U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 15 2008

WAC 06 034 51952

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 21, 2006 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 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 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).

Here, the Form ETA 750 was accepted on May 14, 2003. The proffered wage as stated on the Form ETA 750 is $13.08 per hour ($27,206.40 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, counsel submits a brief; a letter dated July 17, 2006 from [redacted], CPA; the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2003, 2004 and 2005; the petitioner's IRS Forms 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Returns, for 2003 and 2004; IRS Form 1040, U.S. Individual Income Tax Return, for [redacted] and [redacted] for 2005; a list of the properties owned by [redacted] as of February 28, 2006;[2] a letter dated April 24, 2006 from [redacted], general Manager of Kennedy Tax Service; the petitioner's monthly bank account statements covering the period from July 1, 2003 to March 31, 2006; Washington Mutual bank statements of the petitioner's owner covering the period from July 15, 2003 to April 13, 2006; and Bank of America bank statements of the petitioner's owner covering the period from September 27, 2004 to March 29, 2006. Other relevant evidence in the record includes IRS Forms 1040, U.S. Individual Income Tax Returns, for [redacted] and [redacted], for 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 February 1998 and to currently employ three full-time and seven part-time workers. On the Form ETA 750B, signed by the beneficiary on March 11, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) recently approved another petition by the petitioner on behalf of a different beneficiary for the position of cook, and that CIS' denial of this petition is an abuse of discretion. Citing *Del Mundo v. Rosenberg*, 341 F.Supp. 345, 348-349 (C.D. Cal. 1992), counsel asserts that CIS cannot grant a benefit on one occasion and deny the identical benefit on another.[3] Further, counsel asserts that the director's request for evidence dated April 8, 2006 did not raise the issue of the petitioner's ability to pay the proffered wage and that if it had, the petitioner would have provided additional evidence of the petitioner's ability to pay. Counsel states that the petitioner paid substantial wages to other employees in 2003, 2004 and 2005 and that with additional cooks, the petitioner will be able to "provide consistent good cooking and with eventual expansion in the future."

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

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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] Although the petitioner lists 12 properties owned by [redacted] and [redacted] with total mortgages due of $3,320,047.00 as of February 28, 2006, the He's 2005 tax return indicates that they paid $5,220.00 in real estate taxes and $22,578.00 in home mortgage interest in 2005. The record does not explain the discrepancy between mortgage interest and real estate taxes paid by [redacted] and the mortgages and property ownership claimed by them. 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).

[3] This office notes that the AAO is not bound to follow the published decision of a United States district court, even in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

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 2003 onwards.

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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 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 supported a family of four in 2003, a family of six in 2004 and a family of seven in 2005.[4] The tax returns reflect the following information for the following years:

[4] The record does not contain a statement of the proprietor's annual household expenses for 2003, 2004 or 2005. Therefore, the AAO cannot determine if the petitioner was able to pay his household expenses and the proffered wage in any relevant year.

	2003	2004	2005
Proprietor's adjusted gross income (Form 1040)	$37,849	$33,715	$13,231

In 2003 and 2004, the sole proprietorship's adjusted gross income covers the proffered wage of $27,206.40.[5] In 2005, the sole proprietorship's adjusted gross income does not cover 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.

However, the record of proceeding contains bank statements from the petitioner's checking account and the petitioner's owner's checking accounts. The funds in the petitioner's checking account represent the sole proprietorship's business checking account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On the petitioner's owner's bank statements, the ending balances are as follows:

	Washington Mutual	Bank of America
2003:		
August	$82,039.75	
September	$87,987.24	
October	$60,530.96	

[5] As noted by counsel in his brief on appeal, the petitioner filed one other I-140 petition which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner in November 2005 was approved in June 2006. The priority date for that petition was July 9, 2003. The record in the instant case contains no information about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary or the date of any hiring. However, counsel asserts on appeal that the position offered to the beneficiary of the other petition is identical to the proffered position in the instant case and, therefore, the proffered wage for the other position is calculated at $27,206.40 per year. Therefore, the petitioner must establish its ability to pay the total combined wages of both petitions, or $54,412.80 per year. The petitioner's adjusted gross income fails to cover the total combined wages in any relevant year.

November	$62,611.68	
December	$55,178.19	
2004:		
January	$16,517.15	
February	$24,598.52	
March	$24,530.99	
April	$29,090.18	
May	$29,517.80	
June	$30,125.49	
July	$37,093.26	
August	$18,811.38	
September	$128,085.36	$100.00
October	$29,052.91	not provided
November	$32,819.54	$13,683.30
December	$32,242.24	$26,477.30
2005:		
January	$29,296.41	$38,262.34
February	$33,181.79	$50,701.46
March	$36,751.25	$59,963.48
April	$34,327.50	$44,029.31
May	$33,982.75	$44,065.65
June	$32,821.34	$50,172.15
July	$32,169.70	not provided
August	$35,786.59	$50,625.75
September	$47,985.51	$57,273.41
October	$46,681.27	$40,180.80
November	$63,479.39	$54,630.87
December	$52,327.15	$61,115.79
2006:		
January	$53,902.32	$18,267.86
February	$47,171.32	$25,018.40
March	$72,016.68	$31,122.04
April	$76,287.20	not provided

The priority date of the instant case is May 14, 2003. In order to establish the ability to pay the proffered wage, bank statements would have to show a closing balance as of the priority date which is greater than the annual proffered wage or would have to show monthly increases in balances by at least the amount of the monthly proffered wage. The petitioner did not submit bank statements for May 2003, and therefore has not established a closing balance as of the priority date which is greater than the annual proffered wage. The combined annual proffered wage of $54,412.80 is equal to about $4,534.40.00 per month. Monthly closing balances on bank statements do not represent new funds each month, but rather show the amount of the petitioner's cash reserve remaining after expenditures. If the cash reserve were used in a given month to pay the monthly wage of the beneficiaries, the balance in every succeeding month would then be lower by that amount. The petitioner has not shown monthly increases in balances by at least the amount of the monthly

combined proffered wage. Further, without evidence of the proprietor's annual household expenses for 2003, 2004 or 2005, the AAO cannot determine if the petitioner was able to pay the proprietor's household expenses and the combined proffered wage in any relevant year.

On appeal, counsel asserts that CIS recently approved another petition by the petitioner on behalf of a different beneficiary for the position of cook, and that CIS' denial of this petition is an abuse of discretion. The director's decision does not indicate whether she reviewed the prior approval of the other immigrant petition. If the previous immigrant petition was approved based on the same financial evidence contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petition on behalf of another beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd.* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, counsel states that with additional cooks, the petitioner will be able to "provide consistent good cooking and with eventual expansion in the future." Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner has failed to establish by the preponderance of the evidence its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains permanent residence.

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.