

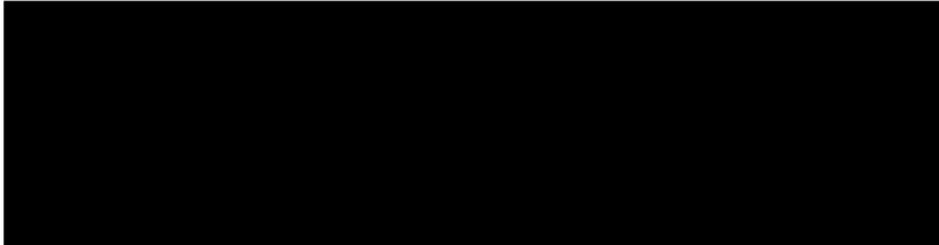
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



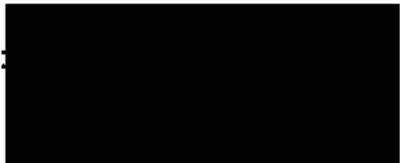
**U.S. Citizenship  
and Immigration  
Services**



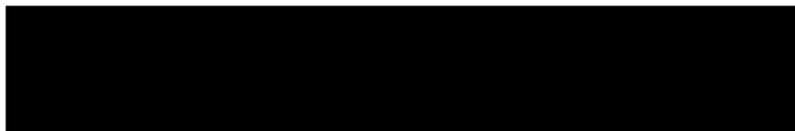
B6

Date: **JUL 31 2012**

Office: TEXAS SERVICE CENTER

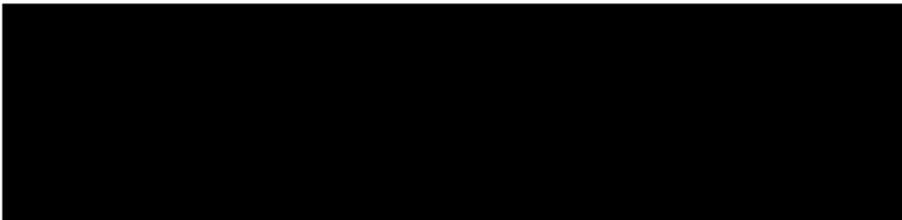
FILE: 

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 Director, Texas Service Center, denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cook. As required by statute, a labor certification approved by the Department of Labor (DOL) accompanied the petition.<sup>1</sup> 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 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.<sup>2</sup>

On August 2, 2011, the AAO issued a notice of derogatory information and intent to dismiss (NDI/ITD) informing the petitioner that the Form I-140, Immigrant Petition for Alien Worker, was improperly filed and provided the petitioner with instructions on how to correct the deficiency. Specifically, the petitioner was informed that the petition was improperly filed as the Form I-140 listed the beneficiary's name instead of the petitioner's name in the signature block in Part 8 of the form. The petitioner was further informed that the beneficiary of an immigrant petition is not a recognized party in the proceeding pursuant to 8 C.F.R. 103.2(a)(3) and 8 C.F.R. 103.3(a)(1)(iii)(B). The petitioner was informed that a properly executed Form I-140 must be submitted.

As of this date, United States Citizenship and Immigration Services (USCIS) records do not indicate that the petitioner has filed a revised Form I-140 on behalf of the beneficiary.

The regulation at 8 C.F.R. § 204.5(c) states:

*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the effectiveness of this final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>2</sup> 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).

The regulation at 8 C.F.R. § 103.2(a)(2) states:

*Signature.* An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on an application or petition that is being filed with the [USCIS] is one that is either handwritten or, for applications or petitions filed electronically as permitted by the instructions to the form, in electronic format.

No regulatory provision waives the signature requirement for a petitioning United States employer or permits a petitioning United States employer to designate the beneficiary to sign the petition on behalf of the United States employer. The petition has not been properly filed because the petitioning United States employer, [REDACTED] did not sign the petition. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

Thus, the appeal will be rejected. Nevertheless, the AAO will review the evidence submitted on appeal with regard to the denial of the visa petition.

As set forth in the director's June 19, 2008 denial, at 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.

At the outset, it is noted that the current employer in the instant case is a different entity than the company that filed the Form ETA 750 and the Form I-140. The labor certification and Form I-140 were filed by [REDACTED] merged with [REDACTED] an S corporation, on October 21, 2008. On appeal, counsel asserts that [REDACTED] and the successor-in-interest, [REDACTED], had the ability to pay the beneficiary's proffered wage in the amount of \$36,000.00 per year as of the filing date up to the present."

The evidence in the record sufficiently documents that Everest Foods, Inc. merged with Punchgini Inc. and is now a successor-in-interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986)

The 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 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.

The priority date is February 28, 2003, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The effective date of the merger was October 21, 2008. Therefore, [REDACTED] must show that it possessed the ability to pay the proffered wage from 2008 to the present, and that Punchgini Inc. possessed the ability to pay the proffered wage in 2003, 2004, 2005, 2006 and 2007.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The proffered wage as stated on the Form ETA 750 is \$36,000 per year. The petitioner and its successor are structured as S corporations. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 18 workers.<sup>3</sup> According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on July 5, 2007, the beneficiary claimed to have worked for the petitioner from May 2002 to the present (July 5, 2007).

<sup>3</sup> The website for the New York Department of State, Division of Corporations at [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html) states that the successor entity, [REDACTED] was incorporated on June 22, 2007.

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, 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.

Although the beneficiary claims to have been employed by the petitioner from May 2002 to July 5, 2007, the petitioner has submitted no evidence of this employment such as Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income. Therefore the petitioner must establish that it had sufficient funds to pay the entire wage of \$36,000 from 2003 through 2008 (until it was merged with [REDACTED]). In addition, the successor-in-interest must show that it had sufficient funds to pay the proffered wage from the time it merged with Punchgini, Inc. in 2008 to the present.<sup>4</sup>

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced.

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<sup>4</sup> Furthermore, the petitioner has filed multiple petitions on behalf of other beneficiaries. Therefore, the petitioner must establish that it has had the ability to pay the combined proffered wages to all of the beneficiaries of its pending petitions. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The successor-in-interest should address this issue in any further filings.

Showing that the petitioner's gross receipts 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 USCIS 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).

Punchgini, Inc.'s tax returns demonstrate its net income for 2003 to 2007, as shown in the table below.

- In 2003, the Form 1120S stated net income<sup>5</sup> of \$113,862.00.

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<sup>5</sup> 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

- In 2004, the Form 1120S stated net income of \$11,013.00.
- In 2005, the Form 1120S stated net income of \$41,512.00.
- In 2006, the Form 1120S stated net income of \$39,125.00.
- In 2007, the Form 1120S stated net income of \$47,018.00.

Therefore, for the years 2001, 2002, 2003, 2005, 2006, and 2007, it appears that [REDACTED] had sufficient net income to pay the proffered wage of \$36,000.<sup>6</sup> [REDACTED] did not have sufficient net income in 2004 to pay the instant beneficiary or the additional beneficiaries.

Everest Foods Inc.'s tax returns demonstrate its net income for 2008 to 2010, as shown in the table below.

- In 2008, the Form 1120S stated net income of \$43,866.
- In 2009, the Form 1120S stated net income of \$56,412.
- In 2010, the Form 1120S stated net income of \$56,087.

Therefore, for the years 2008 through 2010, it appears that [REDACTED] had sufficient net income to pay the proffered wage of \$36,000.<sup>7</sup>

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.<sup>8</sup> 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

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(1997-2003) line 17e (2004-2005) line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 28, 2012) (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 for 2002, 2004, 2005, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax return for 2002, 2004, 2005, 2006, and 2007.

<sup>6</sup> However, as [REDACTED] filed multiple petitions for additional employees, it is unclear whether or not [REDACTED] had sufficient net income to pay both the instant beneficiary and the wages of the additional sponsored beneficiaries.

<sup>7</sup> However, as a successor-in-interest to [REDACTED] must show that it had sufficient net income to pay both the current beneficiary and the wages of the additional sponsored beneficiaries. It has not done so.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

proffered wage using those net current assets. [REDACTED] tax returns for 2003 through 2007 demonstrate its end-of-year net current assets for those years, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of \$23,419.
- In 2004, the Form 1120S stated net current assets of \$9,271.
- In 2005, the Form 1120S stated net current assets of – Schedule was not submitted.
- In 2006, the Form 1120S stated net current assets of \$24,114.
- In 2007, the Form 1120S stated net current assets of \$104,914.

In 2004, the only year in which the petitioner and its successor-in-interest do not have sufficient net income to pay the beneficiary's wage alone, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage. Thus, considering payments to the beneficiary alone, the petitioner does not have the ability to pay the beneficiary in 2004. For this reason alone, the petition must be denied.<sup>9</sup>

[REDACTED] tax returns for 2008 through 2010 demonstrate its end-of-year net current assets for those years, as shown in the table below.

- In 2008, the Form 1120S stated net current assets of \$126,176.
- In 2009, the Form 1120S stated net current assets of \$160,113.
- In 2010, the Form 1120S stated net current assets of \$69,046.

For the years 2008 through 2010, it appears that [REDACTED] had sufficient net current assets to pay the proffered wage of \$36,000.<sup>10</sup>

<sup>9</sup> Again, although it appears that [REDACTED] had sufficient net current assets to pay the proffered wage to the beneficiary of \$36,000 in 2007, as [REDACTED] filed multiple petitions for additional employees, it is unclear that [REDACTED] had sufficient net current assets to pay both the beneficiary and the wages of the additional sponsored beneficiaries. In 2003 through 2006, the record does not establish that [REDACTED] had sufficient net current assets to pay the current beneficiary and the wages of the additional sponsored beneficiaries.

<sup>10</sup> However, as a successor-in-interest to [REDACTED] must show that it had sufficient net current assets to pay both the instant beneficiary and the wages of the additional sponsored beneficiaries. It has not done so.

Therefore, for the years 2001 through 2007, [REDACTED] has not established that it had sufficient funds to pay the proffered wage to the instant beneficiary and the additional sponsored beneficiaries, and [REDACTED] has not established that it had sufficient funds to pay the proffered wage to the instant beneficiary or the proffered wages to the additional sponsored beneficiaries from 2008 through 2010.

A petitioner that has filed multiple I-140 petitions on behalf of other beneficiaries must establish that it has had the ability to pay the combined proffered wages to all of the beneficiaries of its pending

Therefore, from the date the DOL accepted the Form ETA 750 for processing, 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, its net income, or its net current assets.

On appeal, counsel asserts that two of the petitioning business's shareholders, [REDACTED], collectively owned 90 percent of the corporation in 2004 and had the ability to pay the beneficiary the proffered salary from their officers' compensation. Counsel submitted accompanying affidavits from these two shareholders regarding their ability to pay. As part of the AAO's August 2, 2011 NDI to the petitioner, the AAO asked the petitioner to provide specific evidence demonstrating [REDACTED] ownership in the company.

On appeal, the petitioner also submitted a letter from its certified public accountant (CPA) dated August 6, 2008, stating that the petitioner paid an uncharacteristic expense of \$13,500.00 in order to oust two other shareholders in 2004. The petitioner's CPA asserts that these funds would have otherwise been available to pay the beneficiary's salary for that year. The AAO also asked for information documenting this ouster within the NDI.

The AAO finds that the petitioner has provided sufficient evidence regarding [REDACTED] ownership of the petitioning business and regarding the ouster of two prior shareholders within its NDI response.

As part of the NDI, the AAO also asked the petitioner for information regarding its CPA's assertions that [REDACTED] was involved in trademark and patent litigation in 2004, costing it \$17,000.00. A letter was submitted from the [REDACTED] firm attesting to the fact that [REDACTED] was involved in a litigation case starting in February 2003. The letter states that [REDACTED] was involved in the discovery and summary judgment phase of the lawsuit in 2004. However, the petitioner has provided no evidence demonstrating its payment of legal fees in 2004, which could have impacted its ability to pay the beneficiary the proffered wage for that year. Going on record without supporting

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petitions. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The other proffered wages are considered starting from their respective priority dates until the beneficiaries have obtained lawful permanent residence, their petitions have been withdrawn, or their petitions have been revoked or denied without a pending appeal. For each year that it has not paid the beneficiary the full proffered wage which in this case is for all the years, the petitioner must establish its ability to pay the combined proffered wages. The record in the instant case does not contain sufficient information to determine the priority dates and proffered wages for the other beneficiaries. The AAO cannot determine whether the petitioner has employed the additional beneficiaries or the wages paid to the other beneficiaries. Therefore, [REDACTED] failed to establish that it had sufficient net income or net current assets to pay the proffered wage to the beneficiary and the proffered wages to the additional sponsored beneficiaries in 2003 through 2007. The successor-in-interest has also failed to establish that it had sufficient net income or net current assets to pay the proffered wage to the beneficiary and the proffered wages to the additional sponsored beneficiaries in 2008 through 2010.

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)).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns that demonstrates that neither [REDACTED] nor its successor-in-interest, [REDACTED] could pay the proffered wage to the beneficiary in 2004 and to the additional sponsored beneficiaries in any of the years.

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *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 2003 through 2007 tax returns for [REDACTED] and the 2008 through 2010 tax returns for [REDACTED] were submitted. However, although it has been documented that [REDACTED] is a successor-in-interest to [REDACTED] the evidence submitted is not sufficient to establish that either [REDACTED] had adequate funds to pay the proffered wage of the instant beneficiary and the additional sponsored beneficiaries. As discussed previously, the evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. There is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is no evidence of the petitioner's reputation in the industry and although, the petitioner states that it was involved in trademark and patent litigation in 2004 costing \$17,000, no evidence was submitted exhibiting its payment of legal fees in 2004 which could have impacted its ability to pay the instant beneficiary and the additional sponsored beneficiaries their respective

proffered wages. Therefore, in this individual case, it is concluded that it has not been established that either [REDACTED] had the continuing ability to pay the proffered wage to the current beneficiary and the other sponsored beneficiaries.

On appeal, counsel asserts that the petitioner has established its continuing ability to pay the proffered wage based on officer compensation. Counsel submits affidavits from two of the petitioner's officers and personal tax returns for the two officers for the year 2004. Both affidavits are identical and state:

I am willing to and will, if necessary, apply and [sic] portion of my income to pay the wage of employees including [the beneficiary].

Due to the success of [REDACTED] I have accumulated sufficient wealth to invest additional cash, more than \$100,000.00 into the company's payroll.

USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

However, a relevant factor when determining ability to pay is if the petitioner pays its officer-owner(s) a substantial salary, and the remaining amount required to meet the proffered wage is only a small percentage of the total salary paid to the officer-owner(s). The record must also contain a statement or other evidence establishing that the salary of the officer-owner(s) is not set by contract and that the petitioner would have used and could have used a portion of the officer-owner(s) salary to pay the proffered wage. In performing this analysis, USCIS does not examine the personal assets of the officer-owner(s), but instead merely considers the ability of a corporation to set reasonable salaries for its officer-owner(s) based, in part, on the profitability of the organization.

In the instant case, the compensation paid to the petitioner's officer-owner(s) summarized in the preceding paragraph is not sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary and the proffered wages of the other beneficiaries. Although officer compensation is listed as \$174,000 on the 2004 tax returns, the AAO notes that there were six shareholders in 2004 and no evidence was submitted to show the actual wages paid to the two officers above. Even if the AAO were to determine that [REDACTED] had sufficient funds to pay the beneficiary, which it does not, no evidence was submitted that demonstrates the proffered wages of the additional sponsored beneficiaries or the wages actually paid to the additional sponsored beneficiaries. Therefore, the AAO is unable to determine if [REDACTED] paid sufficient officer compensation to redirect to pay the proffered wage to the beneficiary and the proffered wages of the additional sponsored beneficiaries.

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 petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As the appeal was not properly filed, and it is unclear whether or not the petitioner consented to having an appeal filed on its behalf, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

**ORDER:** The appeal is rejected.