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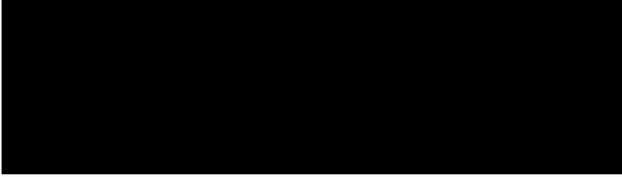
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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FILE: [Redacted]  
LIN 07 181 50115

Office: NEBRASKA SERVICE CENTER

Date: SEP 27 2010

IN RE: Petitioner: [Redacted]  
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:



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 Mexican restaurant in southern California. It seeks to employ the beneficiary permanently in the United States as a cook (Mexican specialty). 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 denied the petition, finding that the petitioner did not have sufficient income to pay the proffered wage of \$24,960 per year, specifically in 2001, 2002, 2003, and 2004.

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 April 10, 2008 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 at 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 (Act. Reg. Comm. 1977).

In this case, the petitioner submitted and the DOL accepted for processing the Form ETA 750 on April 30, 2001. The rate of pay or the proffered wage stated on that form is \$12 per hour or \$24,960 per year. Further, the Form ETA 750 states that the position requires a minimum of 2 years experience in the job offered. At part B of the Form ETA 750, the petitioner indicated that it had employed the beneficiary as a cook since December 1998.

To demonstrate that it has the ability to pay \$12 per hour or \$24,960 per year beginning on April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence, the petitioner submitted copies of the following evidence:

- [REDACTED] individual tax returns filed on Internal Revenue Service Forms 1040, U.S. Individual Income Tax Return, for 2001-2004;
- [REDACTED] schedule C (Form 1040), Profit or Loss from Business (Sole Proprietorship), for 2005;
- [REDACTED] tax return filed on IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2006;
- Forms W-2 issued to the beneficiary from 2001 through 2006 by [REDACTED]  
[REDACTED]
- Individual tax returns of the beneficiary filed on IRS Forms 1040 for 2004-2006;
- A letter dated May 1, 2008 from the petitioner's bookkeeper, [REDACTED] who stated that [REDACTED] (the petitioner) owns all of the real properties of [REDACTED]  
[REDACTED] also has income from apartment rentals which is reported on schedule E of her individual tax returns; and
- Various documentation relating to the real properties mentioned by [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as an S Corporation.<sup>1</sup> On the petition, the petitioner claims to have established the business in June 1974, to currently have 27 employees, and to have gross annual income and net annual income of \$1,505,098.18 and \$62,248, respectively.

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.<sup>2</sup>

<sup>1</sup> Although the Form I-140 lists the name of the petitioner as Casa Gamino, the record establishes that the petitioner is Casa Gamino Family Restaurant, Inc., with an Internal Revenue Service (IRS) tax number of 20-4279367. This is the same tax number listed by Casa Gamino Family Restaurant, Inc. on its 2006 Form 1120S U.S. Income Tax Return for an S Corporation. A search of the California Secretary of State's website reveals that Casa Gamino Family Restaurant, Inc. was incorporated on February 9, 2006.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-

As a threshold issue, the AAO notes that the petitioner is not the same entity as the entity that obtained the approved labor certification. That entity is the Schedule C sole proprietorship of [REDACTED] operating as [REDACTED] with a federal tax identification number of [REDACTED]. Although not identified as an issue by the director, the record does not establish that the petitioner is a successor-in-interest to the sole proprietorship. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of the business transfer until the beneficiary adjusts status to lawful permanent resident.

The record does not establish that [REDACTED] transferred her ownership rights in the sole proprietorship to the petitioner, the terms of such transfer, or that the new business will be controlled and operated in substantially the same manner as it was before the ownership transfer. Nor does the record contain evidence that the job opportunity on the approved labor certification will remain the same as originally offered on the labor certification. Thus, the petitioner has not been established as a successor-in-interest to the sole proprietorship. As such, there is no approved relevant labor certification accompanying the petition, as the approved labor certification was issued to [REDACTED] a sole proprietorship owned by [REDACTED]. For this independent reason, the petition must be denied.

As the director did not discuss the successor-in-interest issue, the petitioner has not had the opportunity to address the issue on appeal. The AAO will nevertheless not remand the decision to the director to adjudicate whether the petitioner is a successor-in-interest to the sole proprietorship, as the record does not establish that the petitioner and the sole proprietor together have the ability to pay the proffered wage. For purposes of this appeal, the AAO will adjudicate the ability to pay issue as if the petitioner had established, which it has not, that it is the successor-in-interest to the sole proprietor.

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.

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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).

Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Assuming that the petitioner were to establish that it is a successor-in-interest to the sole proprietor, it must establish both the sole proprietor's ability to pay the proffered wage from the priority date, and its own ability to pay the wage from the date of the business transfer until the beneficiary adjusts status to lawful permanent resident.

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. Comm. 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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, although the petitioner has established that the sole proprietor and the petitioner employed the beneficiary continuously from the priority date, it has not established that the beneficiary received the full proffered wage during any relevant time frame including the period from the priority date in 2001 or subsequently. Further, a review of the Forms W-2 in the record reveals that some part of the beneficiary's box 1 wages came from "tips" reported by the beneficiary as specified at box 7. In his decision, the director considered tips as part of the beneficiary's total wages and held that the petitioner had paid the beneficiary at a salary equal to or greater than the proffered wage in 2005 and 2006.<sup>3</sup>

The AAO disagrees with the director's conclusion that tips are part of the beneficiary's total wages. Tips are not wages paid by the petitioner and must be subtracted out of the beneficiary's box 1

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<sup>3</sup> The director did not distinguish between wages paid by the petitioner and wages paid by the sole proprietor. As noted above, the wages paid by the sole proprietor are not relevant, as the petitioner has not established itself as a successor-in-interest to the sole proprietorship. Because, however, the petitioner has not had the opportunity to address the successor-in-interest issue, the AAO will consider wages paid to the beneficiary by both the petitioner and the sole proprietor for purposes of the present adjudication.

wages. Accordingly, the director's conclusion that the petitioner had paid the beneficiary at a salary equal to or greater than the proffered wage in 2005 and 2006 is withdrawn.

In light of this analysis, the Forms W-2 submitted show that the beneficiary received the following **net wages** from the petitioner and the sole proprietor:

TAX YEAR	W-2 BOX 1 TOTAL WAGES	W-2 BOX 7 "TIPS"	NET WAGES FROM	W-2 BOX 1 TOTAL WAGES	W-2 BOX 7 "TIPS"	NET WAGES
2001	\$18,189.7	\$444.70	\$17,745	N/A	N/A	N/A
2002	\$19,867.4	\$1,250	\$18,617.40	N/A	N/A	N/A
2003	\$21,537.46	\$3,274.14	\$18,263.32	N/A	N/A	N/A
2004	\$22,748.66	\$5,637.83	\$17,110.83	N/A	N/A	N/A
2005	\$27,037.89	\$8,307.93	\$18,729.96	N/A	N/A	N/A
2006	\$6,853.27	\$2,490	\$4,363.27	\$19,492.43	\$7,544.76	\$11,947.67

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, it must be able to pay the difference between the net wages, which are the wages actually paid to the beneficiary, and the proffered wage, which is:

- \$7,215 in 2001;
- \$6,342.60 in 2002;
- \$6,696.68 in 2003;
- \$7,849.17 in 2004;
- \$6,230.04 in 2005;
- \$8,649.06 in 2006.

When 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*, --- F. Supp. 2d. ---, 2010 WL 956001, at \*6 (E.D. Mich. 2010). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Assuming that the petitioner could prove that it is a successor-in-interest to the sole proprietorship, USCIS would examine the net income figure of the sole proprietorship from 2001 to 2006. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole 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 (7<sup>th</sup> 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.

According to the tax returns submitted, the sole proprietor [REDACTED] is single and had one dependent child in 2001 and 2002. From 2003 onwards, the sole proprietor had no dependents.

Further, a review of the sole proprietor's and the petitioner's tax returns reveals the following information:

Tax Year	Adjusted Gross Income (loss) (AGI)	Net Operating Loss (NOL) Carryover	AGI without NOL Carryover – <b>Modified AGI</b> <sup>4</sup>	Amount needed to pay the remainder of the beneficiary's wage
2001	\$4,539	\$0	\$4,539	\$7,215
Tax Year	Adjusted Gross Income (loss) (AGI)	Net Operating Loss (NOL) Carryover	AGI without NOL Carryover – <b>Modified AGI</b>	Amount needed to pay the remainder of the beneficiary's wage
2002	(\$8,924)	\$17,776	\$8,852	\$6,342.60
2003	(\$39,649)	\$26,216	(\$13,433)	\$6,696.80
2004	(\$38,991)	\$41,154	\$2,163	\$7,849.17
2005 <sup>5</sup>	N/A	N/A	N/A	\$6,230.04

For 2006, the petitioner can pay the difference between the two wages – the net wage and the proffered wage – through its net income or net current assets. In that year, the Form 1120S of [REDACTED] stated net income (loss)<sup>6</sup> of \$11,345 (line 21 of Schedule K). The

<sup>4</sup> The net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company and individual can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses. The AAO considers the modified AGI – that is AGI without NOL carryover – to be more reflective of the sole proprietor's gross income between 2001 and 2007.

<sup>5</sup> The record does not include the sole proprietor's individual tax return for 2005.

<sup>6</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15,

petitioner, as stated earlier, needed to pay \$8,649.06 in 2006, which is the difference between the wages the sole proprietor and the petitioner actually paid to the beneficiary in that year and the proffered wage.

Based on the information above, the petitioner has sufficient net income to pay the beneficiary's wage only in 2006. As for the years 2001 through 2005, the petitioner has not established the sole proprietor's ability to pay the proffered wage. Even though the sole proprietor's modified AGI is more than the beneficiary's wage in 2002, the record does not explain how, for instance, the sole proprietor could support herself and one dependent child on a modified AGI of \$8,852. The sole proprietor's modified AGI in 2001, 2003, and 2004 is less than the proffered wage. 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.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A sole proprietor's year-end current assets are, however, not shown on his or her tax returns. Instead, they are reflected on his or her balance sheets, if any. 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, however. 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.

In this case, no audited financial statements or balance sheets are submitted, but on appeal, the petitioner submits a letter from the sole proprietor's bookkeeper, [REDACTED] who states that all of the real properties of [REDACTED] belong to the sole proprietor and that the sole proprietor has additional income from her rental properties, which is reported on schedule E of her tax returns.

The petitioner essentially wants the AAO to consider all of the real properties of the sole proprietor as evidence of its ability to pay the proffered wage. Upon *de novo* review, the AAO finds that none of the real properties in this case is a current asset in that none of them is readily convertible into cash to pay the beneficiary's wage. Further, it is unlikely that the sole proprietor would sell any of her business properties to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also*

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2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, there is no additional income, credit, or deduction on the petitioner's schedule K and thus, the petitioner's net income is found on line 21.

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

*Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> 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).

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 Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonogawa*, nor has it been established that the sole proprietor, especially between 2001 and 2005, had uncharacteristically substantial expenditures.

Assuming that the petitioner could establish that it is a successor-in-interest to the sole proprietor, the petitioner would have been in a competitive field since 1974 and is a viable business. The issue here, however, is whether the petitioner has the ability to pay \$12/hour or \$24,960/year as of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the sole proprietor's and the petitioner's tax returns and other relevant evidence, the AAO is not persuaded that the petitioner has that ability.

Beyond the decision of the director, the petition may not be approved, as the nature of the job duties to be performed by the beneficiary is in question.<sup>8</sup>

The job title listed at part A of the Form ETA 750 is “cook (Mexican specialty).” However, the beneficiary has received increasing amounts of tips as part of his wages since 2001, casting serious doubt on the veracity of the petitioner’s claim that the beneficiary has been working solely as a cook for the sole proprietor and for the petitioner. It also calls into question the nature of the job the petitioner is seeking to fill under the approved labor certification and the validity of that labor certification. If the beneficiary has not been employed as a cook and if the sole proprietor and the petitioner have never intended to hire a cook since the priority date, the underlying labor certification may be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (d).<sup>9</sup>

Moreover, a review of the beneficiary’s Forms W-2 shows that the beneficiary has the following social security number: [REDACTED]. A review of the beneficiary’s tax returns, however, shows that the beneficiary filed his income tax returns under the following social security number: [REDACTED]. The Form I-140 petition as well as the Form I-485 and the Form G-325A accompanying the petition all state “none” for the beneficiary’s social security number. The inconsistencies in the record concerning the beneficiary’s social security number call into question whether the sole proprietor and the petitioner knowingly utilized a social security number belonging to another person. The inconsistencies in the record also cast doubt on the sole proprietor’s and the petitioner’s claim that it has employed and paid the beneficiary since 1998.

Although this is not the basis for the director’s decision in this case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in

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<sup>8</sup> As noted above, the petitioner has not established that it is a successor-in-interest to the sole proprietor, and that the job opportunity will remain substantially the same as originally offered on the labor certification. If the petitioner were to establish that it is a successor-in-interest to the sole proprietor and that it intends to continue the beneficiary’s employment in the same manner as the sole proprietor employed the petitioner, the nature of the job is called into question.

<sup>9</sup> The regulation at 20 C.F.R. § 656.30(d) states:

After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies’ procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor’s Office of Inspector General.

certain circumstances to the alien's removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8<sup>th</sup> Cir. 2010). In addition, 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. 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.