finally, the petitioner's estimate did not appear to include car insurance, gasoline for her car, car maintenance or health insurance. Thus, the petitioner's estimate does not appear to include all of the proprietor's expenses. This casts doubt on the petitioner's estimate.

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.

Thus, the AAO does not accept the proprietor's estimate of monthly expenses. Without an accurate estimate of monthly expenses, it has not been established that the proprietor's adjusted gross income would be sufficient to support her family as well as pay the proffered wage in 2006 and the difference between the wages paid and the proffered wage in 2008.

Copies of monthly bank statements were submitted for 2006 to 2009. However, the funds in the are located in the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record contains evidence of real estate owned by As previously discussed, the record does not contain sufficient evidence to establish the successor-in-interest relationship between Therefore, it has not been established that assets owned by would be evidence of the petitioner's ability to pay. However, even if the AAO were to accept that was the successor, 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).

Copies of the petitioner's financial statements for 2006, 2007 and 2008 were submitted. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's letter that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of

and [redacted] compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 petitioner has been in business since 2002 and has four to five employees. The submitted evidence indicates that the petitioner's gross receipts declined from 2007 to 2008. The petitioner paid minimal wages to all employees in all relevant years. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities. Although bank statements were submitted reflecting funds in the sole proprietorship's business bank account, based on the evidence in the record, the funds appear to have been included on the Schedule C to IRS Form 1040. The net profit (or loss) from Schedule C is carried forward to page one of the sole proprietor's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. Further, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa.* No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.