

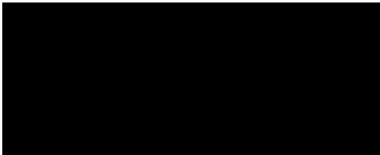
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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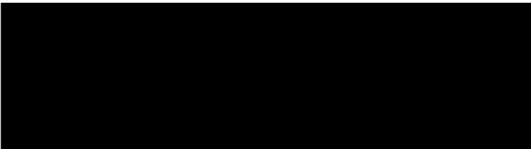


IN RE: Petitioner:
Beneficiary:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Elizabeth McCormack

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 Chinese cuisine 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 an ETA Form 9089, Application for Permanent 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 March 31, 2009 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 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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on March 15, 2007. The proffered wage as stated on the ETA Form 9089 is \$22,526 per year. The ETA Form 9089 states that the position requires 24 months of experience in the job offered of Chinese specialty cook.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2007. On the petition, the petitioner claimed to have been established in 1993 and to currently employ one worker. On the ETA Form 9089, signed by the beneficiary on January 10, 2009, 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'l Comm'r 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'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. 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 2007 onwards. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$22,526 in 2007 onwards. In addition, the petitioner has filed another Form I-140 for an additional worker with the same priority date year as the instant beneficiary. Therefore, the petitioner is obligated to show that it had sufficient funds to pay both the beneficiary and the additional sponsored beneficiary their respective proffered wages from their respective priority dates and continuing until each beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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).

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).

The petitioner was a sole proprietorship in 2007, 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'r 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 (IRS 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. *See 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 petitioner 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 supports a family of four. The proprietor's tax return reflects the following information for 2007:²

² It is noted that the petitioner has submitted both its 2006 and its 2008 Forms 1040, U.S. Individual Income Tax Returns. However, the petitioner's 2006 tax return is for the year prior to the priority date of the visa petition; and, therefore, it has little probative value when determining the petitioner's continuing ability to pay the proffered wage from the priority date of March 15, 2007. Therefore, the AAO will not consider the petitioner's 2006 IRS Form 1040 when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. In addition, the petitioner claims to have been structured as an "S" corporation in 2008. If the petitioner became a corporation in 2008, the sole proprietor's IRS Form 1040 would not be relevant. 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

	<u>2007</u>	<u>2008</u>
Proprietor's adjusted gross income (IRS Form 1040, line 37)	\$69,057	\$91,565

In 2007 and 2008, it appears that the sole proprietor had sufficient adjusted gross income to pay the proffered wage of \$22,526 to the beneficiary and a claimed proffered wage of \$22,526 to the additional sponsored beneficiary with the same priority date year.³ However, the sole proprietor has not submitted any verifiable evidence that the job offered to the additional sponsored beneficiary had a proffered wage of \$22,526. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In addition, the petitioner claims that his expenses were \$14,500 in 2007, \$8,000 for household expenses such as clothing, gas, etc. and \$6,500 for utilities such as cable, electric, etc. In support of these totals, the petitioner submits invoices for the following expenses:

- Property taxes for 2008 of \$4,062.58
- Water for 2008 of \$183.80 (December 1, 2008)
- AT&T for 2009 of \$43.67 (March 10, 2009)
- Gas for 2009 of \$254.70 (April 17, 2009)
- Allstate insurance for 2009 of \$57.12 per month
- ComEd for 2009 of \$127.21 (March 6, 2009)
- Unicare for 2009 of \$240 (January 2009)

The petitioner also stated that his home and car were paid in full prior to 2007 and that he had no installment payments or credit card payments. Further, counsel maintained that the sole proprietor spends most of his time at the restaurant, he eats his meals there, and he prepares food to take home to his children most every afternoon, which reduces his household expenses.

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 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." Nevertheless, Hong Kong Chop Suey of Mundelein, Inc. has not provided sufficient evidence to show that it is a successor-in-interest to Hong Kong Chop Suey (See footnote 4 below.). Thus, the AAO will consider the sole proprietor's 2008 IRS Form 1040 in this decision as the record does not establish that Hong Kong Chop Suey of Mundelein, Inc. is a successor-in-interest to Hong Kong Chop Suey.

³ The petitioner's counsel states on appeal that the wage of the other sponsored beneficiary was \$22,526. The petitioner does not state what the position of the other sponsored beneficiary was. or submit a copy of the approved labor certification on behalf of the second beneficiary.

In response to the director's request for evidence (RFE), the sole proprietor indicated that he had no mortgage or rent payments. Nevertheless, the Schedule A attached to the sole proprietor's 2007 tax return indicates home mortgage interest paid of \$3,519. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In the instant case, nothing in the record resolves this inconsistency. Further, the sole proprietor's mortgage payments are not included on the illustrative expenses. The 2007 Schedule A of the sole proprietor's IRS Form 1040 also shows real estate taxes paid of \$5,757, another expense which is not included on the list of the sole proprietor's expenses. Thus the sole proprietor's list of claimed expenses is not reliable, and the evidence does not establish that the sole proprietor could pay the salaries of both the beneficiary and the additional sponsored beneficiary and have sufficient remaining funds to support his family on an adjusted gross income of \$69,057. In 2008, the sole proprietor did not submit Schedule A of his IRS Form 1040. However, the sole proprietor states that he paid \$4,062.58 in property taxes in 2008. Nevertheless, without a reliable list of personal household expenses, the evidence is not sufficient to establish that the sole proprietor could pay the salaries of both the beneficiary and the additional sponsored beneficiary and have ample funds to support his family on an adjusted gross income of \$91,565.

For 2008, the petitioner also submitted the corporate tax returns of Hong Kong Chop Suey of Mundelein, Inc.⁴ If the petitioner were to establish that the corporation is the successor-in-interest to

⁴ The AAO notes that the sole proprietor has not established the "S" corporation is his successor-in-interest. If the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred.

No regulations govern immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto*, a binding legacy Immigration and Naturalization Service ("INS") precedent that was decided by the Administrative Appeals Unit and 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.

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 more broad: "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 at 1473 (defining "successor in interest").

the sole proprietor, the IRS Form 1120S would be considered to establish the ability to pay in 2008. The corporation's tax returns demonstrate its net income for 2008, as shown in the table below.

- In 2008, the IRS Form 1120S stated net income⁵ of \$50,219.

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. *Id.* (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.

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.

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 job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. In the instant case, no evidence has been submitted to demonstrate that Hong Kong Chop Suey of Mundelein, Inc. is the successor-in-interest to the petitioner, Hong Kong Chop Suey.

⁵ 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) line 18 (2006-2011) of Schedule K. *See Instructions for IRS Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 29, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits,

While it appears that the corporation had sufficient net income to pay the proffered wage to the beneficiary and the proffered wage to the additional sponsored beneficiary (if both proffered wages were \$22,526), the record does not contain evidence of the proffered wage for the additional sponsored beneficiary, and therefore, the AAO is unable to determine if the petitioner had sufficient net income to pay those wages.⁶

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.⁷ 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 corporation's tax returns demonstrate its end-of-year net current assets for 2008, as shown in the table below.

- In 2008, the IRS Form 1120S stated net current assets of \$7,788.

Therefore, for 2008, the corporation did not have sufficient net current assets to pay the proffered wage to the beneficiary and the proffered wage to the additional sponsored beneficiary.

Therefore, from the date the ETA Form 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.

On appeal, counsel asserts:

As you stated in your decision, my client's adjusted gross income (AGI) for 2007 was \$69,057. After subtracting the two (2) proffered wages ($\$22,526 \times 2 = \$45,052$) that left my client's family with \$24,005, which is above the Federal Poverty Level of \$21,200 for 2008 that you stated in your decision. Please keep in mind that the Federal Poverty Level for 2007, the year in question, was \$20,650 or \$550 less than

etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2008, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

⁶ In any further proceeding, the corporation must establish that it is the successor-in-interest to the sole proprietor.

⁷ 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.

the 2008 level. Therefore, in 2007, my clients had income in excess of \$3,355 above the Federal Poverty Level.

Although the director referred to the Federal Poverty Guidelines in his decision, the AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to determine a sole proprietor's personal living expenses. The poverty guidelines are used for administrative purposes - for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty guidelines are not adjusted for regional differences in the cost of living and, therefore, comparisons across regions of the country may be misleading. Thus, the poverty guidelines will not be considered when determining the petitioner's ability to pay the proffered wage.

In addition, as noted earlier, the petitioner has not submitted any verifiable evidence of the proffered wage for the additional sponsored beneficiary with the same priority date year, and has not submitted reliable evidence of the sole proprietor's expenses for 2007, and therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage to the beneficiary, to pay the proffered wage of the additional sponsored beneficiary, and to cover his expenses for a family of four in 2007. Further, without evidence of the proffered wage for the additional sponsored beneficiary, the AAO is unable to determine if the petitioner had sufficient funds to pay the proffered wage to the beneficiary and the proffered wage to the additional sponsored beneficiary in 2008.

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 (Reg'l Comm'r 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, the Form I-140 indicates that the petitioner was established in 1993. The petitioner has provided the sole proprietor's Forms 1040 for 2007 and 2008 and the petitioner's IRS Form 1120S for 2008. However, as the petitioner did not submit reliable evidence of the sole proprietor's expenses or verifiable evidence of the additional sponsored beneficiary's proffered wage, it has not established its ability to pay the proffered wage of \$22,526 to the beneficiary and the proffered wage to the additional sponsored beneficiary with the same priority date year. The other proffered wage is considered starting from its respective priority date until that beneficiary has obtained lawful permanent residence, the petition has been withdrawn, or the petition has been revoked or denied without a pending appeal. For each year that it has not paid the beneficiary the full proffered wage, the petitioner must establish its ability to pay the combined proffered wages (reduced by any wages paid to the beneficiaries) from the priority date. 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 9089 and Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2).

The record in the instant case contains no information about the proffered wage for the other beneficiary as recorded by USCIS, whether the beneficiary has withdrawn from the petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. There is also no information in the record about whether the petitioner has employed the additional beneficiary or the wages paid to the other beneficiary, if any. Therefore, the AAO concludes that the petitioner has not demonstrated adequate financial strength and its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or the proffered wage to the beneficiary of the other petition. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. Furthermore, the sole proprietor has not submitted any evidence to establish that Hong Kong Chop Suey of Mundelein, Inc. is his successor-in-interest. There is no probative evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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 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.