U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 29 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Nebraska Service Center. The petitioner filed a Motion to Reopen. At the time that the motion was filed, a different acting director was in place. This acting director granted the petitioner's motion and affirmed the earlier decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had failed to establish that it was a successor-in-interest to the entity which filed the Form ETA 750. Also, the petitioner had not established that it and its predecessors[1] had the continuing ability to pay the beneficiary the proffered wage from the priority date of the visa petition onwards. Therefore, the director denied the petition.

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

As set forth in the acting director's October 13, 2005 decision to affirm the earlier denial, at issue in this case is whether the petitioner is a successor-in-interest to the entity that filed the Form ETA 750 and whether the petitioner has demonstrated that it and its predecessors have had the ability to pay the proffered wage from the priority date onwards.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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.

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[1] The petitioner has indicated that there has been more than one successor to the entity which filed the Form ETA 750 since the filing of that form.

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 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d).

In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that its predecessors had the ability to pay the proffered wage from the priority date until the date that the intervening successors or the petitioner succeeded it, and that the successor had the ability to pay the wage from that date onwards. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

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

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $11 per hour, 40 hours per week or $22,880 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position and six years of grade school education.

The AAO takes a *de novo* look at issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

Evidence in the record includes:

- the Form ETA 750 filed by [redacted] Mexican Foods of Kearns, Utah;
- the Form I-140, Immigrant Petition for Alien Worker, filed by [redacted] of Murray, Utah;
- the Form 1040, Individual U.S. Income Tax Return, for 2004 for [redacted] and [redacted] including Schedule C, Profit or Loss from Business (Sole Proprietorship), which indicates that [redacted] are the sole proprietors of [redacted]s Mexican Food, located at the same address as the petitioner;
- the Form 1040 for 2003 for [redacted] which does not include the Schedule C, but which does indicate that the beneficiary is [redacted] mother-in-law;
- an affidavit of [redacted] dated September 15, 2005, in which [redacted] makes various statements relating to the entity that submitted the Form ETA 750 and its several successors, and which includes the claim that since July of 2003 [redacted] has been the owner of [redacted]s Mexican Food restaurant, a business which is part of a national franchise of restaurants and a successor-in-interest to the relevant entities in this matter;
- a statement from [redacted] ted September 12, 2005 which indicates that in 1996, [redacted] opened [redacted] of Murray, Utah and that in late 1998, more than seven years before the Form I-140 was filed listing [redacted] of Murray, Utah as the petitioner, this entity split into two separate businesses, [redacted] owned by [redacted] and [redacted] apparently owned by [redacted] brother, [redacted], neither of which bears the name [redacted]; [redacted] also indicates, in contradiction to

[2] 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).

affidavit, that he continued to own through the 2005 date of his statement;

- the Form 1120, U.S. Corporation Income Tax Return, for 1998, 1999, 2000, 2001, 2002, 2003 and 2004 for [redacted] Mexican Food, Inc. of Oceanside, California, attached to which is a cover letter indicating that is doing business in Oceanside, California under the name [redacted] Mexican Food;
- forms which indicate that [redacted] paid taxes to the State of Utah on behalf of [redacted]s Mexican Food of Utah, Murray, Utah, from 1998 through 2003;
- a letter from a Wells Fargo Bank, Personal Banker dated August 4, 2005 which indicates that [redacted] owns [redacted] Mexican Food restaurant and that he keeps a certain average balance in his business checking account and his business savings account at Wells Fargo;
- the Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002 and 2003 for [redacted]., located in Murray, Utah at a different address than the petitioner;
- the printout of a [redacted] record for [redacted]'s Mexican Food which indicates, [in contradiction to [redacted] affidavit listed above], that in 2004 [redacted] still owned the restaurant located at the address of the petitioner;
- pay stubs for [redacted] and [redacted] issued by [redacted] Mexican Food and [redacted]-Utah for various pay periods during 2000, 2001 and 2002;
- the Form W-2, Wage and Tax Statement, for 1997, 1998, 1999, 2000, 2001, 2002 and 2003 for Jose Montes issued by: [redacted]. of Phoenix, Arizona (1997); [redacted]. of Salt Lake City, Utah (1998); [redacted] Mexican Food of Salt Lake City, Utah (1999); [redacted] of Salt Lake City, Utah (2000); [redacted] of Salt Lake City, Utah (2001); [redacted]s Mexican Food of Salt Lake City, Utah and of Murray, Utah (2002); and [redacted] of Salt Lake City Utah (2003).
- the Form W-2, Wage and Tax Statement, for [redacted]' wife, for 2001 issued by [redacted] of Salt Lake City, Utah; for 2002 issued by Mexican Food of Salt Lake City, Utah; and for 2003 issued by [redacted]
- pay stubs for the beneficiary that indicate that during 1998 [redacted] Mexican Food of Salt Lake City, Utah paid the beneficiary $4,428;
- documents which indicate that [redacted] and/or his wife owed various debts in 2005 to [redacted]'s Department Store, GMAC and the University of Utah Hospitals and Clinics.

The petitioner did not provide any other evidence to support the claim that the petitioner is a successor-in-interest to the entity which filed the Form ETA 750 or evidence that the petitioner and its predecessors have had the ability to pay the proffered wage from the priority date onwards.

The petition in this matter was filed on May 12, 2005. On the petition, the petitioner claimed to have been established in 1975 and to currently employ six workers. On the Form ETA 750B, signed by the beneficiary on January 9, 1998, the beneficiary claimed to have worked for the entity that filed that form from December 1997 until the date the form was signed.

On appeal, the petitioner asserts that the petitioner has demonstrated the ability to pay the wage from the priority date onwards in that it has opened a new restaurant and is in the process of opening others.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition that is later based on that Form 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). Further, in this case, the petitioning entity is claiming that it is a successor-in-interest to a successor-in-interest to the entity that filed the Form ETA 750. A successor-in-interest must submit proof of any change in ownership and of how the change(s) 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*, 19 I&N Dec. 481 (Comm. 1981).

Without evidence of a successor-in-interest relationship, the petitioner [redacted] of Murray, Utah, may not utilize the Form ETA 750 filed by [redacted] Mexican Foods of Kearns, Utah, and Citizenship and Immigration Services (CIS) may not accept the petition. The record does not establish that the petitioner is a successor-in-interest to the entity which filed the Form ETA 750 that accompanied the petition.

[redacted] indicated in his statement dated September 12, 2005 that in 1996 he opened a restaurant named [redacted] and that in late 1998 that entity split into two restaurants, one named [redacted] of which [redacted] was the owner, and one named [redacted] also specified that he continued to own [redacted] at the time of his statement, which was made several months after the Form I-140 was filed.

[redacted] claimed in his affidavit dated September 15, 2005 that [redacted]'s brother, [redacted] became owner of [redacted] the second restaurant created in late 1998. [redacted] also claimed that [redacted] sold his restaurant, [redacted]'s, to [redacted] in early 2003 and that [redacted] bought it from [redacted] in late 2003. However, [redacted] did not provide any formal, documentary evidence to indicate: that [redacted], the entity owned by [redacted], became the successor-in-interest to the entity which first filed the Form ETA 750; that [redacted] became the owner of a restaurant that is a successor-in-interest to [redacted] or that [redacted] now owns a restaurant which is a successor in interest to the restaurant which [redacted] owned. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, as referenced above, [redacted] indicated in his statement that he continued to own [redacted] late in 2005 after Mr. Montes filed the Form I-140. It is also noted that [redacted] is the employer that filed the Form ETA 750 in January 1998. However, in early 1999, the DOL reviewed the Form ETA 750, together with the employer and the beneficiary, and changed the employer's name to [redacted] Mexican Foods, both on the Form ETA 750A and on the Form ETA 750B. The employer initialed this change on the Form ETA 750A using the initials: [redacted]', apparently signifying [redacted] That is, the record indicates that after [redacted] split in late 1998, it was [redacted] restaurant, not [redacted], [redacted]'s restaurant, that gained rights to the Form ETA 750 filed by [redacted] in January 1998. Thus, it appears that only [redacted] Mexican Foods owned by [redacted] or its successor-in-interest might use the instant Form ETA 750 to support a Form I-140 petition.

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[3] The beneficiary also initialed this change in the name of her employer on the Form ETA 750B with the initials: "[redacted]

In addition, in order to maintain the original priority date, if the successor-in-interest relationships claimed are established in this case, the successor must demonstrate that its predecessors had the ability to pay the proffered wage from the priority date until the date that the intervening successor(s) or the petitioner succeeded it, and that the successor had the ability to pay the wage from that date onwards. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

Concerning the petitioner's ability to pay the proffered wage, even if the petitioner were able to document: that it is a successor-in-interest to [redacted]'s restaurant; that [redacted]'s restaurant is a successor-in-interest to [redacted]'s restaurant, [redacted]; and that [redacted]'s is a successor-in-interest to [redacted] Mexican Foods, the employer who filed the Form ETA 750, as certified, such that CIS might accept its petition and review its financial documents, the documents in the record do not establish a continuing ability to pay from the priority date onwards.

On appeal, counsel indicates that the petitioning entity has decided to open additional restaurants and that this demonstrates a continuing ability to pay the proffered wage. No evidence in the record supports the assertion that the petitioner has opened an additional restaurant and that it plans to open others. The undocumented 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). Further, regardless of whether it might currently be in a position to open an additional restaurant, the petitioner must demonstrate an ability to pay the proffered wage, and in the case of a successor-in-interest its ability to pay and its predecessor(s) ability to pay, from the priority date of January 14, 1998 onwards through documentation such as tax returns, audited financial statements and annual reports, or it must provide well supported reasons why such documents do not adequately reflect its financial position. *See* 8 C.F.R. § 204.5(g)(2)

Further, there is no indication in the record, nor does counsel even assert, that [redacted]'s Mexican Food, Inc. of Oceanside, California is a successor-in-interest to the entity in Kearns, Utah that filed the Form ETA 750. Thus, the various tax returns for [redacted]'s Mexican Food, Inc. of Oceanside, California submitted into the record subsequent to the filing of the appeal will not be considered further.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. A pay stub in the record indicates that [redacted]'s Mexican Food of Salt Lake City, Utah paid the beneficiary $4,428 during 1998. If the petitioner were able to demonstrate that [redacted]'s Mexican Food of Salt Lake City was a successor-in-interest to the entity in Kearns, Utah that filed the Form ETA 750, it would still need to demonstrate the ability to pay the remaining balance of the proffered wage or $18,452 in 1998, as well as the ability to pay the full proffered wage, $22,880, in the years subsequent to 1998.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period of analysis, CIS will next examine the net income figure 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. 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 is claiming that it is a successor-in-interest to the entity that filed the Form ETA 750 in January 1998, and that it is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *See 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). Thus, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered when analyzing 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 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, the sole proprietor indicates on the Form 1040 that he and his wife have four dependents.[4] He submitted copies of bills he received from various businesses and he indicated that his family has no grocery expense because the family members eat all of their meals at the sole proprietor's restaurant. The sole proprietor did not provide detailed information regarding his actual annual or average monthly household expenses. The tax returns submitted reflect the following information for the following years:

	2003	2004
Proprietor's adjusted gross income (Form 1040)	$40,617	$60,728
Petitioner's gross receipts or sales (Schedule C)	**Sch. C not submitted**	**$499,174**
Petitioner's wages paid (Schedule C)	Sch. C not submitted	$59,541
Petitioner's net profit from business (Schedule C)	Sch. C not submitted	$65,345

Regarding 2003, the sole proprietor, [redacted] failed to document for the record the entity for which he was sole proprietor that year in that he failed to include the Schedule C as an attachment to the Form 1040. Even if he was able to document that in 2003 he was sole proprietor for an entity that is a successor-in-interest to the entity that filed the Form ETA 750, the adjusted gross income of $40,617 still would not demonstrate an ability to pay the proffered wage. That is, this office finds that it would not have been possible for [redacted] and his wife to support a household of six during 2003 on the balance that would have been left after subtracting the proffered wage of $22,880 from the proprietor's adjusted gross income of $40,617.

The office notes that indicates that the beneficiary will be assuming the tasks that he and his wife performed for the proprietorship, and as such their salaries should be considered funds available to pay the wage. Even if [redacted]s could document for the record that the proprietorship in question is a successor-in-

[4] It is noted that [redacted] lists the beneficiary as his mother-in-law and as one of his dependents on the two Forms 1040 which he submitted into the record. [redacted] also lists his two children as well as the beneficiary's son, [redacted], as dependents on these forms.

interest to the relevant entities in this matter; and could document that he and his wife had been performing the work of the proffered position, and that they were genuinely needed to perform other tasks, not just stepping aside out of preference for a non-U.S. worker, who is also the proprietor's mother-in-law; etc., the wages listed on the Forms W-2 in the record for 2003 for [redacted] and his wife amount to $12,500. Their $12,500 in wages are part of the $40,617 in adjusted income considered above. This office shall not double count these wages, nor any other amounts, when analyzing a proprietor's ability to pay the proffered wage.

Regarding 2004, even if the sole proprietor could document that during 2004 he was proprietor of a business that is a successor-in-interest to the relevant entities in this matter, an adjusted gross income of $60,728 would not have been sufficient to support a household of six in 2004 and to pay the proffered wage of $22,880.

Also submitted into the record were the Forms 1120S for [redacted]. for 2002 and 2003. Even if it was documented for the record that these returns are for a successor-in-interest to the entity that filed the Form ETA 750 and a predecessor to the petitioner in this matter, they each show an ordinary income (loss) or net income far below the proffered wage. Also, the forms submitted do not include the Schedule L, and as such, the petitioner has failed to document whether this entity had positive net current assets which might be considered in this analysis.

Regarding the various other Forms W-2 in the record for [redacted] and his wife for earlier years, even if it could be shown that these two performed the work of the proffered position, and even if it could be shown that the entities for which they worked during these years were successors-in-interest to the employer listed on the Form ETA 750, as certified, this office notes that even when amounts from these Forms W-2 are combined, they add up to amounts that are less than the proffered wage for each given year. This office notes further that even if the $4,428 that the beneficiary apparently earned in 1998 was added to the amount on the Form W-2 for 1998 for [redacted] in the record, it would still equal an amount that is less than the proffered wage.[5]

The statement from the Wells Fargo Personal Banker dated August 4, 2005, regarding the average balances in [redacted] business checking and business savings account does not state over what period these averages were calculated. Thus, even if it were shown that these amounts relate to a relevant successor-in-interest in this matter, this statement may not be used to demonstrate a continuing ability to pay the wage from the priority date onwards, or even a portion of that period. Also, no reason was provided as to why CIS should consider the statements of a personal banker rather than the documents normally required by regulation to demonstrate the ability to pay, such as the sole proprietor's tax returns. *See* 8 C.F.R. § 204.5(g)(2).

Where the record does not indicate that the sole proprietor has sufficient net income or sufficient personal assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities and the totality of the circumstances concerning a petitioner's financial performance, when determining its ability to pay the wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition that 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 more than the petitioner's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's net profit, including financial data, the petitioner's reputation and clientele, its number of employees, future business plans, news articles, and explanations of the petitioner's temporary financial difficulties. The Regional Commissioner looked beyond the petitioner's inadequate net income for the year of filing and found that the petitioner's expectations of continued business growth and increasing profits were

[5] For the year 1998, there is no Form W-2 for [redacted]' wife, [redacted] in the record.

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 proffered wage.

Accordingly, CIS may, in its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a sole proprietor's net income and personal 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 relevant to the petitioner's ability to pay the proffered wage. In this case, however, there is no clear evidence in the record of an ability to pay even a portion of the proffered wage for even a portion of the relevant period of analysis, nor is there even evidence that the employer listed on the petition is a successor-in-interest to the employer listed on the Form ETA 750, as certified. Thus, there is not sufficient evidence in the record to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, the evidence in the record is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonegawa*, nor to establish whether 1998 through 2004 were uncharacteristically unprofitable years for the petitioner/sole proprietor.

This office notes an additional issue that was not thoroughly developed in the two decisions issued by the acting directors, but which also provides grounds on which to deny the instant petition. This office would note too that a petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Pursuant to 20 C.F.R. § 656.20(c)(8)(2004)[6] the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or the relationship may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (May 15, 2000).

In this case, the beneficiary is apparently the mother-in-law of the individual who is claiming that he is the sole proprietor of a successor-in-interest to the entity that filed the Form ETA 750. CIS must scrutinize whether this relationship by marriage had an impact on the petitioner's recruitment efforts before the petition may be approved.

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[6] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the Department of Labor by the acronym PERM for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the labor certification application in this matter was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and those which follow are to the DOL regulations as in effect prior to the PERM amendments.

Where the petitioner's sole proprietor and the beneficiary are son-in-law and mother-in-law, it raises the question of whether the petitioner is attempting to employ its relative in preference to a U.S. worker. The relationship by marriage also raises the following questions: whether the petitioner actually needs to fill the proffered position; whether the petitioner attempted in good faith to locate a suitable U.S. worker; and whether U.S. workers were rejected merely out of preference for the family member.

Under these circumstances, any evidence that the job offer may not be *bona fide*, that the employer may not truly have attempted to locate a U.S. worker for the position, that evidence may have been falsified, or that the beneficiary may not actually be qualified pursuant to the terms of the approved labor certification, when considered with the relationship by marriage, may be sufficient to deny the petition. This is particularly likely to lead to a denial where the DOL was not made aware of the relationship by marriage when ruling on the labor certification application.

In this case, DOL apparently could not have been made aware of any relationship by marriage when it ruled on the labor certification application. That is, the petitioner is not the same as the entity that filed the Form ETA 750 before DOL. The record does not indicate that a relationship by marriage existed between the beneficiary and the owner of the business entity listed on the Form ETA 750, as certified. Nonetheless, this office also notes that the record contains no evidence that the petitioner denied the relationship by marriage or withheld it in response to a question put forth by the DOL or by CIS. Under these circumstances, the failure to disclose the relationship by marriage may not be fairly characterized as a material misrepresentation or material omission.

Yet, as noted above, in the record there is evidence that contradicts the petitioner's assertions that its business in Murray, Utah is a successor-in-interest to the employer in Kearns, Utah listed on the Form ETA 750, as certified, and nothing in the record to support those assertions. As such, there is no indication in the record that the restaurant owned by J[redacted] or its predecessors ever carried out any recruitment efforts to locate qualified U.S. workers for the proffered position. As the record includes evidence that the petitioner is not a successor-in-interest to the employer listed on the Form ETA 750, as certified, this in turn serves as evidence that the petitioner may have never attempted to locate a qualified U.S. worker for the proffered position. This considered together with the relationship by marriage between the beneficiary and the petitioner is additional grounds on which to deny the petition.

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.

ORDER: The appeal is dismissed.