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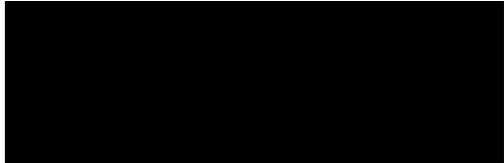
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 13 2008
WAC 03 210 53393

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a music production company. It seeks to employ the beneficiary permanently in the United States as a radio and television sales representative. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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

As set forth in the director's original February 10, 2005, decision, 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)(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 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 either 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 Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is November 13, 1997. The proffered wage as stated on the Form ETA 750 is \$20.65 per hour or \$42,952 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's statement and a letter dated June 4, 2004 from [REDACTED], **Attorney at Law**. **Other relevant evidence includes a copy of a letter dated August 11, 1997 from [REDACTED]**, Vice President, of Luna Music Corporation; a letter dated June 4, 2004 from [REDACTED] General Manager and Secretary, of the petitioner; a copy of a letter dated June 10, 2004 from [REDACTED] of Hispanic Business, Inc.; pictures of the petitioner; copies of the petitioner's 2002 and 2003 Forms 941, Employer's Quarterly Federal Tax Returns; a letter dated July 1, 2003 from [REDACTED], Vice President, of the petitioner; copies of the 1999 and 2000 Forms 1065, U.S. Returns of Partnership Income, for Luna Management, LLC; a copy of the 1997 Form 1120, U.S. Corporation Income Tax Return, for Luna Music Corporation; copies of the 2000 and 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation, for Luna Publishing Corporation; copies of the 1997 through 1999 Forms 1120, U.S. Corporation Income Tax Returns, for Luna Publishing Corporation; copies of the 1998 through 2001 Forms 1120, U.S. Corporation Income Tax Returns, for Moon Broadcasting Corporation; and copies of the 2000 and 2001 Forms 1065, U.S. Returns of Partnership Income, for Moon Holdings, LLC. Previously submitted documentation with a prior petition includes copies of payroll records issued by Luna Records Corporation to the beneficiary for three dates each in 1985, 1986, and 1987; copies of Forms W-2, Wage and Tax Statements, issued by Luna Records Corporation to the beneficiary for 1989, 1990, and 1991; copies of Forms W-2, issued by Luna Music Corporation to the beneficiary for 1992, 1993, 1997, 1998, and 1999; a copy of the 1997 Form 100, California Corporation Franchise or Income Tax Return; a letter dated May 1, 2002 from [REDACTED] Vice President, of Luna Management, LLC; and a letter dated January 26, 2001 from [REDACTED] Senior Vice President, Sony Discos, Inc. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The letter dated June 4, 2004 from [REDACTED] states:

[The petitioner] is a limited liability company wholly owned by [REDACTED]

Over the course of the last ten years, [REDACTED] has formed or acquired several companies, almost all wholly owned. To provided [sic] a cost-effective and manageable work environment, [REDACTED] in 2000, consolidated all employment in a single company, [the petitioner]. [The petitioner] then bills the affiliate for the monthly employment costs. Utilizing this approach allows economies of scale for health care, workers compensation as well as for the requirements for a 401(k) plan.

Please note that Luna Management LLC and Moon Holdings LLC are included in [REDACTED] [REDACTED] 2003 tax return as a Schedule "C" Companies [sic], e.g. 100% owned. . . .Luna Music Corp. was a 100% owned company, from 1978 until 1999. Luna Music Corp. was sold in 1999. Documentation attached.²

The letter dated August 11, 1997 from [REDACTED] of Luna Music Corporation states that Luna Music Corporation is "one of the largest independent business [sic] in the United States in the Latin music field." The

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).

² No documentation of the sale of Luna Music Corp. in 1999 is in the record of proceeding.

letter from [REDACTED] also confirms the beneficiary's employment from August 1984 to the present (August 11, 1997); specifically as a Promotional Event Agent from August 1994.

The letter dated June 4, 2004 from [REDACTED] of the petitioner explains:

[The petitioner] is a privately-owned company involved in two areas:

1. It serves as the employee leasing company for all the affiliate companies under the common ownership of [REDACTED]
2. It provides radio advertising marketing services to affiliates companies, including direct market of spots.

For the fiscal years ending December 31, 2003, 2002, and 2001, revenues (as reported on its Compiled Income Statements,³ were \$4,374,844, \$3,954,259, and \$2,515,797, respectively. At December 31, 2003, the Company employed 133 people.

The letter dated June 10, 2004 from [REDACTED] of Hispanic Business, Inc. states that the petitioner "is ranked #323 on the 2004 Hispanic Business 500® directory of the largest Hispanic-owned companies, an elite list that will be published in our June issue."

The petitioner's 2002 Forms 941 reflect wages paid to the beneficiary of \$8,033.54 for the 1st quarter, \$8,034.06 for the 2nd quarter, \$8,045.74 for the 3rd quarter, and \$8,005.70 for the 4th quarter, equaling \$32,119.04 for the year.

The petitioner's 2003 Forms 941 reflect wages paid to the beneficiary of \$8,022.78 for the 1st quarter, \$8,074.42 for the 2nd quarter, \$8,040.04 for the 3rd quarter, and \$7,940.04 for the 4th quarter, equaling \$32,077.28 for the year.

The letter dated July 1, 2003 from [REDACTED] Vice President, of the petitioner states:

This letter is written in behalf of [the beneficiary], employee of [the petitioner], with holding companies of Luna Management, CostaRola Music, Moon Broadcasting, and Luna Publishing. This conglomerate of companies has been in existence since the early 1980's with [the

³ 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that [REDACTED] refers to are not persuasive evidence. The accountant's report that would have accompanied those financial statements would have made clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report would also make clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In any case, the compiled financial statements [REDACTED] refers to are not in the record of proceeding. 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)).

petitioner] assuming ownership and management responsibilities since 2000. [The beneficiary] was hired to promote the company's musical artists and their music.

The 1999 Form 1065 for Luna Management LLC has an Employer Identification Number (EIN) of 95-4745332 and reflects an ordinary income or net income from Schedule K of \$149,523 and net current assets of \$621,574. It is noted that the tax return indicates that Luna Management LLC has a principal business activity of publishing.

The 2000 Form 1065 for Luna Management LLC reflects an ordinary income or net income from Schedule K of -\$122,411 and net current assets of \$437,772.

The 1997 Form 1120 for Luna Music Corporation has an EIN of 94-2609250 and reflects a taxable income before net operating loss deduction and special deductions or net income of \$425,831. Schedule L was not submitted; therefore, the AAO is unable to determine the corporation's net current assets. The tax return indicates that the corporation is a business service organization involved in promotions.

The 2000 and 2001 Forms 1120S for Luna Publishing Corporation have an EIN of 95-4486960 and reflect ordinary incomes or net incomes from Schedule K of \$2,324 and \$66,204, respectively. The 2000 and 2001 Forms 1120S for Luna Publishing Corporation also reflect net current assets of \$15,170 and \$262,468, respectively. The tax returns indicate that the corporation's business activity is that of publishing.

The 1997 through 1999 Forms 1120 for Luna Publishing Corporation with EIN 95-4486960 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$36,595, \$92,330, and \$22,736, respectively. The 1997 through 1999 Forms 1120 for Luna Publishing Corporation also reflect net current assets of \$24,815, \$77,504, and -\$11,068, respectively.

The 1998 through 2001 Forms 1120 for Moon Broadcasting Corporation have an EIN of 95-4428888 and reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$93,214, \$29,470, \$60,888, and \$0, respectively. The 1998 through 2001 Forms 1120 also reflect net current assets of \$26,264, \$2,122, \$10,766, and \$11,100, respectively. The tax returns indicate that the corporation's product or service is a radio station, and its business activity is radio broadcasting.

The petitioner's 2000 and 2001 Forms 1065 have an EIN of 95-4797469⁴ and reflect ordinary incomes or net incomes from Schedule K of -\$46,812 and -\$47,473, respectively. The petitioner's 2000 and 2001 Forms 1065 also reflect net current assets of -\$47,473 and -\$291,551, respectively. The tax returns indicate that the company's principal business activity is broadcasting, and its principal product or service is a radio station. The 2001 tax return states under Statement 4, Other Current Assets, that there are two accounts receivable – entity, one accounts receivable – member, and an amount due from an affiliate. However, the entities, member, and affiliate are not named on the tax return.

The previously submitted payroll records, issued by Luna Records Corporation (EIN 94-2609250) on behalf of the beneficiary, show wages paid ranging from \$207.70 to \$453.75 for three dates in each year 1985, 1986, and 1987.

The 1989 through 1991 Forms W-2, issued by Luna Records Corporation on behalf of the beneficiary, reflect wages paid to the beneficiary of \$13,911.05, \$22,274.50, and \$24,901.66, respectively.

⁴ It is noted that this EIN matches the EIN represented on the I-140 petition.

The 1992, 1993, and 1997 through 1999 Forms W-2, issued by Luna Music Corporation on behalf of the beneficiary, reflect wages paid to the beneficiary of \$30,796.86, \$29,859.07, \$28,035.25, \$36,170.50, and \$12,074, respectively.

The letter dated May 1, 2002 from [REDACTED] Vice President, Luna Management, LLC, states:

Luna Music is a record label that began operations in 1978. Along with the record label Luna Music also had an artist management division. Luna Music became [one] of the most successful independent labels in the music industry and in April of 1999, the decision was made to sell the record label to Sony Discos, keeping only the management division.

Since the name of the record label was Luna Music, we began operating as Luna Management, LLC. [The beneficiary] has been employed by our company since September of 1984 and continues to be employed by us. [The beneficiary] continues his position as Promotions Manager.

The letter dated January 26, 2001 from [REDACTED] Senior Vice President, Sony Discos, Inc. states:

The following is to confirm that I have known [the beneficiary] since 1984, when he began working for Luna Music Corporation, of which I was president. [The beneficiary] was warehouse manager and because he works well with people he was promoted to the promotions department. When the company was sold in 1999, [the beneficiary] was one of the employees that was [sic] transferred to Sony Discos. [The beneficiary] is now promotion's manager for the Regional Mexican Division and is responsible for having our artists on the radio in the entire United States.⁵

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$42,952 as "tax materials and other documentation were submitted that amply evidenced the [petitioner] is the

⁵ It is noted that this letter is inconsistent with the letter dated May 1, 2002 from Irene Escalante in that it specifically states that the beneficiary was transferred to Sony Discos and did not remain with Luna Management, LLC.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on 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.

No evidence has been submitted that shows that Sony Discos is part of Luna Management, LLC.

successor-in-interest to Luna Music Corporation (as outlined in the submitted letter of the petitioner's corporate attorney, . . .).”

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. 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 the instant case, the petitioner would need to show that it is a successor in interest to the original business, which filed the labor certification. The petitioner must show that it has assumed all the rights, duties, and obligations of that business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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 750, signed by the beneficiary on October 27, 1997, the beneficiary claims to have been employed by Luna Music Corporation (the business that filed the labor certification) from August 1984 to the present (October 27, 1997). In addition, counsel has submitted the 1992, 1993,⁶ and 1997 through 1999 Forms W-2, issued by Luna Music Corporation on behalf of the beneficiary, as proof that the beneficiary was employed by Luna Music Corporation during those years.

Luna Music Corporation is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$42,952 and the actual wages paid to the beneficiary in 1997 through part of 1999. Those differences were \$14,916.75 in 1997, \$6,781.50 in 1998, and \$30,878 in 1999.

In 2000, the petitioner was organized as domestic general partnership, and in 2001 through 2003, the petitioner was organized as a limited liability company. Counsel has submitted copies of the petitioner's 2002 and 2003 Forms 941 establishing that it employed the beneficiary in 2002 and 2003 and paid wages to the beneficiary of \$32,119.04 in 2002 and \$32,077.28 in 2003. Again the petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$42,952 and the actual wages paid to the beneficiary in part of 1999 through 2003. There is no evidence in the record of proceedings that establish that the petitioner employed the beneficiary in part of 1999 or 2000 and 2001. Therefore, the petitioner must establish that it had sufficient funds to pay part of the beneficiary's proffered wage in 1999 and the complete proffered wage of \$42,952 in 2000 and 2001. The difference between the proffered wage of \$42,952 and the actual wages paid to the beneficiary in 2002 and 2003 were \$10,832.96 in 2002 and \$10,874.72 in 2003.

⁶ It is noted that the 1992 and 1993 Forms W-2 are for two years prior to the priority date of November 13, 1997, and, therefore, have little evidentiary value when considering Luna Music Corporation's ability to pay the proffered wage from the priority date and continuing until its sale in 1999. Therefore, the 1992 and 1993 Forms W-2 will not be considered when determining Luna Music Corporation's ability to pay the proffered wage from the priority date and continuing until 1999.

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 (9th 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 (7th 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

In 1997, Luna Music Corporation was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The 1997 tax return for Luna Music Corporation demonstrates that its net income was \$425,831. Luna Music Corporation could have paid the difference of \$14,916.75 between the proffered wage of \$42,952 and the actual wages paid of \$28,035.25 from its net income in 1997. However, no tax returns were submitted for 1998 and 1999. Therefore, there is no evidence that Luna Music Corporation had sufficient funds to pay the difference of \$6,781.50 in 1998 and the difference of \$30,878 in 1999 between the proffered wage of \$42,952 and the actual wages paid of \$36,170.50 in 1998 and \$12,074 in 1999 from its net incomes in those years.

In 2000, the petitioner was organized as a domestic general partnership. A partnership consists of a general partner(s) and may also have limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The record of proceeding does not contain enough information regarding the general partner's personal expenses. As such, the petitioner has not demonstrated that the general partner's assets may be utilized to pay the proffered wage. In addition, the petitioner's 2000 tax return reflects a net income from Schedule K of -\$46,812. The petitioner could not have paid the proffered wage of \$42,952 from its net income in 2000.

In 2001, the petitioner was organized as a limited liability company. Where a LLC'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 LLC 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 LLC'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).

In the instant case, the petitioner's net income from Schedule K for 2001 was -\$133,595. The petitioner could not have paid the proffered wage of \$42,952 from its net income in 2001. In addition, the petitioner has failed to submit its 2002 and 2003 tax returns, and therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$10,832.96 in 2002 and the difference of \$10,874.72 in 2003 between the proffered wage of \$42,952 and the actual wages paid of \$32,119.04 in 2002 and \$32,077.28 in 2003 from its net incomes in 2002 and 2003.

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.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 18⁸. If a corporation'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. The petitioner's net current assets in 2000 and 2001 were -\$46,812 and -\$291,551, respectively. The petitioner could not have paid the proffered wage of \$42,952 from its net current assets in 2000 and 2001. In addition, the petitioner has failed to submit its 2002 and 2003 tax returns, and therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$10,832.96 in 2002 and the difference of \$10,874.72 in 2003 between the proffered wage of \$42,952 and the actual wages paid of \$32,119.04 in 2002 and \$32,077.28 in 2003 from its net current assets in 2002 and 2003.

Furthermore, the petitioner has not submitted the 1998 and 1999 tax returns for Luna Music Corporation, and therefore, the AAO is unable to determine if Luna Music Corporation had sufficient funds to pay the difference of \$6,781.50 in 1998 and the difference of \$30,878 in 1999 between the proffered wage of \$42,952

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.

⁸ The year-end current liabilities for Form 1065 are shown on lines 15 through 17.

and the actual wages paid to the beneficiary of \$36,170.50 in 1998 and \$12,074 in 1999 from its net current assets in 1998 and 1999.

On appeal, counsel contends that the petitioner has established that it is a successor-in-interest to Luna Music Corporation and that it has established its ability to pay the proffered wage of \$42,952 from the tax materials and other documentation submitted.

Counsel is mistaken. A successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all the rights, duties, obligations, and assets of the original entity. The petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger, evidence that the predecessor company had the ability to pay the wage at the time the application for labor certification was filed, and evidence that the successor company continues to have that ability. There is no evidence of the sale of part of Luna Music Corporation, no evidence that the part of Luna Music Corporation that was kept was renamed Luna Management, LLC, or that the petitioner, as a holding company for Luna Management, LLC, assumed all the rights, duties, obligations, and assets of Luna Music Corporation. 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)).

Moreover, as a successor in interest, the petitioner is required to establish that it had the continuing financial ability to have paid the certified wage from the purchase date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The evidence in the record does not establish that the petitioner has the continuing ability to pay the proffered wage from the date of purchase of Luna Music Corporation. Since the petitioner is a limited liability company and since it is 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.⁹ 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, if they wished, 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. In addition, the petitioner may not pick and chose which tax returns from its member companies it wishes CIS to use in determining its ability to pay the proffered wage. Therefore, the AAO does not find that the petitioner is a successor in interest to Luna Music Corporation for immigration purposes. The AAO also does not find that Luna Music Corporation has established its ability to pay the proffered wage from the priority date of November 13, 1997 to its sale in 1999 or that the petitioner has established its ability to pay the proffered wage from 1999 and continuing to the present.^{10 11}

⁹ 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.

¹⁰ Another issue of concern, but one that does not affect the adjudication of the current visa petition involves a review of records that shows that the beneficiary appears to have previously used a social security number that does not belong to him. Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on a Social Security

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

¹¹ It is noted that the petitioner has filed an additional three Forms I-140 subsequent to the beneficiary's filing, and therefore, must establish its continuing ability to pay all the appropriate proffered wages from the priority date of each visa petition and continuing to the present.