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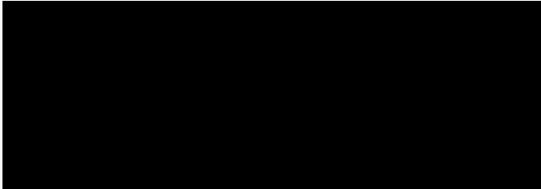
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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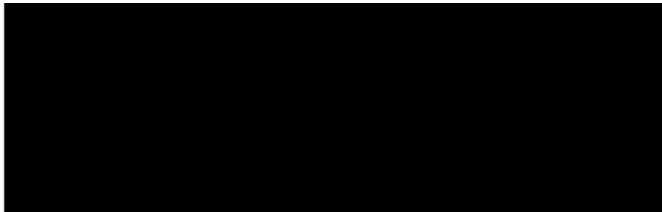


FILE: LIN 07 137 51875 Office: NEBRASKA SERVICE CENTER Date: APR 19 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a vegetarian Indian restaurant and catering service. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

The record shows that the appeal 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.

As set forth in the director's May 19, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2005 priority date and continuing until the beneficiary obtains lawful permanent residence. The director noted that the financial resources of the original business that merged with the petitioner were not sufficient to pay the proffered wage.

The AAO notes that the director in his decision did not refer to the instant petitioner's relationship to [REDACTED], a petitioner that had filed an I-140 petition previously for the beneficiary. (LIN 06 129 51823).¹

The record of proceedings contains a Merger Agreement that indicates the original petitioner had merged with [REDACTED] the instant petitioner, on January 18, 2007, and that indicates [REDACTED] assumed all "rights, duties, obligations, immigration liabilities and assets" of the petitioner. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. The AAO finds that the instant petitioner has established that it is the successor-in-interest to the original petitioner that filed the ETA Form 9089. However, in order to maintain the original priority date, a successor-in-interest must demonstrate the financial ability of the predecessor enterprise to

¹ On January 11, 2010, the AAO issued a Notice of Derogatory Information (NDI) based on information from the state of Ohio Secretary of State corporate database, that indicated [REDACTED] merged with the petitioner and was dissolved in 2007. The AAO subsequently dismissed the appeal as moot, noting that even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Thus, in the instant petition, the single issue is whether the petitioner can establish that the original ETA Form 9089 petitioner had the ability to pay the proffered wage in the 2005 priority year and up to the time of the documented 2007 merger, and that the instant petitioner continues to have that ability from the business transfer until the beneficiary adjusts status to lawful permanent resident.

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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 9089 was accepted on October 11, 2005. The proffered wage as stated on the Form ETA 9089 is \$30,000 per year. The Form ETA 9089 states that the position requires two years of prior work experience as a chef or head cook. Sections H-10 and H-14 indicate that the two years of work experience in an alternate occupation would be acceptable in any job title cooking Indian-style vegetarian foods.

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.²

On appeal, counsel states that based on the bank statements of [REDACTED] the ETA Form 9089 petitioner had sufficient funds to pay the proffered wage to the beneficiary during tax year 2006. Counsel asserts that the director erred in not considering both the tax returns and the bank statements of [REDACTED]

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and notes parallels between the instant petitioner, the initial ETA Form 9089 petitioner, and the petitioner in *Sonogawa*. Counsel states that in 2006, [REDACTED] incurred expenses that it normally would not have incurred as a result of the merger with [REDACTED] and the transfer of the restaurant to a new location.

Counsel also notes that the instant petitioner just signed a new lease agreement with its landlord to increase its square footage of rental space, and the petitioner's desire for a cook from India is evidence of the petitioner's viability. Counsel notes that [REDACTED] and his wife have been able to make a living running [REDACTED] restaurant and its predecessor [REDACTED]. Counsel submits the new leasing agreement to the record as well as an affidavit dated April 22, 2008 from [REDACTED]

[REDACTED], a partner of the instant petitioner, explained the history of [REDACTED] and its merger with [REDACTED]. [REDACTED] stated that in July of 2006, [REDACTED] purchased the place for its new restaurant and after remodeling and repairs, the restaurant opened in October 2006. He stated that [REDACTED] ended its operations in December 2006, intending to merge with [REDACTED]. [REDACTED] explains how the other two partners manage the [REDACTED] for twelve hours a week, while he is the managing partner for the restaurant.

[REDACTED] stated that [REDACTED] showed a negative net income in 2006 due to being open only three months, startup costs including statutory fees, deposits, trial of recipes at the new kitchen, advertising, insurance, rental payment prior to the restaurant being open, and repairs and remodeling. [REDACTED] also noted that [REDACTED] during 2006 had to pay \$23,476.61 for repairs to its leased premises to turn the rental property back in its original condition to the landlord; and to pay \$25,611.19 for additional rental payments for the balance of the lease term when the restaurant ceased operation in December 2006, resulting in a negative net income for the ETA Form 9089 petitioner also in 2006.

[REDACTED] also noted that the instant petitioner's tax return for 2007 shows a negative income loss of \$30,955. [REDACTED] states that this number is misleading, as many of the costs were actually incurred at the beginning of 2007, as a direct result of starting the new restaurant, that included an

² 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).

aggressive advertising campaign that cost \$21,978; \$16,774 in repairs and \$38,893 in supplies for remodeling. [REDACTED] states that these costs were not normal expenses incurred by the petitioner, but based on the startup of the new restaurant. [REDACTED] states that all three members of the new partnership are ready and willing to pay any expenses, and that he personally would guarantee to cover any deficiency in the beneficiary's wages if necessary.³

Counsel also states that similar to the petitioner in *Sonegawa*, the business of the instant petitioner is very positive. Counsel notes that despite the expenses incurred in 2006, the increasing sales of [REDACTED] and [REDACTED] demonstrate that [REDACTED] is a viable corporation. Counsel notes that [REDACTED] 2005 gross sales totaled \$233,047.16, with gross sales in 2006 of \$249,636.85, and that in 2007, the instant petitioner's gross sales totaled \$266,874.

Counsel also notes that [REDACTED] is well-known in Columbus, Ohio, and in the surrounding states of West Virginia, Kentucky and Pennsylvania, for its food and catering. Counsel states that in addition to the magazine review of [REDACTED] submitted with the petition,⁴ many favorable reviews can be found on the Citysearch website. Counsel states that the petitioner provides catering services to Ohio, Pennsylvania, Kentucky, and West Virginia. Counsel submits four catering orders Ohio Charlestown, West Virginia; Prospect Kentucky; and Lake Villa, Illinois (for a catering event in Columbus, Ohio).

Counsel submits an additional affidavit from [REDACTED] dated July 10, 2008 that explains that the petitioner's restaurant and the catering business currently use the same cook, [REDACTED] and that in order to keep costs lower for out of town catering, [REDACTED] does the cooking at the locations in the other states. However, the restaurant has to close to do these out of state events. With the addition of a full time chef for the catering business alone, the petitioner would be able to remain open during the catering events and to remain open for longer hours and the catering business could expand.

Counsel also submits an unaudited financial statement for [REDACTED] C dated April 30, 2008. The petitioner had previously submitted its 2007 tax return in response to the director's request for evidence dated March 12, 2008. Counsel also resubmitted the bank statements from National City Bank for the month of March 2005 for [REDACTED], and for the months of January to September 2006.

The record indicates the original petitioner was structured as a C Corporation and filed its tax return on IRS Form 1120 in tax year 2005. In tax year 2006, the ETA Form 9089 petitioner filed its tax return on IRS Form 1120S, as an S Corporation. The instant petitioner is structured as a limited

³ The petitioner previously submitted the W-2 Forms for all three partners for tax years 2005 to 2007, along with their Forms 1040 tax returns. All three partners receive salaries from other employment.

⁴ The petitioner submitted an article with regard to [REDACTED] in the April 2007 issue of *Columbus Monthly*, along with the restaurant's menu.

liability company and filed its tax returns on IRS Form 1065.⁵ On the petition, the instant petitioner claims to have been established in 2006 and to currently employ two workers. According to the tax returns in the record, the initial ETA Form 9089 petitioner and the instant petitioner's fiscal year are both based on a calendar year. On the Form ETA 9089, signed by the beneficiary on March 10, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that the original petitioner paid any wages to the beneficiary from the priority date to the 2007 merger of ██████████ and ██████████. The petitioner also did not establish that it paid the beneficiary any wages in tax year 2007. Thus the petitioner has to establish that ██████████, the original petitioner, had the ability to pay the entire proffered wage in tax years 2005 and 2006, and that ██████████, the instant petitioner, has the ability to pay the entire proffered wage to the beneficiary in tax year 2007.

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

⁵ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the instant petitioner, a three partner LLC, is considered to be a partnership for federal tax purposes.

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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.

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 116. "[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 record before the director closed on April 23, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the instant petitioner's 2007 federal income tax return would have been due but is not contained in the record. The petitioner's 2006 is the most recent return available.

The AAO will examine the tax returns for [REDACTED] for tax years 2005 and 2006. Since the instant petitioner, [REDACTED] did not merge with the initial ETA Form 9089 petitioner until January 2007, the instant petitioner's tax return for 2006 will not be considered in these proceedings. The AAO will consider the instant petitioner's tax return for 2007 in its deliberations. The original ETA Form 9089 petitioner's and the instant petitioner's tax returns stated net income as detailed in the table below.

In 2005, the ETA Form 9089 petitioner's Form 1120 stated net income⁶ of \$27,584.47.

In 2006, the ETA Form petitioner's Form 1120S stated net income⁷ of -\$37,274.54.
In 2007, the instant petitioner's Form 1065 stated net income⁸ of -\$34,116.

Therefore, for the years 2005 to 2007, neither the initial petitioner nor the successor-in-interest petitioner established that it had sufficient net income to pay the proffered wage in the respective years in question.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹

⁶ For a C Corporation, the petitioner's net income is indicated on line 28, taxable income before net operating loss deduction and special deductions.

⁷ 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. The AAO notes that in tax year 2006 the ETA Form 9089 petitioner has an additional deduction that reduced the petitioner's actual net income in that year. Thus, the petitioner's net income for tax year 2006 is found on line 18, Schedule K.

⁸ Where a LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. In the instant matter, the petitioner's Schedule K has relevant entries for additional deductions in 2007, and therefore, its net income is found on line 1 of the Analysis of Net Income (loss) of the Schedule K.

⁹ 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.

A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

- In 2005, the original petitioner's Form 1120 stated net current assets of \$36,491.28.
- In 2006, the original petitioner's Form 1120S stated net current assets of \$6,138.22.
- In 2007, the petitioner's Form 1065 stated net current assets of -\$7,131.

Therefore, for the year 2005, the original petitioner had sufficient net current assets to pay the proffered wage, while in tax years 2006 and 2007, neither the original petitioner nor the successor-in-interest petition established that it had sufficient net current assets to pay the proffered wage.¹⁰

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for the 2005 priority year.

On appeal, counsel asserts that USCIS should have considered [REDACTED] bank statements in tax years 2005 and 2006. However, counsel's assertions are not persuasive. Counsel's reliance on the balances in the petitioner's bank account for March 2005 and for nine months in 2006 is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. The AAO also notes that the original petitioner's bank statement reflects both personal and business expenditures and possibly personal finances.

¹⁰ The AAO notes that USCIS computer records indicate that the original petitioner filed two I-140 petitions with USCIS on March 29, 2006. One of these petitions (LIN 06 129 51866) was initially approved on August 3, 2007, and subsequently revoked on April 18, 2008. If this additional petition had the same priority date for the same proffered position, the petitioner would have to establish its ability to pay both proffered wages. Since the approval of the second I-140 petition has subsequently been revoked, the AAO considers the issue of an additional wage to be moot.

Counsel and the petitioner's partner also state that the partners are willing to pay any deficiency with regard to wages. The petitioner submits its partners' tax returns and W-2 Forms. However, 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On appeal, counsel states that adding an additional cook to the petitioner's staff will produce further growth. 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.

As counsel correctly notes, 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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, although counsel cites to *Sonegawa*, the circumstances of the instant petitioner are not similar to the petitioner in *Sonegawa*. The instant petitioner was in business since the end of 2006, or some three to six months prior to filing the instant petition on April 11, 2007. The record contains no evidence that the instant petitioner had any restaurant operations or experience prior to merging with the original ETA Form 9089 petitioner.

Although the petitioner submits evidence to establish the petitioner's business profile in the multistate area, this evidence alone is not sufficient to overcome both the original petitioner and the successor-in-interest's insufficient financial resources. Further, the petition indicates the petitioner has two employees, and other evidence and statements indicate that the petitioner depends on the services of its three partners to maintain its restaurant operations. The original petitioner's tax returns for tax years 2005 and 2006 reflect no wages, no officer compensation and no cost of labor expenditures listed on Schedule A. The successor-in-interest petitioner's tax return for 2007 only reflects wages of \$27,260.

While the food produced by both petitioners may have an avid audience throughout a large geographic area, the actual financial resources identified in the record do not strongly support the petitioner's financial viability. 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.

The evidence submitted does not establish that the original petitioner or the successor-in-interest had the continuing ability to pay the proffered wage beginning on the priority date and until the beneficiary obtained permanent resident status.

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.