U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 1 6 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is an American, Chinese, and Korean restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed on December 12, 1997, and approved by the Department of Labor (DOL), on June 28, 2002. 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.

On appeal, the petitioner submitted a brief and additional evidence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor 8 C.F.R. § 204.5(d). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on December 12, 1997. The proffered wage as stated on the Form ETA 750 is $2,010.67 per month, or approximately $24,128 per year.

With the petition, the petitioner submitted the ETA 750, a certificate of employment from the beneficiary's Korean employer, and a compilation of financial statements prepared by the petitioner's accountant. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's experience, the director, on December 4, 2002, requested additional evidence pertinent to that issue. Specifically, the Service Center requested copies of the petitioner's W-2 and W-3 wage reports beginning with the reports from 1997, copies of the petitioner's quarterly wage reports submitted to the State of California on Forms DE-6, copies of its annual reports, federal tax returns, or audited financial statements, and copies of business licenses. In addition to these items, the RFE requested the petitioner's date of birth, an executed part 5 of the petition, and evidence of the beneficiary's experience as listed on the ETA 750.

On or about February 3, 2003, the petitioner responded by submitting the information requested. The tax returns reflect the following information for the following years:

	1997	1998	1999
Petitioner's adjusted gross income (Form 1040)	$ 42,314	$50,251	$41,501
Petitioner's gross receipts or sales (Schedule C)	$150,822	$197,676	$257,755
Petitioner's wages paid (Schedule C)	$ 7,070	$21,348	$31,258
Petitioner's net profit from business (Schedule C)	$45,763	$54,769	$78,993

	2000	2001	2002
Petitioner's adjusted gross income (Form 1040)	$ 74,688	$50,390[1]	$71,022
Petitioner's gross receipts or sales (Schedule C)	$245,060	$168,165	$256,562
Petitioner's wages paid (Schedule C)	$30,264	$23,450	$32,156
Petitioner's net profit from business (Schedule C)	$75,845	$54,221	$76,421

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 12, 2003, denied the petition finding that although the petitioner's gross income exceeded the amount of the proffered wage, the director was not convinced that the remaining amount was sufficient for the sole proprietor to maintain himself and his family.[2]

On appeal, counsel has submitted a brief asserting that the director erred in analyzing the petitioner's tax returns and submits additional evidence including an affidavit from [redacted] the petitioner's owner at the time of the priority date[3], which indicates that additional income in the form of bank deposits from outside sources of income was received during 2000 and 2001. In addition, counsel provides bank statements demonstrating ending balances which, according to counsel, demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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. The petitioner has not established that it has previously employed the beneficiary.

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[1] The record reflects that for the 2001 tax year, tax returns have been submitted from both the initial and current owners. For purposes of simplifying the discussion, we have included only the adjusted gross income of the current owner. We note, however, that the tax records show that the first owner's adjusted gross income was ($17,203), an amount that raises an additional issue concerning the ability to pay the wage during the first half of 2001.

[2] On the same date, the director denied the beneficiary's previously filed I-485 adjustment of status application based upon the denial of the underlying visa petition.

[3] The record reflects that in 2001 there was a chance in business ownership and location. Although this occurred after the filing of the ETA 750, the 750 reflects a change in ownership and address. Therefore, this case does not raise a successor-in-interest issue.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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. In addition, they 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 (7th 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.

In the instant case, the director found that the sole proprietor supports a family of two.[4] The director's decision found that in 2000 and 2001, the sole proprietorship had taxable income of $63,322, and $42,940 respectively. The director found that it was not reasonable to conclude that the petitioner's household of two family members could live off of the remaining income after subtracting the beneficiary's proffered wage of $24,128.[5] The AAO disagrees with the director's use of the petitioner's taxable income, and also notes that the director's decision is incomplete, as it did not analyze the petitioner's ability to pay the wage the remaining years beginning with 1997, although it sought information as to the petitioner's ability to pay the wage in those years. We will consider the evidence on this issue in more detail.

Assuming that the director had used the correct figures, the adjusted gross income, in calculating the petitioner's ability to pay the wage, we find that the initial evidence covering the entire period does not show that the petitioner demonstrated the ability to pay while having sufficient funds remaining to support the petitioner's family. We note that the change in ownership of the company also affects the analysis. The sole-proprietor, who owned the business from 1997 through part of 2001, supported a family of three in 1997 and 1998, and a family of two in 2000 and 2001. The sole proprietor who acquired the business in 2001, filed tax

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[4] The district director erred in examining the tax returns. Presumably he was examining the 2000 and 2001 tax returns. However, a review of those returns shows that it was only in 2000 that the tax returns showed that the petitioner supported a family of two. The 2001 tax return shows that the taxpayer/sole-proprietor, was filing as a single individual. We further note that the two tax returns relate to the different sole-proprietors who claim different dependent related deductions on their tax returns.

[5] The amounts remaining for each year would be $39,194 for 2000, and $18,812 for 2001.

returns as a single individual claiming no additional dependents. The income available in each of those years after deducting the amount of the beneficiary's salary from the adjusted gross income is as follows:

1997:	$18,186	1998:	$26,123	1999:	$17,373
2000:	$50,560	2001:	$26,262	2002:	$46,894

The amounts for the 1997 and 1999 tax year are notably lower than the amounts for the remaining years. We note that in those years the first sole-proprietor owned the business and supported a household of three individuals. The amounts available to support the sole proprietor's family in those years is less than $20,000 and would appear to be an insufficient amount to support the petitioner's family.

The alleged successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. A successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

Counsel offers additional evidence on appeal which counsel argues supports the petitioner's ability to pay the wage. That additional information consists of bank records in the form of statements showing what counsel asserts are deposits to the beneficiary's account resulting from foreign investments. Specifically, the records show substantial deposits totaling $51,200 on May 22, 2000, and $52,400 on April 28, 2001. This is further supported by the petitioner's affidavit which states that deposits were made to the account in the amounts of $51,200, and $52,400 as reflected on the petitioner's May 13, 2000 and April 14, 2001, bank statements. However, even if the deposits were to be considered, they do not address the petitioner's ability to pay the wage and support the sole proprietor's family during the 1997 and 1999 tax years that are at issue due to the low amount of the adjusted gross income. During those years, the sole proprietor had income remaining of $18,186 and $17,373 available to support a family of three. Counsel's explanations regarding the supplements to the petitioner's income do not address those years.

Counsel additionally appears to be arguing that the director erred in his analysis by not adding amounts such as depreciation expenses and other deductions back into the personal income as such amounts would serve to raise the income. (Counsel's Brief at p.2.) However, counsel does not provide authority for this assertion. CIS does not accept counsel's argument. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Finally, counsel discussed a 1995 non-precedent decision in his brief; the facts of which he asserts are similar to the facts of the instant case. (Counsel's Brief at p.6.) Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.[6]

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 and the petition is denied.

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[6] Even if we were inclined to accept evidence in the form of bank account statements, no additional evidence has been offered of the petitioner's ability to pay the proffered wage in during the years at issue.