(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: DEC 0 8 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a technical consultant/sales representative. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner was not the successor-in-interest to the employer which filed the labor certification and 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 18, 2009 denial, the issue in this case is whether or not the petitioner is the successor-in-interest to the labor certification employer and whether each entity had the ability to pay the proffered wage for its respective period of time as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 25, 2005. The proffered wage as stated on the Form ETA 750 is $51,438 per year. The Form ETA 750 states that the position requires two years of experience in the job offered: sales representative/technical consultant.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel submits a letter dated July 10, 2009 from Accountant for Counsel supplied no brief and no other documentary evidence.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[2] On the petition, the petitioner[3] claimed to have been established in 2006 but left blank that field in Part 5 of Form I-140 in which it identifies its current number of employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on March 24, 2005, the beneficiary did not claim to have worked for the labor certification employer or the I-140 petitioner.

On appeal, counsel's argument is made by way of a letter from According to in referring to the successorship, the labor certification employer declared bankruptcy. However, asserts that the I-140 petitioner "assumed all the residual ASSETS (inventory, leaseholds, patents), LIABILITIES (lease agreements, contracts, warranty claims) OPERATIONS (customer service, vendors, and manufacturing activities) and BUSINESS OBLIGATIONS of . with the exception of those assets, liabilities and equity amounts discharged by the Bankruptcy Court" (emphasis in original). On appeal, asserts that the individual who owns 100 percent of the petitioning entity also owns 100 percent of

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[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] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

[3] According to the evidence in the record, the labor certification employer was a multi-member LLC, considered a partnership, and was owned 63.68 percent by with minority shares being held by 17 other entities. The I-140 petitioner has one partner/shareholder

four other LLCs, 63.25 percent of one LLC and, through 2006, 100 percent of a limited company (LTD) and that since 2005 the beneficiary has been paid by three of the other companies in which the petitioner's managing partner, has ownership interest. On appeal, also asserts that in assessing the petitioner's assets, the sum for "Intra-Company Balance accounts" should be considered as a long-term liability rather than as a short-term liability because "they are only payable when excess funds are available and so directs."

The instant petition was filed by with Form ETA 750 which was filed by and certified for With the initial petition submission, the petitioner submitted a letter dated May 2, 2007 from , Managing Partner of In his letter, states:

> This letter is being provided to explain why is no longer able to sponsor [the beneficiary] and we wish to transfer the sponsorship to
>
> In the recent past, had the misfortune of becoming involved in a series of drawn out law suits. In the process of defending those suits, ncurred staggering legal bills that further impacted the survivability of the Company. In as much as was one of several operations funded by a privately held operating group, it was determined that the absorption of ongoing losses was detrimental to the investor owners and a decision was made to allow to file for Chapter 7 Bankruptcy. The filing took place on June 23, 2006.
>
> The investor group managing partner has replaced the manufacturing operations with a new LLC called has acquired the proprietary patents and customer list of and continues to recognize and service the warranty liabilities associated with its implant products. This is the entity that wishes to take over the sponsorship of [the beneficiary].

On March 12, 2009, the director issued a request for evidence, referencing *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In his letter, the director notified the petitioner that it could only utilize the labor certification for if the petitioner were the successor-in-interest to and had "assumed all of that company's obligations." Therefore, the director requested evidence demonstrating that the petitioner assumed all of obligations, thereby demonstrating that the petitioner is the successor-in-interest to In its May 14, 2009 response, the petitioner provided a letter dated May 6, 2009 from , Managing Partner for In his letter, states:

> has indeed assumed all the obligations with regards to the above noted beneficiary…along with all the business operating activities and obligations associated with those operations. [The beneficiary] continuing doing the same

> activities she was doing under [redacted] as well as undertaking new responsibilities to further expand her knowledge and expertise in the implant industry.[4]
>
> I would like to point out that [redacted] Bankruptcy filing took place on June 23, 2006[5] while [the beneficiary's] transfer to [redacted] effectively occurred on May 16, 2006 when that Limited Liability Corporation was established.
>
> In support of the fact that [redacted] truly represents a continuation of the [redacted] operations, I point out again that [redacted] continues to recognize and service the warranty liabilities associated with its implant products. [redacted] services the same customer list as [redacted] is actively working with the same vendor/supplier group that supported [redacted] operations.

Though the petitioner asserted that it assumed all of [redacted] obligations and some of its liabilities; continues to operate the same type of business; continues to honor all of [redacted] warranty claims; continues to service all of the same clients; and continues to utilize the same vendor/supplier, it provided no documentary evidence to substantiate any of its assertions.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Because the petitioner failed to support its claims with documentary evidence, the director denied the petition for failure to demonstrate that the petitioner is the successor-in-interest to [redacted] the labor certification employer.

On appeal, the petitioner provided no documentary evidence substantiating a successorship between the petitioner and the labor certification employer, [redacted] Rather, the petitioner supplied a letter dated July 10, 2009 from [redacted] the petitioner's accountant. With respect to the claim of successorship, [redacted] reiterates the statement made by [redacted] in his May 6, 2009 letter, to wit:

> With the exception of those assets, liabilities and equity amounts discharged by the Bankruptcy Court, [redacted] has indeed assumed all of the residual ASSETS (inventory, leaseholds, patents), LIABILITIES (lease agreements, contracts, warranty claims) OPERATIONS (customer service, vendors and manufacturing activities) and BUSINESS OBLIGATIONS of [redacted] This fact is confirmed by the

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[4] The petitioner has provided no evidence demonstrating that it has employed or paid any wages to the beneficiary at any time from the priority date onwards.

[5] According to records maintained by the Illinois Secretary of State, [redacted] was involuntarily dissolved on May 11, 2007. http://www.ilsos.gov/corporatellc/CorporateLlcController (accessed August 27, 2012)

> enclosed Department of Health & Human Services inspection reported dated July 1, 2009.

(Emphasis in original.)

The petitioner did not provide a Department of Health & Human Services inspection report and provided no other evidence substantiating its claim to be the successor-in-interest to

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Neither the assertions of counsel nor those of the petitioner's accountant constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

U.S. Citizenship and Immigration Services (USCIS) has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including

> ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

In the present matter, the USCIS Service Center Director strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[6] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to

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[6] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

establish that it is a true successor-in-interest to the employer identified in the labor certification application.[7]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[8] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim

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[7] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[8] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes.

Though requested to provide evidence of the transfer of ownership from the labor certification employer to the I-140 petitioner, the petitioner provided no such documentation. Therefore, the petitioner has not demonstrated that it purchased assets from the predecessor, or that it assumed the essential rights and obligations of the predecessor necessary to carry on the business. Without documentary evidence to substantiate the petitioner's claims, it has not satisfied the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, based upon statements made by the evidence would not support a successorship as described above. According to the labor certification employer, declared Chapter 7 Bankruptcy and the petitioner wishes to "transfer the sponsorship" of the beneficiary to does not describe a merger, acquisition or transfer of ownership. Neither the regulations nor *Matter of Dial Auto* permit the transfer of sponsorship without the establishment of a bona fide successorship. Further, according to accountant, owns 100 percent of five LLCs as well as ownership interest in two other companies. Without documentary evidence to substantiate the petitioner's claims, the AAO cannot be sure which one of the five LLCs or other companies, if any, assumed the obligations and liabilities of

Another element to be proven for the demonstration of a valid successorship is that the petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if

the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither the I-140 petitioner nor the labor certification employer claims to have employed or paid any wages to the beneficiary at any time from the priority date onwards.[9]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding

[9] On appeal claims that the beneficiary was paid by three of the other entities in which is a shareholder. However, the petitioner provided no evidence of any wages paid.

> depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on May 14, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return is the most recent return available. The petitioner provided the federal income tax returns for [redacted] for 2005, 2006 and 2007 and the federal income tax returns for [redacted] for 2006, 2007 and 2008. The tax returns stated net income as detailed in the table below.

For [redacted]

- In 2005, the labor certification employer's Form 1065 stated a net loss of $203,663.00.[10]
- In 2006, the labor certification employer's Form 1065 stated net income of $0.
- In 2007, the labor certification employer's Form 1065 stated net income of $0.

For [redacted]

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[10] For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed August 27, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the labor certification employer's Schedule K for 2006 has relevant entries for additional deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax return for that year.

- In 2006, the petitioner's Form 1065 stated a net loss of $1,772.00.
- In 2007, the petitioner's Form 1065 stated net income of $72,092.00.
- In 2008, the petitioner's Form 1065 stated net income of $60,656.00.

Though the petitioner claims that ceased operations in 2006 and that commenced operations in 2006, it provided no documentary evidence to substantiate a date upon which the transfer of ownership might have taken place. Nevertheless, based upon the tax returns submitted, did not demonstrate sufficient net income to pay the proffered wage in 2005, 2006 or 2007. did not demonstrate sufficient net income to pay the proffered wage in 2006. However, did demonstrate sufficient net income to pay the proffered wage in 2007 and 2008.

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, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[11] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns stated net current assets as detailed in the table below.

For

- In 2005, the labor certification employer's Form 1065, Schedule L stated net current liabilities of $334,449.00.
- In 2006, the labor certification employer's Form 1065, Schedule L stated net current assets of $0.
- In 2007, the labor certification employer's Form 1065, Schedule L stated net current assets of $0.

For

- In 2006, the petitioner's Form 1065, Schedule L stated net current liabilities of $468,164.00.

[11] 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.

Therefore, for the years 2005, 2006 and 2007, the labor certification employer did not demonstrate that it has sufficient net current assets to pay the proffered wage. For 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the labor certification employer had not established that it had the ability to pay from the establishment of the priority date or at any time thereafter and the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the date upon which it commenced operations through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2007 and 2008.

On appeal, counsel refers to the letter from to assert that the beneficiary has been "paid her wages first by then by and currently (since 2007) by goes on to state:

> The petitioner was led to believe that the proffered wage of $51,438.00 was the amount to be paid upon completion of the training and certification of the beneficiary. Beneficiary has received annual compensation increases since 2005 and in 2009 will exceed the $51,438.00 stated wage base.

According to 8 C.F.R. § 204.5(g)(2), "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" (emphasis added).

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'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

An 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.[12] 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.

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[12] 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.

Therefore, as evidence of the ability to pay, the petitioner may not rely upon wages which might have been paid by other entities in which the managing partner has ownership.[13]

Further, the petitioner is not required to demonstrate that it has already paid the beneficiary the proffered wage, only that it has the ability to pay the proffered wage. The obligation to pay the proffered wage obtains only after the beneficiary becomes a lawful permanent resident.

On appeal, also asserts:

> Based upon the nature of inter/intra-company transaction, any review of the petitioner's net current assets as a means of determining the ability to pay proffered wages should include a reclassification of 2399 – Intra-Company Balance accounts from current liability to Other Long Term Liability for as related party transactions, they are only payable when excess funds are available and so directs. At 12/31/2007 this amounts to $488,370.29 and at 12/31/2008 this amounts to $797,000.00 in increases to net current assets.

At least one of the sums ($488,370.29) which identifies seems to be reflected on/derived from the 2007 unaudited balance sheet which was submitted with the initial petition submission.

Counsel's and reliance on unaudited financial records is 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. 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.

Further, whereas indicates that the line 2399 – Intra-Company Balance for December 31, 2007 is $488,370.29, the amount for line 2399 identified on the balance sheet is actually $399,832.44.

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

Further, the petitioner provided no documentation to substantiate the assertion related to 2008.

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[13] The petitioner provided no evidence of wages paid by any entity in which the managing partner has an ownership interest.

The petitioner has provided its federal income tax returns for both 2007 and 2008. The assessment of the petitioner's ability to pay was based upon the figures reported to the Internal Revenue Service (IRS) as reflected on Forms 1065 for 2007 and 2008. On its tax return for 2007, the petitioner included a statement of explanation for Line 17 of Schedule L. In this statement, the petitioner identifies as a current asset funds "due to affiliated companies" with a beginning year amount of $423,979 and an end of year amount of $827,378. For 2008, the Schedule L, Line 17 statement indicates amounts "due to affiliated companies" of $827,378 for the beginning of the year and $824,000 for the end of the year.

These figures were reported to the IRS as current liabilities. On appeal, the petitioner would now like for the AAO to consider such sums long-term liabilities without the petitioner's having filed an amended tax return.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In order to be able to recognize the reclassification of certain current liabilities to long-term liabilities, the AAO would require documentary evidence demonstrating that such reclassification is permitted by the terms of the LLC's Articles of Organization. Also, the petitioner would have to provide IRS-certified copies of amended federal tax returns to establish that the petitioner made official amendments to its tax returns and that the amended returns were actually received and processed by the IRS.

The petitioner has provided no such evidence but has simply requested that USCIS consider the reclassification of such liabilities. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, as explained above, the AAO has already determined that the I-140 petitioner has demonstrated the ability to pay the proffered wage through its net income for both 2007 and 2008. Even if we were to accept the petitioner's assertions on appeal, such assertions would not rectify the inability to pay for 2005 or 2006.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her

clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner asserts that the entity which purports to be the predecessor suffered financial setbacks due to legal disputes up until its claimed bankruptcy in 2006. Indeed, none of the tax returns provided demonstrate that the labor certification employer was profitable for the three years represented. The I-140 petitioner is only able to demonstrate profitability for two years. The record of proceeding does not contain evidence demonstrating the total number of years the companies have been doing business, the petitioner's historical growth, the overall number of employees, the occurrence of any uncharacteristic expenditures or losses,[14] the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the labor certification employer had the ability to pay from the establishment of the priority date until the time that it was purportedly dissolved or that the I-140 petitioner had the continuing ability to pay from its inception onward, with the exception of 2007 and 2008.

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

ORDER: The appeal is dismissed.

[14] The petitioner claims that the labor certification employer was the subject of litigation which caused its financial difficulties and ultimate bankruptcy. However, the petitioner has provided no documentary evidence substantiating any of its claims.