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

(b)(6)

DATE: JAN 29 2013 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,

Rachel M Jones
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian specialty cook. 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 not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary had the two years of experience in the job offered which are required to perform the proffered position. 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 June 28, 2009 denial, the first 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 December 23, 2002. The proffered wage as stated on the Form ETA 750 is $9.96 per hour ($20,716.80 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered: Italian specialty cook.

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]

On appeal, the petitioner submits a brief; photographs of the petitioner's restaurant; marketing materials for the petitioner's restaurant (e.g., business card, yellow pages advertisements, menus); copies of the U.S. Individual Income Tax Returns (Forms 1040) for [redacted] for 2007 and 2008; business checking account statements for 2009; copies of the petitioner's business licenses, occupancy permits, and beverage license; copies of payroll checks for 2009; a copy of a property tax bill for 2006-2007; a copy of a mortgage statement for 2009; and copies of the two employment letters, which the petitioner submitted in response to the director's request for evidence (RFE).

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 1997 and currently to employ ten workers. On the Form ETA 750B, signed by the beneficiary on December 12, 2002, the beneficiary claimed to have worked for the petitioner since March 2002.

On appeal, counsel asserts that the petitioner is a bona fide business, which has been operating successfully since 1997; that the sole proprietor has personal assets, which demonstrate her success in business; that the petitioner's gross income is significant; and that these factors go towards demonstrating the petitioner's ability to pay the proffered wage. Counsel further states that the petitioner has personal assets, which demonstrate her ability to pay the beneficiary from her own resources. On appeal, counsel asserts that the beneficiary has approximately 12 years of experience as a cook and that the evidence submitted substantiates such claimed experience.

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

[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).

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 provided copies of Internal Revenue Service (IRS) Forms W-2, which it issued to the beneficiary in each year from 2002 through 2008. The beneficiary's W-2, Wage and Tax Statements, show compensation received from the petitioner, as reflected in the table below.

- In 2002, Form W-2 stated compensation of $9,419.29.
- In 2003, Form W-2 stated compensation of $12,680.50.
- In 2004, Form W-2 stated compensation of $13,912.50.
- In 2005, Form W-2 stated compensation of $12,996.50.
- In 2006, Form W-2 stated compensation of $12,096.39.
- In 2007, Form W-2 stated compensation of $15,643.59.
- In 2008, Form W-2 stated compensation of $16,292.65.

Therefore, in the instant situation, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2002 onwards. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for each year from 2002 through 2008, that difference being $11,297.51 in 2002, $8,036.30 in 2003, $6,804.80 in 2004, $7,720.30 in 2005, $8,620.41 in 2006, $5,073.21 in 2007, and $4,424.15 in 2008.

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 $6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of two. The proprietor's tax returns reflect the following information for the following years:

- In 2002, the proprietor's IRS Form 1040, line 35, stated adjusted gross income of $2,068.00.
- In 2003, the proprietor's IRS Form 1040, line 34, stated adjusted gross income of $28,954.00.
- In 2004, the proprietor's IRS Form 1040, line 36, stated adjusted gross income of $64,469.00.
- In 2005, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of $60,089.00.
- In 2006, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of $63,782.00.
- In 2007, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of $67,940.00.
- In 2008, the proprietor's IRS Form 1040, line 37, stated adjusted gross income of $72,233.00.

The sole proprietor must demonstrate the ability not only to pay the beneficiary the proffered wage, but also the ability to support her household, both from her adjusted gross income. In order to demonstrate such ability, the sole proprietor must enumerate and document her recurring, monthly, household expenses. The petitioner provided a list of such expenses, the monthly total of which is $5,534.00. Annualized, the petitioner's recurring, household expenses total $66,408.00.

In each year from 2002 through 2006, the total amount of the sole proprietor's household expenses exceeds her adjusted gross income, leaving no funds available to pay the difference between the wages already paid to the beneficiary and the proffered wage. In 2007, the sole proprietor's adjusted gross income exceeded her household expenses by $1,532.00. However, this sum is not sufficient to pay the difference between the wages already paid to the beneficiary and the full proffered wage.

Therefore, the sole proprietor has not demonstrated the ability to pay the beneficiary the difference between wages paid and the proffered wage from the priority date in 2002 through 2007.

On appeal, counsel asserts that the petitioner is a viable and successful business operation, as evidenced by the business materials presented on appeal (e.g., marketing documents, pictures, business licenses, etc.) as well as by the sole proprietor's personal assets and real estate holdings. The issue before the AAO is not whether the petitioner is a functioning business entity, but whether the petitioner has demonstrated the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits the sole proprietor's business checking account statements "showing business income and expenses." The funds in the account 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).

On appeal, counsel references the petitioner's personal assets, such as her bank statements and personal dwelling, which is located in California. According to counsel, this evidence demonstrates the sole proprietor's business success. Counsel also notes that, as a sole proprietor, the petitioner may use her personal assets "to fund the business in times of need."

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).

Regarding the sole proprietor's assets, which are held in her personal bank account, the AAO would consider such assets for purposes of paying the beneficiary. However, the record of proceeding contains only one bank statement for the period of October 1, 2008 through December 31, 2008. As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in the priority date year through 2007 based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances, which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary. In this case, however, the sole proprietor has not supplied the necessary bank statements to demonstrate an average annual balance, which is sufficient to cover the difference between wages paid to the beneficiary and the full proffered wage in the year of the priority date or in any subsequent year.

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. at 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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 sole proprietor did not have sufficient adjusted gross income to pay the beneficiary the difference between wages paid and the proffered wage plus its recurring, monthly, household expenses from 2002 through 2007. The petitioner has not demonstrated the historical growth of the business operation, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether 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.

As set forth in the director's June 28, 2009 denial, the second issue in this case is whether or not the beneficiary possessed the two years of requisite experience in the job offered as of the priority date.

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, 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: Six (6) years
High School: Two (2) years
College: None required
College Degree Required: None
Major Field of Study: Not required
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered: Italian specialty cook
OTHER SPECIAL REQUIREMENTS: Must have verifiable references

The labor certification states that the beneficiary qualifies for the offered position based on experience as an Italian specialty Cook with the petitioner in California from March 2002 until the present. The labor certification also states that the beneficiary worked as a cook at California from August 1994 until September 2001. 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.

With the initial petition submission, as evidence of the beneficiary's qualifying experience, the petitioner submitted a letter from , owner, on letterhead.

According to the letter, the beneficiary worked at from 1994 until mid-2001 as a "cook in the specialty of Greek Food."

Additionally, the petitioner supplied a letter from , owner of the petitioning restaurant. In her letter, Ms. attested that the beneficiary was working for at the time the instant petition was filed.

Since the experience claimed with was as a Greek specialty cook and not as an Italian specialty cook, the director issued an RFE, noting the discrepancy in the claimed experience. The director noted that Form ETA 750 specifically required two years of experience as an Italian specialty cook. Therefore, the director requested that the petitioner supply evidence demonstrating that the beneficiary had the required two years of experience as an Italian specialty cook as of the priority date.

In response, the petitioner supplied two new employment letters: 1) from Chef of and 2) from of restaurant.

In his letter, Chef states that the beneficiary worked for his restaurant as "a lead cook with a specialty in Italian cuisine" from May 1993 until October 1998.

However, the director noted that the beneficiary claimed to have worked at restaurant during the same period, specifically from October 1994 until August 2001. Further, the experience attested to in the letter from Chef is not claimed on Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Moreover, 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). The petitioner provided no independent, objective, verifiable evidence (e.g., pay statements, copies of IRS Forms W-2, etc.) to substantiate such experience.

The second letter from restaurant again indicated that the beneficiary worked for from October 1994 until August 2001 where "he was a lead cook with a specialty in pastas from scratch, roasted and rack of lamb, casserole dishes and Mediterranean desserts." In this letter, did not mention that the beneficiary was a Greek specialty cook as in the previous letter. However, the duties attributed to the position, which the beneficiary held, are commensurate with duties as a Greek specialty cook, as opposed to an Italian specialty cook.

In his decision, the director noted that the evidence submitted in response to his RFE did not demonstrate that the beneficiary obtained two years of experience as an Italian specialty cook performing the duties identified in Section 13 of Form ETA 750:

> Plans menus & cooks Italian-style dishes, dinners, desserts & other foods, according to recipes; prepares meats, soups, pastas, sauces & vegetables before cooking; seasons & cooks food according to prescribed method, portions & garnishes foods…

On appeal, counsel asserts that the petitioner supplied two letters from the beneficiary's former employers, which attest to 12 years of cooking experience. In support of his assertions, counsel submits the two letters, which were previously supplied in response to the director's RFE.

However, as noted in Section 13 of Form ETA 750, the proffered position requires two years of experience as an Italian specialty cook, performing the duties identified above, not as a cook in general.

Further, with respect to the letters provided again on appeal, Chef claims that the beneficiary worked at from May 1993 to October 1998, and this experience is not claimed on Form ETA 750B. *See Matter of Leung,* 16 I&N Dec. at 2350. Moreover, the beneficiary claims to have been working for restaurant during the same time period. Given such inconsistencies, the petitioner would have had to provide independent, objective, verifiable evidence substantiating such experience. *See Matter of Ho*, 19 I&N Dec. at 591-592. However, the petitioner has provided no such evidence. Therefore, the AAO will not consider such experience as qualifying for the proffered position.

The letter from restaurant indicates that the beneficiary worked for more than six years in a Greek restaurant, preparing Mediterranean dishes. However, the letter does not indicate whether the beneficiary worked on a full-time basis. Further, the letter attests to the fact that the beneficiary has experience in preparing Mediterranean dishes, but Form ETA 750B is specific in requiring two years of experience in preparing Italian dishes. The letter from does not claim that the beneficiary has such experience.

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 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.