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**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**

B6.

[redacted]

Date: APR 2 6 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

[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 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 $630. 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.

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 retirement home. It seeks to employ the beneficiary permanently in the United States as a 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. 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 16, 2008 denial, the 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $23,129.60 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 1998 and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on December 2, 2006, the beneficiary claimed to work for the petitioner since 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 2001 onwards. The petitioner did submit Forms 1099 for 2004 and 2006 showing nonemployee compensation paid to the beneficiary by the petitioner in the amount of $5,019 and $9,450, respectively. Those compensation sums are not purported to be wages paid to the beneficiary by the petitioner, nor is there any explanation provided as to what the compensation was for. Thus, it will not be considered and the petitioner must establish the ability to pay the full proffered wage for those years.[2,3]

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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).

[2] Various documents show that the beneficiary resides at the petitioner's address (Form I-485 Application to Register Permanent Residence or Adjust Status and Form G-325A Biographic

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 provided (in response to the director's request for evidence) a list of monthly household living expenses dated February 22, 2008. On that document, the sole proprietor indicates that three individuals resided in his home.[4] The sole proprietor listed total

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Information). Whether the nonemployee compensation represents payment for something other than wages is unclear. 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).

[3] The petitioner did not submit W-2 Forms for any years despite the beneficiary listing that she has been employed with the petitioner since 1998.

[4] Tax returns for 2001, 2004, 2005 and 2006 list two dependents on the sole proprietor's tax returns as well as himself and his spouse for a total of four individuals. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain

monthly expenses of $2,717 ($32,604 per year).[5] The record does not establish that these are the same expenses the proprietor had from 2001 through 2005, or for from 2009 onward. The proprietor's tax returns reflect the following information for the following years:

- Proprietor's 2001 adjusted gross income (Form 1040, line 33) $34,097.
- Proprietor's 2002 adjusted gross income (Form 1040, line 35) $24,371.
- Proprietor's 2003 adjusted gross income (Form 1040, line 34) $26,829.
- Proprietor's 2004 adjusted gross income (Form 1040, line 36) $32,220.
- Proprietor's 2005 adjusted gross income (Form 1040, line 37) $50,136.
- Proprietor's 2006 adjusted gross income (Form 1040, line 37) $44,133.

Assuming the sole proprietor's monthly living expenses for himself and his family, as provided by him in his February 22, 2008 statement ($2,717 per month - $32,604 per year), are an average of his monthly living expenses for all relevant years, which as noted above has not been established, the sole proprietor's adjusted gross income is not sufficient to pay the beneficiary's proffered wage plus those expenses in any relevant year.

On appeal, counsel submits a September 26, 2008 letter from the petitioner's accountant stating that the petitioner had the ability to pay the proffered wage from 2001 onward. Specifically, the accountant states that the sole proprietor "maintained an average of $100,000 in cash and has consistently held net assets in excess of $1,000,000 since 2001." In support of that letter an unaudited Statement of Net Worth was provided for the sole proprietor and his spouse dated June 30, 2008 which lists a net worth of $1,120,643. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report showing an audit accompanying these statements, only a letter, which is insufficient to demonstrate an audit, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management (here, the sole proprietor). The unsupported representations of management are not reliable

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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).

[5] The petitioner submitted a 2004 Form 1098 showing mortgage interest paid by the sole proprietor in the amount of $12,036.64 and a 2004 Form 1098 showing mortgage interest paid by his spouse in the amount of $11,550.15. The sum of these mortgage expenses equals $23,586.79. Assuming the sole proprietor's monthly living expenses for himself and his family, as provided by him in his February 22, 2008 statement ($2,717 per month - $32,604 per year), are an average of his monthly living expenses for all relevant years, this brings into question whether the petitioner has provided an accurate listing of monthly family living expenses. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). This issue must be resolved in any further filings before the self-estimate can be accepted.

evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the statement presented purports to show the net worth of sole proprietor and his spouse as of June 30, 2008 only. Even if the statement were accepted as credible evidence of the sole proprietor's net worth, and it is not, it would not establish the petitioner's ability to pay the proffered wage during any other year prior from the 2001 priority date onward. It is further noted that the petitioner did not submit copies of bank statements or other documentary evidence to support the statements of claimed asset value of cash or property value on the unaudited financial report.

The director had specifically requested evidence of the sole proprietor's checking and bank account statements in his RFE. In response, the petitioner submitted one statement for the petitioner's account ending January 18, 2008 with a starting balance of "overdrawn -$288," and an ending balance of $1,189.04. No other statements for the petitioning entity or the sole proprietor owner were submitted despite the director's request, or assertions of substantial cash on appeal. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 sole proprietor has not established his ability to pay the proffered wage of the beneficiary, plus the necessary living expenses of the sole proprietor and his dependents during any given year from the 2001 priority date onward. The sole proprietor provided a Schedule C (Profit or

Loss from Business – [redacted][6] with his 2001, 2002, 2003, 2004 and 2006 tax returns. The Schedules C showed negative net profit in each of those years. The petitioner's total gross receipts were less than the total proffered wage in 2002, only slightly more than the proffered wage in 2003, and not significantly more than the total proffered wage in 2004, 2005, and 2006. From the record, it is not clear that the total gross receipts would support bona fide full-time employment from the priority date onward. The only other evidence presented by the sole proprietor in support of his ability to pay the proffered wage and required personal living expenses was an unaudited financial statement. The petitioner did submit some miscellaneous interest income statements. The income represented by those statements, however, would have been included in the sole proprietor's personal tax returns. 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.

Beyond the decision of the director,[7] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of 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* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

The labor certification requires two years of experience in the position offered. On the labor certification, the beneficiary lists only one prior position: as a cook for the petitioner from 1998 to the present (date of signing the labor certification, December 2, 2006).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). In attempt to establish that experience, the petitioner submitted a letter from [redacted] which stated that the beneficiary was employed by him as a cook/care giver

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[6] The Schedule Cs list a slightly different name than the petitioner on Form I-140 and do not list any tax identification number. In any further filings, the petitioner would need to establish that the entity listed on Schedule C is the same as that listed on the Form I-140.

[7] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

from January 1995 through January 1997. The specific start and end day for each month of employment were not provided so it cannot be concluded that the beneficiary had two full years of experience as required by the labor certification. Further, the experience with was not listed on the Form ETA 750. 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. The beneficiary listed employment with only the petitioner on Form ETA 750B. Additionally, Form I-140 and From I-485 list the beneficiary's date of U.S. entry as 1998 calling into question her working for at an address in California at this time. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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

**ORDER**: The appeal is dismissed.