U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 12 2005

WAC 03 676 50279

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a home for the elderly and developmentally disabled. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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.

On appeal, counsel submits a brief and additional evidence.

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 granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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, the day 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). Here, the Form ETA 750 was accepted for processing on November 14, 1997. The proffered wage as stated on the Form ETA 750 is $1,178.67 per month, which equals $14,144 per year.

The employer originally identified on the Form ETA 750 was [redacted] California. During the pendency of that application it was amended to indicate that the petitioner had replaced that other company as the beneficiary's prospective employer.

The substituted petitioner has submitted two petitions for the beneficiary. The first petition was submitted on April 9, 2002. On that petition, the petitioner stated that it was established during 1998 and that it employs eight workers. The petition states that the petitioner's gross annual income is $160,000 and that its net annual income is $80,000.[1] On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have

[1] None of the evidence submitted supports that statement.

worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Orange, California.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on May 24, 2002, the California Service Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also noted that the evidence must cover the calendar years from 1997 to 2001. The Service Center also requested that the petitioner provide copies of its California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Returns. Those returns show that the petitioner incorporated on August 20, 1998 and reports taxes pursuant to the calendar year. Counsel submitted a letter stating that, because the petitioner incorporated during August of 1998 and began operations during January of 1999 it has no tax returns for 1997 and 1998.

The petitioner's 1999 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $2,087 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of $14,665 and no current liabilities, which yields net current assets of $14,665.

The petitioner's 2000 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $0 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of $0.

The Request for Evidence included a request for evidence pertinent to the beneficiary's employment claims. In response to that request counsel submitted a letter, dated July 29, 2002, from [redacted] indicating that it employed the beneficiary from May 1997 to August 1998. That the company issued that letter on July 29, 2002 indicates that [redacted] was apparently still in existence on that date.

Counsel submitted a letter, dated July 30, 2002, from the petitioner's president stating that he is also the president of Downey Breast Clinic, Incorporated, and that it pays the employees of both companies. Counsel submitted the California Form DE-6 Quarterly Wage Reports of Downey Breast Clinic for the last two quarters of 2001 and the first two quarters of 2002. Those reports show that Downey Breast Clinic paid the beneficiary $5,751.12, $5,751.12, $5,692.98, and $5,751.00 during those four quarters, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 30, 2002, denied the petition.

On January 3, 2003 the petitioner filed another Form I-140 petition seeking to employ the beneficiary. With that petition counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage.

On May 27, 2003 the California Service Center issued a Request for Evidence in this matter. The Service Center requested, *inter alia*, copies of annual reports, federal tax returns, or audited financial statements to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted (1) a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, (2) copies of the California Form DE-6 Quarterly Wage Reports of Downey Breast Clinic, Incorporated for the second and third quarters of 2002 and first and second quarters of 2003, (3) the 1999, 2000, and 2001 Form 1120S, U.S. Income Tax Returns for an S Corporation of Downey Breast Clinic, and (4) an unaudited profit and loss statement of Downey Breast Clinic.

The petitioner's 2001 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $0 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of $0.

The Form DE-6 reports show that Downey Breast Clinic paid the beneficiary $5,951, $6,952, $6,951, and $5,792 during the first and second quarters of 2002 and the first and second quarters of 2003, respectively.

On August 20, 2003 the Service Center issued another Request for Evidence. The Service Center requested evidence of the relationship between the petitioner and Downey Breast Clinic. The Service Center also requested, consistent with 8 C.F.R. § 204.5(g)(2) that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted (1) a letter, dated October 31, 2003, from the petitioner's president, (2) the 1997 and 1998 Form 1040 U.S. Individual Income Tax Returns of Felino and Guadalupe Elias, (3) the petitioner's articles of incorporation, dated June 2, 1998, and (4) a fictitious name permit for Downey Breast Diagnostic Clinic, Incorporated.

In the October 31, 2003 letter the president states that Spring House Care pays an annual management fee to Downey Breast Clinic covers both the payroll expense and actual management. The president states that the fee, the majority of which constituted the petitioner's payroll, was $43,118 during 1999, $38,138 during 2000, and $50,000 during 2001.

The petitioner's president also noted that the Form ETA 750 in this matter was originally filed by F&G Elias Home, but that it was amended October 1999 to reflect the substitution of Spring House Care as petitioner. The president states that the personal tax returns of [redacted] and [redacted] the owner's of [redacted] demonstrate their continuing ability to pay the proffered wage during 1997 and 1998.

The 1997 and 1998 personal income tax returns include corresponding Schedules C that show that Mr. and Mrs. [redacted] operated the [redacted] as a sole proprietorship during those years.

The 1997 Schedule C shows that during 1997 the petitioner returned a net profit of $25,305. The tax return shows that during that year its owners declared adjusted gross income of $22,193, including the petitioner's profit.

The 1998 Schedule C shows that during that year the F&G Elias Home Care returned a net profit of $32,593. The 1998 tax return shows that the owner's declared adjusted gross income of $65,354 during that year, including the petitioner's profit.

The director found that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date and denied the petition on November 22, 2003. In that decision the director stated that the 1997 and 1998 personal income tax returns appear to indicate sufficient adjusted gross income to pay the proffered wage during those years,[2] and that the petitioner's 1999 corporate return shows net current assets sufficient to pay the proffered wage, but that the petitioner had failed to demonstrate the ability to pay the proffered wage during 2000 and 2001.[3]

On appeal counsel submits (1) a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return, (2) copies of checks drawn by the petitioner to the beneficiary's order, and (3) copies of monthly statements of the petitioner's bank account.

The petitioner's 2002 income tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of $0 during that year. At the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of $0.

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that approval of the petition is not precluded by the fact that the petitioner's net profit failed to exceed the amount of the proffered wage during one or more years since the priority date. Counsel also cites two non-precedent decisions of this office for the proposition that checking account statements can show the ability to pay the proffered wage and the proposition that, if the petitioner paid the proffered wage to the beneficiary during a given year, it has thereby demonstrated the ability to pay the proffered wage during that year. Counsel asserts that the petitioner has actually employed the beneficiary since August of 1998, and cites the submitted copies of checks as support for that assertion.

Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

Counsel emphasizes the amount of the petitioner's total assets and its gross receipts in asserting that it has demonstrated the ability to pay the proffered wage. Counsel also provides a copy of the petitioner's 2002 Form 1120 U.S. Corporation Income Tax Return and emphasizes the increase in its gross receipts over 2001 as an index of its ability to pay the proffered wage.

Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would

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[2] This office disagrees with the director's determination as to 1997, as is further discussed below.

[3] On appeal, counsel submitted evidence showing that during 2001 the petitioner paid wages to the beneficiary in excess of the annual amount of the proffered wage. This office will also, therefore, overturn the director's finding as to 2001.

somehow have reduced its expenses[4] or otherwise increased its net income,[5] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.[6] 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 reported on its tax returns.

Counsel's reliance on the unaudited financial statement in this case is similarly misplaced. 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. 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.

Counsel's citation of *Matter of Sonegawa, supra*, is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity in *Sonegawa* petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, 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.

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[4] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

[5] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

[6] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

The petitioner's clients had been included in 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 couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the evidence does not demonstrate that the petitioner has ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2000, 2001, and 2002 were uncharacteristically unprofitable years for the petitioner. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did establish that it employed and paid her with checks drawn to her order. Those checks show that the petitioner paid the beneficiary $12,699.20 during 2000 and $17,250 during 2001. The Form DE-6 reports submitted show that Downey Breast Clinic paid the beneficiary $11,502.24 during 2001, $24,436.98 during 2002 and $12,743 during 2003. The petitioner's president's letter of October 31, 2003, supported by the large "management fee" claimed on each of its tax returns, show that those salaries were, in effect, paid by the petitioner.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

Contrary to counsel's implicit assertion, however, the petitioner's total assets are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay

wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $14,144 per year. The priority date is November 14, 1997.

The original petitioner in this matter was [redacted] The substituted petitioner is apparently asserting that it is F&G Elias Home Care's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). The successor petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop, Inc. supra.*

[redacted] was, at all salient times, a sole proprietorship. A sole proprietorship, unlike a corporation, is not legally separate from its owner. Therefore the sole proprietor's income and assets are included in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses and pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents on the amount remaining. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982, *aff'd* 703 F2d 571 (7th Cir. 1983).

During 1997 the owners of F&G Elias Home Care had adjusted gross income of $22,193, including the petitioner's profit. If obliged to pay the proffered wage out of that amount, they would have retained a balance of $7,749 on which to support their household. To expect that they could have supported themselves on that amount is unreasonable. The record contains no evidence that they had any other income or assets upon which to support themselves or with which they could have paid the proffered wage. The petitioner has not demonstrated that [redacted] was able to pay the proffered wage during 1997.

During 1998 the owners of [redacted] had adjusted gross income of $65,354, including the petitioner's profit. If obliged to pay the proffered wage out of that amount, they would have retained a balance of $51,210 on which to support their household. The Service Center requested no evidence pertinent to the budget or household expenses of the owners of the [redacted] nd the record contains none. Under these circumstances this office is unable to find that the owners [redacted] were unable to support themselves on the $51,210 that would have remained after paying the proffered wage. The petitioner has shown tha [redacted] was able to pay the proffered wage during 1998.

The petitioner commenced operations during January of 1999. The petitioner has been held, at all salient times, as a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and

assets of the petitioner's owner and of other corporations is irrelevant to the ability of the petitioner to pay the proffered wage and shall not be further considered.

The petitioner declared taxable income before net operating loss deduction and special deductions of $2,087 during 1999. That amount is insufficient to pay the proffered wage. At the end of that year, however, the petitioner had net current assets of $14,665. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

Having demonstrated that it paid the beneficiary $12,699.20 during 2000 the petitioner is obliged to demonstrate the ability to pay the $1,444.80 balance of the proffered wage. The petitioner declared taxable income before net operating loss deduction and special deductions of $0 during 2000. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had net current assets of $0. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no reliable evidence of any other funds available to it during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during 2000.

Checks the petitioner drew to the beneficiary show that it paid her $17,250 during 2001. In addition, the Form DE-6 reports show that the petitioner, through Downey Breast Clinic, paid the beneficiary another $11,502.24. Having demonstrated that it paid the beneficiary a total of $27,752.24 during that year, an amount that exceeds the proffered wage, the petitioner has demonstrated the ability to pay the proffered wage during 2001.

The Form DE-6 reports show that the petitioner, through Downey Breast Clinic, paid the beneficiary $24,436.98 during 2002. That amount exceeded the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate the ability to pay the proffered wage during 1997 and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record contains an additional issue not raised in the decision of denial. As was noted above, [redacted] filed the Form ETA 750 in this case. The substituted petitioner apparently seeks to use that petition as the successor-at-interest of [redacted] Care.

The successor-in-interest petitioner must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

In the instant case, the petitioner submitted no evidence of how it acquired [redacted] In fact, the letter of July 29, 2002 from [redacted] appears to indicate that, on that date [redacted] Care was still in existence, and separate from the petitioner. This apparently indicates that the substituted

petitioner did not acquire [redacted] and did not acquire all of its rights, duties, obligations, and assets. In that event, the petitioner would not be entitled to rely on the Form ETA 750 submitted and the petition in this case would not be supported by a valid labor certification.

Because this issue was not raised below, however, and the petitioner was not accorded an opportunity to respond to it, this office does not base the decision today, even in part, on that issue.

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.