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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 27 2007  
WAC 03 105 53574

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it is a successor-in-interest to the entity that filed the labor certification with DOL and that the petitioner had not established its continuing ability to pay the proffered wage from the priority date. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether or not the petitioner is a successor-in-interest to the entity that filed the labor certification with DOL and whether or not the petitioner had established its continuing ability to pay the proffered wage from the priority date.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The form ETA 750 in this matter was submitted on May 17, 1999 by [REDACTED] Home for the Ambulatory Aged #3 at 723 35<sup>th</sup> Avenue, San Francisco, CA 94121. The petitioner listed on the Form I-140 visa petition, which was submitted on February 18, 2003 is [REDACTED] Home for the Ambulatory Aged at the same address. In January 2000, the petitioner became [REDACTED] Home LLC. The Form I-140 petition was correctly filed with the Texas Service Center, which issued the decision of denial.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>2</sup>

In the instant case the record contains (1) counsel's brief, (2) a letter from [REDACTED] Certified Public Accountant (CPA), dated March 9, 2006, (3) copies of monthly home loan statements for the five residential care facilities owned by [REDACTED], (4) copies of the original licenses for the five residential care facilities showing the licenses were issued to [REDACTED] and [REDACTED] (5) copies of Applications for a Community Care Facility or Residential Care Facility for the Elder License for the five residential care facilities under the name [REDACTED] s Home LLC with [REDACTED] b and [REDACTED] r as the administrator or person in charge of the facility (Peachie is the administrator of three facilities and [REDACTED] is the

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<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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

administrator of two facilities that include the petitioner.),<sup>3</sup> (6) a copy of a Facility Evaluation Report for the petitioner for pre-licensing,<sup>4</sup> (7) an affidavit from [REDACTED], dated June 29, 2005, (8) a copy of a State of California Limited Liability Company Articles of Organization, filed on December 15, 1999, for [REDACTED] Home LLC, (9) a copy of a Fictitious Business Name Statement, filed February 18, 2000, for [REDACTED] Home from [REDACTED] Home LLC, (10) a copy of a statement, dated July 8, 2005, from [REDACTED] and [REDACTED] (11) a letter, dated July 12, 2005, from [REDACTED] (12) a computer printout, dated July 8, 2005, from Bank of America for [REDACTED] Home LLC, (13) copies of Forms W-2, Wage and Tax Statements, issued by [REDACTED] Home LLC for the beneficiary, for 2000 through 2004, and a copy of Form W-2, issued by [REDACTED] Home, for the beneficiary for 1999, (14) copies of Forms 1065, U.S. Return of Partnership Income, for 2000 through 2004, and a copy of Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business, for [REDACTED] for 1999, (15) a copy of a letter, dated July 26, 1999, from [REDACTED] to the Assessment Manager of the Alien Labor Certification Office, (16) copies of Forms DE-6, Quarterly Wage and Withholding Reports for 1999 through 2002 for the employees of [REDACTED] Home LLC (2000 through 2002) and for the employees of [REDACTED] Home for the Ambulatory Aged (1999), (17) copies of [REDACTED] Home's 2000 and 2001 Forms 1040, including Schedule C, and (18) copies of [REDACTED] Home's 2000 through 2002 Forms 1040.

The letter from [REDACTED] dated March 9, 2006, states that based on his reading of the tax returns of the partnership and the representations of management of [REDACTED] Home, LLC, it appears that the petitioner has the capability to pay the proffered annual wage. [REDACTED] claims that for each year considered, there was net income less than the amount of the proffered wage. "However, the Company paid consulting fees to [REDACTED], the father of the owners and the previous owner of the company. The management assures me that any increase in wages or other operating expenses would reduce the payout to [REDACTED]. When the consulting fees are added back to ordinary business income shown on the first page of the Federal Form 1065, the company has sufficient income to pay the proffered wage." [REDACTED] further states that his opinion is based on the information contained in the partnership returns and the representations of management. [REDACTED] reports that he has not audited, reviewed or compiled the financial information presented, and, accordingly, "do not express an opinion or any other form of assurance on them."<sup>5</sup>

The monthly home loan statements for the five residential care facilities owned by [REDACTED] to reflect a principal balance of \$331,136.89 and a monthly payment of \$1,918.66 for the property at [REDACTED] [REDACTED] a principal balance of \$331,136.89 and a monthly payment of \$1,918.66 for the property at [REDACTED] [REDACTED] a principal balance of \$331,136.89 and a monthly payment of \$1,918.66 for the property at [REDACTED] [REDACTED] et, a principal balance of \$489,525.58 and a monthly payment of \$3,078.59 for the property

<sup>3</sup> It is noted that all of the Applications are dated March 3, 2005.

<sup>4</sup> The Facility Evaluation Report for the petitioner states that "this facility is currently licensed by an individual. That individual's family has formed a limited liability corporation and currently is in the process of taking over the ownership as [REDACTED] Home LLC." The Facility Evaluation Report is dated July 25, 2005.

<sup>5</sup> The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. In this case, the CPA specifically stated that he did not audit, review, or compile the financial information presented. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

at [REDACTED] and a principal balance of \$399,620.46 and a monthly payment of \$2,462.87 for the property at [REDACTED], all as of January 12, 2006.

The original licenses for the five residential care facilities were [REDACTED] at [REDACTED] San Francisco, CA 94121, issued to [REDACTED] and [REDACTED] with an effective date of March 3, 1993; [REDACTED] at [REDACTED] San Francisco, CA 94121, issued to [REDACTED] and [REDACTED] with an effective date of March 3, 1993; [REDACTED] Home For Ambulatory Aged #3 at [REDACTED] San Francisco, CA 94121, issued to [REDACTED] and [REDACTED], with an effective date of July 22, 1993; [REDACTED] at [REDACTED] San Francisco, CA 94121, issued to [REDACTED] and [REDACTED] with an effective date of September 8, 1993; and [REDACTED] at [REDACTED] San Francisco, CA 94121, issued to Castor and Peachie Nacario, with an effective date of July 27, 1993.

The Applications for a Community Care Facility or Residential Care Facility for the Elder License, all dated March 3, 2005, reflect the change from their previous names to the new limited liability corporation of [REDACTED] Home, LLC for all five care facilities. Three of the facilities list [REDACTED] as their Administrator, and two of the facilities (including the petitioner) list Marius Winger as their Administrator.

The affidavit, dated June 29, 2005, from [REDACTED] explains why a timely filed appeal was not submitted previously and states:

I told [REDACTED] that I am satisfied with her office's work in all of these seven other cases that they are handling for us and nothing would change in our attorney-client relationship apart from this case. . . .

I believe that all of these cases, the successor-in-interest issue and business licensing were in question. Again, what concerns me about the Tancinco Law Offices' failure to follow-up on [REDACTED]'s case and timely file the Notice of Appeal is that several identical cases were appealed to the AAO on the exact same grounds and the exact same information and evidence was submitted to the CIS and resulted in the appeals being sustained and the I-140's being approved. Their failure to appeal this case has resulted in the potential loss of a trusted employee.

The Limited Liability Company Articles of Organization, filed on December 15, 1999, simply gives the name of the company as [REDACTED] Home LLC with Diosdado D. Aguirre as the agent for service of process and states that the limited liability company members will manage the limited liability company.

The Fictitious Business Name Statement, filed on February 18, 2000, shows the [REDACTED] Home LLC will do business under the fictitious business name of [REDACTED] Home.

The statement, dated July 8, 2005, from [REDACTED], and [REDACTED] states:

Nacario's Home was started in April 1974 by [REDACTED] and has continued to operate since then until today even though, for various legal reasons, the sole proprietorship was then converted to a Limited Liability Company (LLC). In 2000, [REDACTED] Home LLC was formed and assumed the obligations, responsibilities, liabilities, assets, and undertakings of [REDACTED]'s Home. In fact, as part and parcel of the conversion, the business license required for this type of business (i.e., residential care facility for the elderly) is still being converted from the sole proprietorship to the LLC. [REDACTED]'s Home has continued to run and operate

residential care facilities for the elderly since it opened in 1974. The company has never been required to be or willfully shut down. Home has been in continuous operation since 1974. There have been no changes in the day-to-day operations of the homes. The only change made was in terms of the structure of the company.

The Managing Member, has been involved with the company since 1988. Home LLC has assumed all obligations, responsibilities, liabilities, assets, and undertakings of Castor Nacario's sole proprietorship in Home. These obligations and responsibilities also include any labor certifications filed with the U.S. Department of Labor and/or any visa petitions filed with the U.S. Immigration and Naturalization Service or its [sic] successor, the U.S. Citizenship and Immigration Services.

The letter, dated July 12, 2005, from states that Home has been able to pay [the beneficiary] the proffered wage since the filing of the labor certification. The letter further states that "even though Home suffered a loss in 1999 and 2000, this loss was for tax purposes and all employees' salaries were paid. The company has shown a profit since 2000 and has taken steps to ensure that such tax losses will not accrue again in the future."

The computer printout, dated July 8, 2005, from Bank of America for Home LLC shows an available balance of \$36,017.93.

The beneficiary's 1999 through 2004 Forms W-2 reflect wages earned by the beneficiary from the petitioner of \$7,000 (Home), \$12,000 (Home LLC), \$13,428.46 (LLC), \$14,400 (Home LLC), \$14,400 (Home LLC), and \$14,400 (s Home LLC), respectively.

The petitioner's 2000 through 2004 Forms 1065 reflect ordinary incomes or net incomes of -\$45,923 (from line 22 and Schedule K), \$7,323 (from line 22 and Schedule K), \$16,890 (from line 22 and Schedule K), \$560 (from line 22 and Schedule K), and \$989 (from line 22 and Schedule K). The petitioner's 2000 through 2004 Forms 1065 also reflect net current assets of \$0 for all four years.<sup>6 7</sup>

The 1999 Form 1040 for reflects an adjusted gross income of -\$87,052, and Schedule C reflects gross receipts of \$586,867, wages paid of \$170,810, and a net loss of -\$63,056.

The letter, dated July 26, 1999, from to The Assessment Manager Alien Labor Certification Office states:

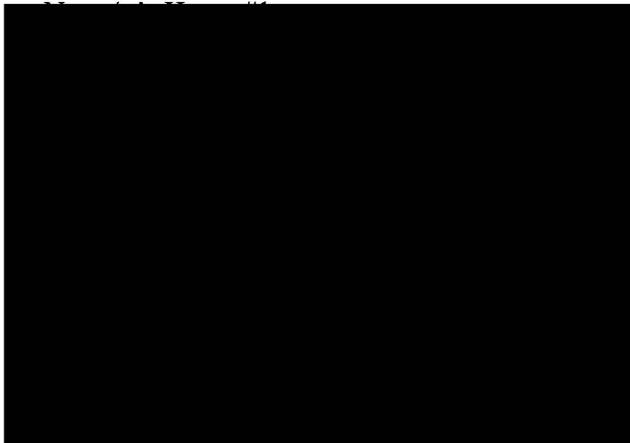
<sup>6</sup> It is noted that the owner of the sole proprietor, is not listed on any of the Forms 1065 under Schedule K-1, Partner's Share of Current Year Income, Deductions, Credits, and other Items.

<sup>7</sup> Where a partnership's income is exclusively from a trade or business, CIS 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. Return of Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22."

Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1065 states that a partnership's total income from its various sources are to be shown not on page one of the Form 1065, but on the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1065, 2006, at <http://www.irs.gov/instructions/i1065/ch02.html>, (accessed May 29, 2007).

This authorizes my daughter, [REDACTED], to decide, act, and sign all matters and documents in relation to our Applications for Labor Certification.

[REDACTED] is the co-licensee and administrator of the five (5) residential care homes listed below. I am now in semi-retirement. Enclosed is our care home's license certificate.



The petitioner's 1999 through 2002 Forms DE-6 reflect wages paid to the beneficiary of \$7,000 in 1999 from [REDACTED] Home for Ambulatory Aged, \$12,000 in 2000 from [REDACTED] Home LLC, \$13,428.46 in 2001 from [REDACTED] Home LLC, and \$14,400 in 2002 from [REDACTED] Home LLC.

The copies of [REDACTED]'s 2000 and 2001 Forms 1040 reflect adjusted gross incomes of \$33,264 and \$45,601, respectively. The 2000 and 2001 Schedule Cs reflect gross receipts of \$280,251, no wages paid, and net profit of \$52,485 and \$65,027, respectively.

The copies of [REDACTED]'s 2000 through 2002 Forms 1040 reflect adjusted gross incomes of \$51,891, \$96,901, and \$120,947, respectively. No Schedule Cs accompanied the Forms 1040 for [REDACTED].

The director denied the petition on June 1, 2004 based on the finding that [REDACTED] Home LLC (apparently the petitioner) is not the true successor of [REDACTED] Home for the Ambulatory Aged within the meaning of the opinion in *Matter of Dial Repair Shop*, 191 & N Dec. 481 (Comm. 1981) because the relationship between the sole proprietorship that originally applied for the labor certification and the actual petitioner is not established.

On appeal, counsel states:

Home LLC was established in 1974 and was originally named [REDACTED] Home. It was converted to a Limited Liability Corporation in January 2000 after one of the original owners, [REDACTED] died in 1994 and her husband, [REDACTED], became the Sole Proprietor.

At the time of the LLC conversion in January 2000, [redacted] children, [redacted], and [redacted] became the firm's Managing Members. The business has always been comprised of five nursing homes: [redacted]

[redacted] As stated, [the beneficiary] was petitioned for employment at [redacted] Home for the Ambulatory Aged and is still employed there.

The CIS has misapplied the law in its decision and disregarded its own guidelines, namely the May 4, 2004 Memo from William R. Yates, Director of Operations, regarding the Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2) by not evaluating the record of proceeding in its entirety and clearly explaining the specific reasons for denial. . . .

The petitioner has submitted substantial evidence in the form of a sworn statement pursuant to 20 C.F.R. §§ 655.730(e), 655.760(a)(7) signed by [redacted] (the previous Sole Proprietor) and his children, [redacted] who are the LLC members. The statement confirmed that Nacario's Home LLC is a successor in interest to [redacted] Home. The Decision merely states that this statement was submitted and is "insufficient to show how the Petitioner assumed all rights and obligations of the entity that originally applied for the labor certification" without more. The Petitioner has carried its burden of proof pursuant to § 291 of the INA, 8 U.S.C. § 1361 by submitting the above statement as well as the previously submitted documentation to show that it is the successor-in-interest. . . .

The petitioner has proven its ability to pay the offered wage by submitting evidence of assets greater than the prevailing wage. Additionally, the service must look at the "Totality of Circumstances" pursuant to *Matter of Sonogawa*.

The CIS must follow the procedural guidelines set forth in the May 4, 2004 Memo from William R. Yates, its Director of Operations. . . .

The petitioner has already submitted evidence of its net current assets in the form of a bank statement that was greater than the proffered wage. The Petitioner has submitted monthly bank statements which have amounts greater than the proffered monthly wages (totaling around \$27,000 at the rate of \$2,076.53 each) for all of its 13 employees for which it has filed labor certifications. It also submitted credible verifiable evidence in the form of the beneficiary's W-2's to show that the petitioner is not only employing her but has also paid and is currently paying the proffered wage, as it has for its other employees. . . .

The CIS has also misinterpreted the Individual Tax Returns of [redacted] for 1999-2001. The CIS believes that [redacted] continued in his role as Sole Proprietor because he derived income from [redacted] Home LLC and was listed as "self-employed." In fact, [redacted] still owns the five nursing homes which comprise [redacted] Home LLC and he derives rental income from that business. Attached as Exhibit "B" are mortgage statements for all five homes submitted to show that he is the owner.

Furthermore, the CIS has not assessed the totality of the circumstances pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) by failing to take into account that the

petitioner's income has increased since 1999 and that that year was uncharacteristically unprofitable due to major repairs performed. Additionally, it has failed to take into account that [REDACTED] Home has been in operation for over 31 years. It must also be noted that the LLC has applied for and recently received licenses from the State of California Department of Social Services because the previous licenses were under the sole proprietorship. This would not occur if the business were failing.

If an entity wishes to rely on a labor certification issued to another entity it must establish that it assumed all of the rights, duties, obligations, and assets of the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). It must also show that both entities have the ability to pay the proffered wage.

*Dial, supra*, states that all of the assets of the petitioning business must have been acquired by the substituted petitioner in order for that substituted petitioner to qualify as a true successor and to rely on the labor certification issued to the original petitioner. In the instant case, we are applying that abstract language to the acquisition of a sole proprietorship.

Counsel claims that the petitioner has submitted substantial evidence in the form of a sworn statement pursuant to 20 C.F.R. §§ 655.730(e), 655.760(a)(7) signed by [REDACTED] (the previous Sole Proprietor) and his children, [REDACTED] and [REDACTED], who are the LLC members. The statement confirmed that [REDACTED] Home LLC is a successor in interest to [REDACTED] Home. The director determined that this statement is "insufficient to show how the Petitioner assumed all rights and obligations of the entity that originally applied for the labor certification" without more. Counsel claims that the Petitioner has carried its burden of proof pursuant to § 291 of the INA, 8 U.S.C. § 1361 by submitting the above statement as well as the previously submitted documentation to show that it is the successor-in-interest.

Counsel is mistaken. First, the statement submitted by [REDACTED] and [REDACTED] does not meet the requirements of a sworn affidavit. The declaration that has been provided is not an affidavit as it was not sworn to or affirmed by the declarants before an officer, authorized to administer oaths or affirmations, who has, having confirmed the declarants' identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does it contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a petition are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

In addition, the Limited Liability Company Articles of Organization for [REDACTED] Home LLC merely state the company's name, the agent, and that the limited liability company will be managed by the limited liability company member. The limited liability company has not provided any verifiable evidence that it assumed all the rights, duties, obligations, and assets of the sole proprietorship; it has not shown any partnership agreements for the new LLC; and it has not provided evidence that the new partnership does not constitute a significant change in ownership. The petitioner has not adequately described the transfer of business from the sole proprietorship to the LLC. The only time the petitioner provided evidence of the partners in the new LLC occurred with the submission of the Forms 1065. Those forms do not show the original owner, the sole proprietor, as a partner in the LLC, and the fact that he still owns the buildings and receives rent from those

buildings has no bearing on whether the LLC is a successor in interest to the sole proprietorship.<sup>8</sup> The actual work relationship that existed when the job offer was made and certified must continue, and not a newly constituted partnership using the same or a new trade name. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For these reasons, the petition may not be approved.

The second issue in this proceeding is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date of May 17, 1999. Although we have determined that the record of proceeding does not support a finding that a successor-in-interest has been established, even, *arguendo*, that we did, neither entity can show the ability to pay the proffered wage.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$2,076.53 per month or \$24,918.36 annually.

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.

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<sup>8</sup> If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. See *Matter of United Investment Group*, Int. Dec. 2990 (Comm.1985). In *Matter of United Investment Group*, the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired.

*See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on May 11, 1999, the beneficiary does not claim the petitioner as a past or present employer. However, counsel submitted Forms W-2, issued by the petitioner for the beneficiary, for the years 1999 through 2004. Therefore, the petitioner has established that it employed the beneficiary in 1999 through 2004. The wages earned by the beneficiary in 1999 through 2004 were \$7,000, \$12,000, \$13,428.46, \$14,400, \$14,400, and \$14,400, respectively. The petitioner is obligated to demonstrate that it had sufficient funds to pay the difference between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary. Those differences were \$17,918.36 in 1999, \$12,918.36 in 2000, \$11,489.90 in 2001, \$10,518.36 in 2002, \$10,518.36 in 2003, and \$10,518.36 in 2004.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

In 1999, the petitioner was structured as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately

\$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of one in 1999. In 1999, the petitioner's adjusted gross income of -\$87,052, was considerably less than the proffered wage of \$24,918.36. In addition, there is no evidence of the petitioner's monthly personal expenses. Therefore, the petitioner has not established its ability to pay the difference of \$17,918.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$7,000 in 1999 and support himself with a negative income. It is noted that counsel claims that 1999 was an uncharacteristically unprofitable year due to major repairs performed, and the sole proprietor's Schedule C does show repairs for that year of \$103,235. However, while the AAO would consider the repairs if the sole proprietor could show that it was a one-time significant expense, the sole proprietor has not provided any evidence such as prior tax returns that would corroborate this claim, and, again, the sole proprietor has not provided any evidence of his monthly personal expense; therefore, the cost of the repairs may not be considered.

In 2000 through 2004, the petitioner was structured as an LLC. An LLC is an entity formed under state law by filing articles of organization. If an LLC has two or more owners, it will automatically be considered to be a partnership for federal income tax purposes unless an election is made to be treated as a corporation. *See* 26 C.F.R. § 301.7701-3. The petitioner filed IRS Form 1065, U.S. Partnership Income Tax Return, after organizing itself as a limited liability company in the State of California. Therefore, from the date of its organization as an LLC, the petitioner is considered to be a partnership for federal tax purposes.

Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>9</sup> An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Chi-Feng Chang*, 719 F. Supp. at 537. *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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<sup>9</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

In 2000 through 2004, the petitioner's net incomes were -\$45,923 (line 22 and Schedule L), \$7,323 (line 22 and Schedule L), \$16,890 (line 22 and Schedule L), \$560 (line 22 and Schedule L), and \$989 (line 22 and Schedule L), respectively. The petitioner could not have paid the difference of \$12,918.36 in 2000, \$11,489.90 in 2001, \$10,518.36 in 2002, \$10,518.36 in 2003, and \$10,518.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$12,000 in 2000, \$13,428.46 in 2001, \$14,400 in 2003, and \$14,400 in 2004 from its net incomes. The petitioner could have paid the difference of \$10,518.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$14,400 from its net income of \$16,890 in 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>10</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. In the instant case, the petitioner's 2000 through 2004 net current assets were \$0 for each of the years. Therefore, the petitioner has not established its ability to pay the difference of \$12,918.36 in 2000, \$11,489.90 in 2001, \$10,518.36 in 2002, \$10,518.36 in 2003, and \$10,518.36 in 2004 between the proffered wage of \$24,918.36 and the actual wages paid to beneficiary of \$12,000 in 2000, \$13,428.46 in 2001, \$14,400 in 2002, \$14,400 in 2003, and \$14,400 in 2004 from its net current assets.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$24,918.36 based on the May 4, 2004 memo from William R. Yates, Director of Operations regarding the determination of ability to pay under 8 C.F.R. § 204.5(g)(2), by the totality of the circumstances pursuant to *Matter of Sonogawa*, by submitting evidence of its net current assets in the form of a bank statement that was greater than the proffered wage, and by the consulting fees paid to the father of the owners and the previous owner of the company.

Counsel is mistaken. Counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate, according to the language in Mr. Yates' memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel urges CIS to consider the wage rate paid to the beneficiary as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

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<sup>10</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.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 17, 1999. Thus, the petitioner must show its ability to pay the proffered wage not only in 1999, but it must also show its continuing ability to pay the proffered wage in 2000 through 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In the present case, the petitioner has not submitted any evidence that shows that it has paid or is paying the proffered wage of \$24,918.36 to the beneficiary. In fact, the most the beneficiary has earned as an employee of the petitioner is \$14,400 in 2002 through 2004, \$10,518.36 less than the proffered wage.

Counsel also claims that the petitioner has established its ability to pay the proffered wage by submitting evidence of its net current assets in the form of a bank statement that was greater than the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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 was considered in determining the petitioner's net current assets.

Counsel asserts that the petitioner has established its ability to pay the proffered wage of \$24,918.36 based on the consulting fees paid to the father of the owners and the previous owner of the company. Again, counsel is mistaken. The consulting fees paid to the father of the owners of the company are considered to be wages paid for services rendered by an employee. There is nothing in the record that would indicate that the company could do without the consulting services provided by the father or that if the father's consulting services were eliminated that the company would not require another consultant to replace the father. Without corroborative evidence that the wages paid to the father are discretionary, those wages cannot be used when determining the petitioner's ability to pay the proffered wage.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter*

*of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, the petitioner has provided tax returns for 1999 through 2004, with only one (2002) of those tax returns establishing the petitioner’s ability to pay the proffered wage of \$24,918.36. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner’s reputation throughout the industry.

The petitioner’s 1999 federal tax return reflects an adjusted gross income of -\$87,052. The petitioner could not have paid the difference of \$17,918.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$7,000 in 1999 from its adjusted gross income.

The petitioner’s 2000 federal tax return reflects an ordinary income or net income of -\$45,923 and net current assets of \$0. The petitioner could not have paid the difference of \$12,918.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$12,000 from either its net income or its net current assets in 2000.

The petitioner’s 2001 federal tax return reflects an ordinary income or net income of \$7,323 and net current assets of \$0. The petitioner could not have paid the difference of \$11,489.90 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$13,428.46 from either its net income or its net current assets in 2001.

The petitioner’s 2002 federal tax return reflects an ordinary income or net income of \$16,890 and net current assets of \$0. The petitioner could have paid the difference of \$10,518.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$14,400 from either its net income in 2002.

The petitioner’s 2003 federal tax return reflects an ordinary income or net income of \$560 and net current assets of \$0. The petitioner could not have paid the difference of \$10,518.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$14,400 from either its net income or its net current assets in 2003.

The petitioner's 2004 federal tax return reflects an ordinary income or net income of \$560 and net current assets of \$0. The petitioner could not have paid the difference of \$10,518.36 between the proffered wage of \$24,918.36 and the actual wages paid to the beneficiary of \$14,400 from either its net income or its net current assets in 2004.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.