U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 12 2007

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IN RE: Petitioner:
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:

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. On appeal of that decision, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter to the director for further consideration of the sole proprietor's household expenses and personal expenses and the ramifications of the sole proprietor's apparent F-2 nonimmigrant status on her ability to submit a Form I-140 petition. The director sent a request for further evidence dated June 29, 2005 to the petitioner. Upon receipt of the petitioner's response, the director issued a new decision denying the petition. The matter is now before the AAO on certification. The director's decision will be affirmed. The petition is denied.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). That section 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.

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director in his new decision determined that, due to the non-immigrant F-1 status of the petitioner's sole proprietor at the time of the April 25, 2001 priority date, the petitioner was not competent to create a job offer for employment of another beneficiary that would act as the basis for issuance of an immigrant visa to that person. The director denied the petition accordingly and certified the decision to the AAO. The petitioner was afforded 30 days in which to supplement the record. In response to the certified decision, the petitioner submitted statements from counsel and the petitioner's former sole proprietor, now owner.

For the reasons discussed below, we affirm the director's decision. Significantly, 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Beyond the decision of the director, we find that the petitioner has not established that a valid employment relationship exists between the petitioner and the beneficiary, the spouse of the petitioner's sole proprietor. Finally, we find that the petitioner has not established its ability to pay the proffered wage as of the priority date in this matter and continuing. We note that the issue of the petitioner's ability to pay the proffered wage was previously raised by both the director and the AAO in its remand order.

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 for the in the director's April 11, 2006 decision certified to the AAO, the single issues raised in this case is whether or not the petitioner's sole proprietor, a non-immigrant, may file a Form I-140 employment based petition for another non-immigrant. As stated above, however, our decision also discusses the issue of a valid employment relationship and the petitioner's ability to pay the proffered wage.

Both the AAO in its remand of the matter to the director and the director in his certified decision described the sole proprietor as having been in F-1 non-immigrant status and the beneficiary, who is the husband of the sole proprietor, as having been in F-2 status at the time of filing the instant petition. In the director's request for further evidence (RFE) dated June 29, 2005, the director requested evidence of the sole proprietor's

immigration status as of April 25, 2001 and as of May 20, 2002. In response, the petitioner submitted two I-797 Notices of Action dated February 21, 2001 with regard to a Form I-539 Application to Extend/Change Nonimmigrant Status. One of these notices states that the beneficiary's nonimmigrant status is changed to F2, while the second notice states that the petitioner's sole proprietor's status is changed to F-1. The record does not contain any evidence as to any studies undertaken by the sole proprietor that would justify this status as of February 2001.

In response to the June 29, 2005 RFE, the petitioner submits an affidavit from its sole proprietor that states when the petitioner submitted the labor certification documentation, the sole proprietor's status was F-1 and that of her husband, the beneficiary, was F-2. The sole proprietor further stated in her affidavit that the restaurant business was very busy, that she could not maintain her full-time student status and that she lost her F-1 status. The sole proprietor then stated that " we can use 245(i) for our application and we are qualified for 245 (i) benefits. The AAO mentioned F-1 issue but [the] AAO was not aware that we wanted to use 245(i) for this process."

In his decision, the director reiterated the AAO's comments with regard to the petitioner not being able to submit a Form I-140 employment-based petition. The director stated, in pertinent part, the following:

> As an alien in a nonimmigrant temporary worker classification, the petitioner is not competent to create a job offer for employment for another alien that would at as the basis for issuance of an immigrant visa to that person. Such a job offer must be permanent in character and not of a seasonal or temporary nature, pursuant to Section 203(b)(3(A) (i) of the Act. The present status of the petitioner is that of a nonimmigrant worker which by definition at section 1010(a)(15)(F)(i) of the Act is temporary in that it requires the nonimmigrant worker to have "a residence in a foreign country which she has no intention of abandoning." *See Matter of Thornhill,* 18 I&N Dec. 34 (Comm.1981).

In response to the receipt of the director's certified decision submitted to the AAO, the petitioner's former sole proprietor and current president, [redacted] submits a letter in which she states that she and her family have already been in the United States for nine years and that they do not have a residence in a foreign country any more since they have already abandoned it. The sole proprietor states that the job offered was created eight years ago and the petitioner has paid taxes for eight years. The sole proprietor then asks that if the job offer for the past eight years is not of a permanent character, how many years the job offer must have existed to be determined permanent. The sole proprietor also states that the beneficiary is qualified to use the provision of section 245(i) of the Act.

The beneficiary's passport indicates that he entered the United States on March 2, 1998 as an F-1 student to attend the Wisconsin English Second Language Institute in Madison, Wisconsin and the petitioner's sole proprietor, the beneficiary's wife, entered the United States on January 7, 1999, as an F-2 Spouse of an F-1 Non-Immigrant Student. The Form I-140 petition indicates that the sole proprietorship was established in May 1998. In a letter submitted with the petitioner's appeal, [redacted], Naperville, Illinois, the petitioner's CPA, stated that the sole proprietorship was established in 1998 and that there are only two employees, the sole proprietor and the beneficiary.[1]

[1] Based on these assertions, the record suggests that since the establishment of the sole proprietor in 1998 and through the filing of the I-140 employment-based petition on April 30, 2001, both the petitioner and the beneficiary were either in non-immigrant student or spouse of student status and/or had fallen out of their

The issue at hand is not whether the job offer listed on the Form ETA 750 is a permanent position, but whether the sole proprietor, as the wife of the beneficiary, and co-owner of the petitioner along with the beneficiary, and as a person who held F-1 nonimmigrant status visa at the time of filing the I-140 petition is able to file a Form I-140 employment-based permanent visa petition for another individual. Based on the temporary nature of the sole proprietor's non-immigrant visa, the director stated that a non-immigrant individual cannot file a Form I-140 employment-based immigrant visa petition.

On certification, the petitioner's sole proprietor asserts that the director erred in failing to take into account that she intends to remain in the United States and that the beneficiary is eligible to adjust status pursuant to section 245(i) of the Act.

In the precedent BIA decision cited, *Matter of Thornhill*, 18 I&N Dec. at 34, the petitioner was a private individual in the United States from Guyana who was a nonimmigrant temporary worker of distinguished merit and ability. He petitioned to employ his former housekeeper in Guyana as a sixth preference immigrant. In other words, a non-immigrant temporary worker was petitioning for the approval of a permanent immigrant visa for his former housekeeper to work with his children in the United States. Significantly, in *Matter of Thornhill,* the petitioner was "in the process of filing for a certification for him as a first step toward according him lawful permanent resident status in the United States." *Id.* at 35. The Board categorically rejected the argument that the petitioner was creating a permanent job because he was seeking permanent resident status, stating unambiguously, "the petitioner, as an alien in a nonimmigrant temporary worker classification, is not competent to create a job for employment for another alien which would act as the basis for issuance of an immigrant visa to that person." *Id.* at 35-36.

In *Matter of Thornhill,* 18 I&N Dec. at 35, the BIA noted that the District Director had relied on *Matter of Sun*, 12 I&N Dec. 800 (BIA 1968), for the proposition that the proposed employment of the beneficiary's housekeeper did not qualify as employment "not of a temporary or seasonal nature" as required by section 203(a)(6) of the Act. The BIA concluded that *Matter of Sun* was applicable in the case before it. *Matter of Thornhill,* 18 I&N Dec. at 36.

Despite the fact that the petitioner in *Matter of Thornhill,* 18 I&N Dec. at 35, clearly intended to remain in the United States and was actively pursuing lawful permanent resident status, his status at the time the petition was filed was that of a nonimmigrant worker which by definition in section 101(a)(15)(H)(i) of the Act is temporary in that it requires him to have a residence in a foreign country which he has no intention of abandoning. Thus, the BIA in that case determined that the petitioner's legal status was not settled and that he could not create a job for employment of another alien that would act as the basis for issuance of an immigrant visa to that person. *Id.* at 35-36.

Section 245(i) of the Act allows Citizenship and Immigration Services (CIS) to adjust the status of certain aliens who have violated the terms of a nonimmigrant visa. Nothing in that section, however, addresses the issue in this matter, whether a nonimmigrant is competent to create a permanent job regardless of her intent. As stated above, the petitioner in *Matter of Thornhill,* 18 I&N Dec. at 34, not only intended to remain in the United States but had already taken steps towards adjusting his status to that of a lawful permanent resident. The Board nevertheless concluded that the petitioner was "not competent" to create a permanent job. *Id.* at 35-36.

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respective non-immigrant status based on unauthorized employment while in student or spouse of a student nonimmigrant student status.

The sole proprietor's assertions regarding her intent to remain in the United States may be an attempt to raise the doctrine of dual intent. Even though a nonimmigrant must demonstrate genuinely that his or her intent is to remain in the United States temporarily, she or he may have both a short-term intent to leave and a long-term intent to remain permanently. *Matter of H-R-* 7 I&N Dec. 651, 654 (Reg. Comm. 1958). *See also Matter of Hosseinpour*, 15 I &N Dec. 191,192 (BIA Int. Dec. 1975.). The doctrine was developed because of the language in section 214(b) of the Act, 8 U.S.C. §1184(b), that addresses the legal presumption that all persons seeking entry into the United States are intending immigrants.

The doctrine of dual intent as outlined above only is applicable in addressing whether an alien has abandoned nonimmigrant status and an alien's admissibility. As stated above, the fact that the sole proprietor may have an intent to remain in the United States does not make her competent to create a permanent job. *Matter of Thornhill,* 18 I&N Dec. at 35-36. *See also Matter of A. Dow Steam,* 19 I&N Dec. 389, 390 (Comm. 1986)(involving different facts but citing *Matter of Thornhill* for the proposition "that a petitioner, who was an alien in an authorized nonimmigrant temporary worker classification, was not competent to create a job offer for the permanent employment of another alien because the petitioner's status was temporary in nature, *regardless of the fact that he intended to apply for permanent resident sometime in the future.*" (Emphasis added.))

Beyond the decision of the director, the petitioner has also not established that a bona fide employment relationship exists between the sole proprietor and the beneficiary. Pursuant to 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

Where the petitioner is owned by the person applying for the position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). While the articles of incorporation submitted in response to the director's final RFE suggest that [redacted] was the sole incorporator of the business in May 2001,[2] other statements by either the sole proprietor or her CPA suggest that both the sole proprietor and the beneficiary share in the ownership of the sole proprietorship. In the instant petition, at the time of filing the labor certification, the petitioner was a sole proprietorship taxed on a joint federal income tax return for both the beneficiary's wife and the beneficiary. The sole proprietor in a cover letter submitted with new evidence submitted to the record in response to the director's June 29, 2005 RFE, also stated that the owner and shareholders of the petitioner are the beneficiary and his wife. These facts would further support the lack of a bona fide job opportunity available to U.S. workers. Therefore for this additional reason, the director's decision will be affirmed and the petition will be denied.

The final issue is the petitioner's ability to pay the proffered wage.[3]

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[2] The state of Illinois Articles of Incorporation submitted to the record in response to the director' RFE dated indicate that the petitioner was incorporated in May 2001, but the incorporation status was not activated until May 2004.

[3] The petitioner, in response to the director's June 29, 2005 RFE, submitted all the documents requested by the director and/or addressed why a specific document was not available, with regard to the petitioner's ability to pay the proffered wage and her current financial status. However, the director did not comment on any of

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 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 U.S. Department of Labor. *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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is $12.25 an hour, which annualizes to $25,480 per year. The Form ETA 750 states that the position requires two years of experience as a cook.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[4]. In response to the director's June 29, 2005 RFE, the petitioner submitted numerous documents with regard to the petitioner's current financial status. Among these documents are:

> IRS Forms, 1040 U.S. Individual Income Tax Returns, for the sole proprietorship for tax years 2001, 2002, 2003, and 2004. The petitioner stated that the business was structured as a sole proprietor from June 1998 to February 2004, and that in April 2004, the sole proprietor incorporated her business operations. The sole proprietor stated that she had paid $2,500 a month to the beneficiary since May 2004;
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> Documentation to establish monthly mortgage expenses for a principal residence and three rental properties; automobile payments for two cars; installment payment for a home equity loan; credit card payments; routine household and business expenses; property taxes; vehicle registration fees; life insurance; medical premiums; and automobile and property insurance;

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the materials submitted to the record, or address the issue of the petitioner's ability to pay the proffered wage again. Rather than remand the decision again to the director for further consideration and a new decision as to the petitioner's ability to pay the proffered wage, the AAO will address this issue more fully in these proceedings.

[4] 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).

Documentation to establish the value of equity held by the sole proprietor in various properties. The sole proprietor indicates that the total value of equity in four properties is $253,000;

Documentation on the value of currently held mutual funds and checking account balances. These documents are dated 2005;

An organizational diagram of the petitioner's corporation, that indicates the sole proprietor also owns a gas station and a restaurant named Burger Joint;

W-2 Forms for the petitioner's employees during tax year 2004. The aggregate amount of salaries for 47 employees for tax year 2004 is $107,947.72;

Forms 941, Employer's Quarterly Federal Tax Forms for the end to the fourth quarter of 2004, and the first two quarters of 2005; along with the state of Wisconsin Employer's Contribution and Wage Report for the last three quarters of 2004 and the first two quarters of 2005;

Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for tax year 2005;

Articles of Incorporation Stock For-Profit Corporation, dated as received May 2001 by the state of Wisconsin, with a handwritten notation "Activated on April 2004";

The petitioner's annual report for April 1, 2004 to March 31, 2006; and

An IRS Form 1120, U.S. Corporation Income Tax Return for the period of time from April 2004 to December 31, 2004, that indicates taxable income before net operating loss deductions and special deductions (net income) of $23,229 and net current assets of $37,287.

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship until April 2004 at which point in time, the petitioner incorporated and filed an IRS Form 1120, U.S. Corporation Income Tax Return, for tax year 2004. In response to the director's denial of the petition, the petitioner's accountant, in a letter dated November 4, 2002 that was submitted with the petitioner's appeal, stated that the petitioner had only two employees, namely, the sole proprietor and the beneficiary. The record now indicates the petitioner has 18 employees as of tax year 2004. On the petition, the petitioner claimed to have been established in 1998. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner. However, the sole proprietor in the letter of employment offer dated May 14, 2002, stated that the beneficiary had worked as a Japanese cook for the sole proprietor 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. 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. Further while the petitioner claimed the beneficiary had worked as a cook of Japanese food since 1998, the beneficiary on the Form ETA 750, Part B, indicated he had never worked for the petitioner as of April 24, 2001, the date that he signed the ETA Form 750. Thus the record is inconsistent. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "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." The petitioner did submit the beneficiary's 2004 Form W-2 Wage and Tax Statement to the record that indicated the petitioner paid the beneficiary $17,500 in tax year 2004.[5] Therefore the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 2001 priority date and continuing. Thus, the petitioner has to establish its ability to pay the entire proffered wage during tax years 2001, 2002, and 2003, and the difference between the beneficiary's actual wages and the proffered wage in tax year 2004.

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).

In tax years 2001 through part of tax year 2004, 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. 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 (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

[5] This Form W-2 for tax year 2004 will be examined in the AAO's consideration of whether the petitioner, structured as a corporation in tax year 2004, is able to establish its ability to pay the proffered wage.

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 supports a family of three. The tax returns reflect the following information for the following years in which the petitioner was a sole proprietor:

	2001	2002	2003
Proprietor's adjusted gross income (Form 1040)	$ 28,209	$ 34,230	$ 18,395
Petitioner's gross receipts or sales (Schedule C)	$ 177,536	$ 106,921	$ 125,381
Petitioner's wages paid (Schedule C)	$ 0	$ 0	$ 0
Petitioner's net profit from business (Schedule C)	$ 40,827	$ 41,093	$ 36,424

In tax years 2001, 2002 and 2003, the sole proprietorship's adjusted gross income of $40,827, $41,093 and $36,424 is sufficient to cover the proffered wage of $25,480. However, as previously stated, the petitioner has to establish both its ability to pay the proffered wage, and to pay its household expenses for a household of three persons. Thus the sole proprietor's household expenses have to be examined in conjunction with her adjusted gross income.

The sole proprietor, in her appeal to the initial denial of the instant petition dated November 19, 2002, submitted a letter from her accountant, [redacted] Naperville, Illinois. In his lette[redacted] stated that the sole proprietor's credit card expenses were actually some business expenses and should not be included in the sole proprietor's household expenses. [redacted] stated that the sole proprietor had actual monthly household expenses ranging from $3,246.82 to $3,746.82, or yearly expenses of $38,961.84, to $44,961.84 .

The AAO notes that the petitioner submitted a list of monthly expenses in its response to the director's request for further evidence dated June 29, 2005. In this document the petitioner distinguished between household expenses for a household of three persons while the petitioner was structured as a sole proprietor and more current expenses incurred as a corporation. The AAO further notes that where the petitioner provided a range of expenses for the categories of credit card payments and payment of installment loans, the AAO used an average of the two figures identified as the range to arrive at a monthly household expense. Based on the 2005 document, the sole proprietor's monthly expenses were $10,522.29, or $126,267.48 for the year. The AAO notes that the increase in the 2005 itemized list of petitioner's monthly expenses appears to be based on the sole proprietor's payment of monthly mortgage payments of $4,391.60 on three income property buildings.

For purposes of these proceedings, the AAO will use the earlier monthly expense figures submitted by the petitioner in the 2002 appeal to analyze the sole proprietor's ability as of the 2001 priority year and through tax years 2002 and 2003 to pay both the proffered wage and its household expenses. Based on the range of figures provided by the sole proprietor for items such as household expenses, and credit card expenses, and the fixed monthly figures of expenses such as house and car insurance, health insurance and one house mortgage, the sole proprietor's monthly household expenses in the 2001 priority and in 2002 ranged from $38,961.84 to $44,961.84 Thus the median figure for the sole proprietor's monthly household expenses in the 2001 priority year and in 2002 is $41,961.84.

After paying the proffered wage of $25,480, the sole proprietor would have been left with $15,347, $15,613, and $10,944 to pay her yearly expenses of $41,961.84 in 2001, 2002 and 2003 respectively. In other words, the petitioner would lack $26,614.84 in 2001, $26,348.84 in 2002, and $31,017.84 in tax year 2003 to pay

both the proffered wage and her yearly expenses. Thus the sole proprietor did not have sufficient adjusted gross income in either the 2001 priority year or tax year 2002 to pay the proffered wage and her household expenses. The AAO notes that the sole proprietor's figures for household expenses submitted on appeal in 2005 are higher with regard to higher and additional mortgage payments. The 2005 list of expenses includes items such as property taxes, vehicle registration fees, and automobile payments that were not included in the 2002 list of itemized expenses. This fact suggests that the sole proprietor's yearly household expenses in tax year 2003, 2004, and 2005 might have been higher than those identified in the 2002 correspondence.

With regard to tax year 2004,[6] the record contains a Form 1040 for tax year 2004 that reflects a gross adjusted income of $12,555 on Form 1040, gross receipts or sales of $11,492, zero (0) in wages and a net profit of $1,151. In 2004, the sole proprietorship's adjusted gross income of $12,555 fails to cover the proffered wage of $25,840. The record, however, also contains a Form 1120, U.S. Corporation Income Tax Return that covers the period April 1, 2004 to December 31, 2004. This document indicates that the petitioner while structured as a corporation in tax year 2004 had net income of $23,229. This amount is sufficient to pay the difference between the beneficiary's actual wages of $17,500 and the proffered wage of $25,480, namely, $7,980.

However, the Form 1120 in the record identifies the taxpayer as Chinmi, Inc. with a date of incorporation of May 11, 2001. The AAO notes that the articles of incorporation submitted to the record by the petitioner also have this 2001 incorporation date. Furthermore, the petitioner in materials submitted in response to the decision certified to the AAO, describes her business operations in September 2005 as involving a new restaurant, Burger Joint at the former Chinmi Japanese restaurant location, a Cenex gas station with convenience store, as well as the more expanded Chinmi restaurant. Based on the incorporation date noted on the Form 1120, and the sole proprietor's statements, as well as corporate structure, the record would indicate that the petitioner's corporate structure and profits in 2004 are based on the petitioner's combined businesses and not just the Chinmi Japanese restaurant. Thus the record contains material discrepancies with regard to the petitioner's business operations and the available net income and net current assets from the restaurant operation that could be applied to pay the difference between the beneficiary's actual wages and the proffered wage. *Matter of Ho*, 19 I&N Dec. at 591-592, states: "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." Based on the above-described issues, the AAO does not accept the petitioner's 2004 tax return, and will give no weight to the 2004 tax return evidence submitted to the record.

In examining the sole proprietor's ability to pay both the proffered wage and her personal household expenses prior to incorporating in 2004, the sole proprietor's savings accounts, money market accounts and investments are all viewed as additional funds available to pay the proffered wage and the sole proprietor's household expenses.

In the original decision by the director dated October 23, 2002, the director commented on the sole proprietor's checking, savings and investment portfolio. With regard to the sole proprietor's checking and savings accounts, the director noted that the sole proprietor's assets in these accounts were not sufficient to pay the difference between the sole proprietor's adjusted gross income and the monies needed to pay both the

[6] The sole proprietor, in her statement submitted in response to the director's June 29, 2005 RFE, states that she was the sole proprietor from June 1998 through February 2004, and that the petitioner's business closed in March and April 2004, and then reopened on new business premises in May 2005.

proffered wage and the sole proprietor's yearly household expenses. The director also noted that while the sole proprietor's investment portfolio appears to have "considerable resources," the record was not clear that the sole proprietor had these resources at the time the labor certification was filed and continuing to the present.

The AAO concurs with the director's initial decision with regard to the sole proprietor's/petitioner's assets and provides further comments to further illustrate the director's decision. The AAO notes that the sole proprietor's savings accounts, money market accounts, certificates of deposits, or other similar accounts should be considered as available funds to be used by the sole proprietor to pay the proffered wage and/or personal expenses. These amounts, however, represent current assets and the AAO will not consider these assets in isolation from the sole proprietor's business or personal current liabilities.

In the instant petition, the record reflects that as of July 16, 2002, the sole proprietor's checking account with USBank indicates an ending balance of $2,551.47, and her star savers club account with the same bank indicates an ending balance of $62.18. In addition, the AAO notes that the record is not clear as to whether the checking account is a personal or business checking account. With regard to the sole proprietor's Vanguard investment accounts, the sole proprietor submitted to the record a financial statement that indicates the accounts value as of June 30, 2002 and also December 31, 2001. Although the December 2001 balance is $48,990.11, the record only contains one other Vanguard Group balance statement dated December 31, 2004 that indicates the sole proprietor had investments of $25,385.94 as of December 31, 2004 and investments worth $22,042.52 as of June 30, 2005. Thus the sole proprietor cannot establish that the average balance in her investment portfolio is sufficient to cover the full or remaining proffered wage as of the 2001 priority date to the present date. Furthermore, even the balance statements submitted to the record do not establish that the respective month's balance could alone support the full proffered wage for a year.

In response to the certified decision, the petitioner submits additional bank account statements for either the petitioning Japanese restaurant, other businesses owned by the sole proprietor, or personal accounts for herself and her husband. However, if the petitioner was, as the sole proprietor claims, incorporated as a corporation as of April 2004, the 2005 financial assets of the sole proprietor (now the sole shareholder) cannot be used to establish the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On appeal, the petitioner also submits evidence with regard to commercial and residential properties owned by the sole proprietor and states that the total value of her equity in the four rental estate properties is $253,000. However, the AAO notes that if these properties were owned by the sole proprietor during the 2001 priority year while the petitioner was still structured as a sole proprietor, they are not viewed as assets easily liquifiable that can be used to pay the missing funds needed to both pay the beneficiary's proffered wage and the sole proprietor's household expenses. In light of the above, the petitioner has not established that any other funds were available to pay the proffered wage. Thus, the sole proprietor/petitioner has not established that it has the ability to pay the proffered wage and her household expenses as of the 2001 priority date and continuing to the present.

Upon review of the record, the petitioner was not competent to create a permanent job offer. In addition, the petitioner has not demonstrated a valid employment relationship. Finally, the petitioner has not provided sufficient evidence to establish her ability as a sole proprietor during the 2001 priority year and continuing to the present, to pay both the proffered wage and her household expenses. For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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. The AAO affirms the director's decision with regard to whether the petitioner is eligible to file the instant petition.

ORDER: The certified decision is affirmed. The petition is denied.