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

(b)(6)

DATE: JUL 2 6 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Rizzio for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (NSC), denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on February 9, 2012, the AAO dismissed the appeal. A subsequent motion to reconsider filed by counsel was dismissed by the AAO as untimely filed pursuant to 8 C.F.R. § 103.5(a)(1)(i). The matter is before the AAO again as a motion to reconsider. The motion will be granted and the prior decision dismissing the appeal shall be affirmed.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a curry chef. 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 on December 31, 2009.

The petitioner submitted a timely appeal to the denial of the petition that was subsequently dismissed by the AAO on February 9, 2012. The AAO affirmed the finding of the NSC director that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage since the priority date. In addition, the AAO determined that the Form I-140, Immigrant Petition for Alien Worker, was not supported by a valid labor certification because the evidence in the record established that the Form I-140 petition is for an unskilled worker, while the labor certification is for a skilled worker requiring two years of experience in the offered job of curry chef. Finally, the AAO determined that details of the job offered on the Form I-140 petition are at variance with the details of the job offered on the labor certificate and certified by the DOL. Specifically, the Form I-140 petition reflected that the petitioner intends to employ the beneficiary at a different wage than that stated on the Form ETA 750, and therefore, the petitioner was not in compliance with the terms of the labor certification. A subsequent motion to reconsider the matter filed by counsel was dismissed by the AAO as untimely filed pursuant to 8 C.F.R. § 103.5(a)(1)(i) on February 1, 2013.

The record shows that the motion is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

On motion, counsel asserts that the petitioner has established its continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel states that a review of the petitioner's net current assets as listed on its corporate federal tax returns for 2001, 2002, 2004, 2005, and 2006, support this assertion. Counsel includes copies of previously submitted documents in support of the appeal.

The first issue to be examined in this proceeding is whether or not the Form I-140 petition is supported by a valid labor certification.

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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified 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.

In the instant case, the Form ETA 750 was accepted on April 2, 2001. The proffered wage as stated on the Form ETA 750 is $752.25 per week based upon a forty hour week or $39,117.00 annually. The Form ETA 750 states that the position requires two years of experience in the offered job.

Here, the Form I-140 petition was filed on April 7, 2006. On Part 2.g. of the Form I-140 petition, the petitioner indicated that it was filing the petition for an unskilled worker. The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the Form ETA 750 reflects that the offered position requires two years of experience as a curry chef but the petitioner requested the unskilled worker classification on the Form I-140 petition. Nevertheless, a review of the evidence in the record reveals that the petitioner submitted a letter signed by owner of at in Laguna Beach, California, who attested that he employed the beneficiary as a curry chef in his restaurant from March 1997 to November 2000. Therefore, letter tends to establish that the beneficiary possesses the two years of experience in the offered job of curry chef required by the labor certification. Consequently, the Form I-140 petition is supported by a valid labor certification and the AAO's previous finding that the Form I-140 petition must also be denied because it is not supported by a valid labor certification is withdrawn.

The next issue to be examined in this proceeding whether the details of the job offered on the Form I-140 petition are at variance with the details of the job offered on the labor certificate and certified by the DOL.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2).

As noted above, the proffered wage as stated on the Form ETA 750 is $752.25 per week based upon a forty hour week or $39,117.00 annually. However, at question 9., of Part 6., of the Form I-140 petition, the petitioner indicated that beneficiary was to be paid $752.00 per week in wages or $39,104.00 annually. Regardless, the difference between the annual proffered wage of $39,117.00 listed on the Form ETA 750 and the annual wage of $39,104.00 listed on the Form I-140 petition is only $13.00 per year and will be considered as negligible. Therefore, the petitioner is in compliance with the terms of the

labor certification and has established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). For this reason, the AAO's previous finding that the Form I-140 petition must also be denied because the petitioner intends to employ the beneficiary at a different wage than that stated on the Form ETA 750 is withdrawn.

The next issue to be examined in this proceeding is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As previously discussed, the Form ETA 750 was accepted on April 2, 2001. The proffered wage as stated on the Form ETA 750 is $752.25 per week based upon a forty hour week or $39,117.00 annually.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 2001 through 2004 and as an S corporation in 2005 and 2006. The business was sold in August of 2006 and has since been operated as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and to currently employ four workers. The petitioner's fiscal year follows the calendar year.

United States Citizenship and Immigration Services (USCIS) has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the

underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other

assumption of interests.[1] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[2]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[3] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor

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[1] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[2] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[3] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner's new owner has provided a copy of the bill of sale for the business, which includes the sale of furniture, fixtures and equipment, as well as the assumption of "control and the management of Long Beach, CA." The petitioner also provided copies of business licenses, indicating that the petitioner has continued doing business in the same place and under the same name after the sale. Thus, the AAO finds that the petitioner has established a valid successor relationship for immigration purposes.

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, 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. The record contains the Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, reflecting wages paid to the beneficiary as follows:

- 2001 – $12,710.78 ($26,406.22 less than the proffered wage of $39,117.00).

- 2002 – $12,000.00 ($27,117.00 less than the proffered wage of $39,117.00).
- 2003 – $12,000.00 ($27,117.00 less than the proffered wage of $39,117.00).
- 2004 – $12,000.00 ($27,117.00 less than the proffered wage of $39,117.00).
- 2005 – $12,000.00 ($27,117.00 less than the proffered wage of $39,117.00).
- 2006 – $12,000.00 ($27,117.00 less than the proffered wage of $39,117.00).
- 2007 – $27,400.00 ($11,717.00 less than the proffered wage of $39,117.00).
- 2008 – $31,200.00 ($7,917.00 less than the proffered wage of $39,117.00).
- 2009 – $31,200.00 ($7,917.00 less than the proffered wage of $39,117.00).
- 2010 – $31,200.00 ($7,917.00 less than the proffered wage of $39,117.00).

The evidence in the record does not establish that the beneficiary was paid the full proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010. Although the petitioner and the successor sole proprietor must demonstrate the ability to pay the full proffered wage from 2001 to 2010, it must be noted that the petitioner is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in each year from 2001 to 2006, and the successor sole proprietor is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in each year from 2007 to 2010.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure

> during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns reflect the following net income:

- In 2001, the IRS Form 1120 stated net income[4] of $14,047.00.
- In 2002, the IRS Form 1120 stated net income of $19,535.00.
- In 2003, the IRS Form 1120 stated net income of $24,697.00.
- In 2004, the IRS Form 1120 stated net income of $2,137.00.
- In 2005, the IRS Form 1120S stated net income[5] of $1,702.00.
- In 2006, the IRS Form 1120S stated net income of $7,308.00

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[4] For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

[5] Forms 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 25, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K in 2005 and 2006, the petitioner's net income is found on Schedule K of those tax returns.

Therefore, the petitioner did not have sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage of $39,117.00 in 2001, 2002, 2003, 2004, 2005, and 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns reflect the following net current assets:

- In 2001, the IRS Form 1120 stated net current assets of <$2,216.00>.[7]
- In 2002, the IRS Form 1120 stated net current assets of <$1,100.00>.
- In 2003, the IRS Form 1120 stated net current assets of $49,418.00.
- In 2004, the IRS Form 1120 stated net current assets of <$3,017.00>.
- In 2005, the IRS Form 1120S stated net current assets of <$6,250.00>.
- In 2006, the IRS Form 1120S stated net current assets of $10,018.00

Therefore, the petitioner did not have sufficient net current assets to pay the difference between wages paid to the beneficiary and the full proffered wage of $39,117.00 in 2001, 2002, 2004, 2005, and 2006.

On motion, counsel contends that the petitioner had the ability to pay the proffered wage in 2001 and 2002 if corporate funds used as compensation to pay its sole officer in those years were considered as money which could have been utilized to pay the beneficiary the difference between wages paid in each year and the full proffered wage. However, the record is absent evidence that the petitioner's sole officer made a pledge to forego any compensation in either 2001 or 2002. In addition, a pledge to forego funds that have already been paid by the petitioner as salary to its officer in 2001 and 2002 is not persuasive because the funds were paid and cannot be reasonably refunded or returned to the petitioner. Even if the petitioner's sole officer had pledged to forego compensation paid by the petitioner in 2001 and 2002, such a pledge is unenforceable. 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'r 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

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

[7] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel asserts that the petitioner had the ability to pay the proffered wage in 2004 and 2005 if corporate funds listed as intangible assets less amortization as listed on line 13 of the petitioner's Schedule L of its federal tax returns for each year were considered as money which could have been utilized to pay the beneficiary the difference between wages paid in each year and the full proffered wage. However, intangible assets such as a business's goodwill, copyrights, patents, and trademarks listed at line 13 of the Schedule L represent long term resources of the business rather than items which are readily convertible with short term value in most cases of one year or less such as cash, marketable securities, inventory, and prepaid expenses that are listed as a business's net current assets at lines 1 through 6 of the Schedule L. For this reason, the intangible assets of the petitioner listed at line 13 of the Schedule L cannot be considered as a source of readily available funds that could be utilized by the petitioner to pay the difference between the full proffered wage of $39,117.00 and wages paid by the petitioner to the beneficiary in 2004, 2005, and 2006.

In July of 2006, the petitioner's restaurant was purchased by 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 $20,000.00 where the beneficiary's proposed salary was $6,000.00 or approximately thirty percent (30%) of the petitioner's gross income.

A review of the Form 1040 tax returns of the successor sole proprietor from 2007 to 2010 reveals that the sole proprietor's household consisted of himself and his wife in 2007, 2008, 2009, and 2010. The record contains a statement reflecting that the sole proprietor's monthly household expenses were $4,641.00, or annual expenses of $55,692.00.

The sole proprietor's jointly filed Form 1040 tax returns reflect the following:

- Sole proprietor's adjusted gross income (Form 1040, line 37) for 2007 was $76,205.00.
- Sole proprietor's adjusted gross income (Form 1040, line 37) for 2008 was $80,221.00.

- Sole proprietor's adjusted gross income (Form 1040, line 37) for 2009 was $72,880.00.
- Sole proprietor's adjusted gross income (Form 1040, line 37) for 2010 was $67,864.00.

From 2007 through 2010, the sole proprietor's adjusted gross income covers the difference between the full proffered wage of $39,117.00 and the wages actually paid to the beneficiary. However, the sole proprietor also claimed monthly expenses of $4,641.00 ($55,692.00 annually). After reducing the adjusted gross income by the sole proprietor's claimed personal expenses and the difference between the wages actually paid and the proffered wage, it is determined that the successor sole proprietor has established the ability to pay the proffered wage from 2007 through 2010.

In summary, the petitioner established the ability to pay the proffered wage of $39,117.00 through an examination of its net current assets in 2003, and the successor sole proprietor established the ability to pay the full proffered wage of $39,117.00 through an examination of his adjusted gross income in 2007, 2008, 2009, and 2010. However, the petitioner did not establish that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income, or its net current assets in 2001, 2002, 2004, 2005 or 2006.

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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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 petitioner failed to establish the ability to pay the annual proffered wage of $39,117.00 through an examination of wages paid, the petitioner's net income, and the petitioner's net current assets in 2001, 2002, 2004, 2005, and 2006. Furthermore, the financial records provided show

that the petitioner's gross receipts and total payroll had fallen significantly during this period. Unlike the petitioner in *Sonegawa*, the petitioner in this case has not submitted any evidence of its reputation within its industry, nor has it cited uncharacteristic events that decreased its income or increased its business expenses and prevented it from establishing the ability to pay the beneficiary the proffered wage in 2001, 2002, 2004, 2005 or 2006. 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 and the director's decision is affirmed.

Based on a review of the underlying record and arguments submitted on motion, the petitioner has not established its continuing financial ability to pay the proffered wage.

The AAO's decision of February 19, 2012, dismissing the appeal to the denial of the petition will be affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The prior decision of the AAO dismissing the appeal shall be affirmed.