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

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 02 2005

SRC-02-226-53737

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

According to the petition, the petitioner is engaged in the business of mail order vitamins and wholesale cosmetics. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 is a successor-in-interest to the entity certified on the Form ETA 750. The purported predecessor entity is MDR Fitness Corp (MDR Fitness).

On appeal, counsel submits a brief statement.

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 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 (DOL). *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The visa petition was submitted to Citizenship and Immigration Services (CIS) on July 18, 2002. The proffered wage as stated on the visa petition is $20.00 per hour, which amounts to $41,600.00 annually.[1] On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the purported predecessor entity, MDR Fitness, since February 2001.

On the petition, the petitioner claimed to have been established in April 1985, to employ 140 employees, and to have a gross annual income of $13 million. In support of the petition, the petitioner submitted a letter from its vice president and a letter from its controller. The vice president's letter, dated June 28, 2003, states the following:

> The original petitioner in this matter was MDR Fitness Corp, our affiliate company, located in Sunrise, Florida. In January 2002, the company's inventory was purchased by MDR Health Corp. We hired all of our affiliate's employees as well. This change was made to

[1] The certified Form ETA 750 A does not contain evidence of a proffered wage. Thus, CIS is not confident that the prevailing wage rate was examined and certified by DOL. A review of DOL's Online Wage Library's prevailing wage rate for a graphic designer in Broward County confirms that the proffered wage meets the prevailing wage rate.

> allow MDR Fitness to concentrate on its own business of selling nutritional products through mail order without the distraction of providing products for its other affiliates. MDR Health, a management services company, now uses the inventory that formerly belonged to all the other affiliates and the former employees of MDR Fitness to provide products for all the other affiliates to sell.
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> * * *
>
> MDR Health Corp offers permanent employment to [the beneficiary] as a Graphic Designer under the same terms and working conditions as the labor certification. [The beneficiary] will be compensated $20.00 per hour plus normal company benefits. MDR Health assumes all the immigration responsibilities and liabilities for its employees.
>
> MDR Fitness Corp and MDR Health Corp operated under the exact same ownership.

The controller's letter, dated June 28, 2003, states the following:

> I have been responsible for the preparation of the companies' tax retur ns [sic] for the past 14 years. During the tax year 2000, the last year for which definitive income figures are available, the companies had gross receipts in excess of $13,000,000. At this time, we do not expect any adverse material change in this financial information for the tax years 2001 or 2002.
>
> MDR Fitness Corp and MDR Health Corp operate under the exact same ownership. MDR Fitness has been actively doing business since 1985. MDR Health has existed since 1994, but only became active in 2002 when it hired all the employees and acquired all the inventory of MDR Fitness. MDR Health currently employs 120 persons.

Because the evidence initially submitted with the petition was deficient, the director issued a request for evidence on May 15, 2003, requesting evidence of the petitioner's continuing ability to pay the proffered wage, such as a complete and legible copy of the petitioner's tax returns for 2001 and 2002 and evidence of wages paid to employees, such as a copy of its form 941 quarterly federal tax return for the last quarter in 2001. The director also requested documentary evidence establishing that the petitioner is a successor-in-interest to MDR Fitness Corp, such as federal tax returns, forms W-3 and W-2s for both companies, and documentation of the petitioner's acquisition of all assets and liabilities from MDR Fitness. The director also requested evidence of the petitioner's existence, such as occupancy, business, and health department licenses and a lease or mortgage, which will not be further discussed since the issue was not further raised by the director.

In response to the director's request for evidence, the petitioner submitted the first page of MDR Fitness' and the petitioner's corporate tax returns for the year 2001 along with evidence they both filed extension requests for 2002.[2] Both entities provided federal quarterly wage reports – MDR Fitness for the last quarter in 2001 and the

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[2] In her accompanying letter to the petitioner's response to the director's request for evidence, counsel paraphrased the regulatory provisions at 8 C.F.R. § 204.5(g)(2) that permits employers with over 100 employees to submit a letter from a financial officer concerning its ability to pay the proffered wage and states that the petitioner submitted such a letter.

petitioner for the last quarter in 2002. The petitioner provided a copy of its response to the IRS concerning its federal quarterly wage report in which it indicated employing no employees prior to 2002. The petitioner and MDR Fitness also submitted copies of various Uniform Business Reports filed with the Florida Secretary of State, and an Employer Account Change Form filed with the Florida Department of Revenue in April 2002 indicating that MDR Fitness was leasing its employees to the petitioner. Forms W-3, Transmittal of Wage and Tax Statements, for 2001 was submitted by MDR Fitness and for 2002 by the petitioner.

The petitioner's controller submitted another letter, dated August 6, 2003, stating the following:

> Effective January 1, 2003, [MDR Fitness] spun-off its payroll and benefit departments (including Workers Compensation Insurance and Unemployment Insurance) into one of its existing affiliated companies, [the petitioner]. [The petitioner] is the administration and business support division and is responsible for processing all payroll functions including payroll tax filings, hiring, terminations, and the transfer of all employees of [MDR Fitness] into [the petitioner].
>
> Due to this spin-off, [the petitioner] expressly assumes from [MDR Fitness] all of the obligations and liabilities and benefits associated with the labor certifications, immigrant and non-immigrant petitions, etc.

In counsel's accompanying letter to the petitioner's response to the director's request for evidence, she reiterates that MDR Fitness was "spun-off" from the petitioner, who assumed all immigration obligations and liabilities, evidenced by the letters from the controller and vice president. She also states the following concerning the purported successorship:

- All employees will remain the same in the new company. (Please refer to UCT-6 for both companies listed in Items 3 & 4 above)[;]
- All employees will continue to engage in the same business that they engaged in previously as a division of the original organization[;]
- Both companies are owned by the same shareholders and managed and operated by the same officers and directors [redacted] and [redacted]
- Both companies will continue to operate from the same worksite location in Sunrise, Florida and will continue with the same type of business[; and]
- All the terms and conditions of the [b]eneficiary's employment will remain the same as outlined in the labor certification. Please refer to the company letter submitted with the petition.

Counsel also states that CIS proposed to adopt a "substantial continuity" test in proposed regulations drafted in 1995 and proffers that:

> for the purposes of establishing successorship which appears to provide the controlling authority on successor in interest and if a new employer can demonstrate substantial assumption of assets and liabilities of the predecessor OR can otherwise show substantial

> continuity between the predecessor and surviving entities, a new employer can qualify as successor in interest. In the instant case, the companies are substantially the same company owned and operated by the same shareholders and officer, at the same worksite location and with the employees providing the same services under the same terms and conditions.

The director determined that the evidence submitted did not establish that the petitioner was the successor-in-interest to MDR Fitness, and, on September 26, 2003, denied the petition. The director's decision is a thorough seven-page decision that evaluates every piece of evidence submitted by the petitioner into the record of proceeding. To summarize, the director determined that assertions made by counsel and the petitioner's vice president and controller were unsubstantiated by documentary evidence. The director noted that the petitioner failed to submit its taxes for 2001 and 2002 with the reason that a financial officer stated that the petitioner employed more than 100 employees. The director stated in his decision that the regulation at 8 C.F.R. § 204.5(g)(2) uses the word "may" in the context of a petitioning entity submitting an appropriate letter from a financial officer in lieu of federal tax returns, annual reports, or audited financial statements. The director stated that his reason for seeking the petitioner's tax returns was based on his discretionary authority to seek evidence to clarify a material fact or issue, which in this case, had to do with understanding the relationship between the petitioner and MDR Fitness and determining if MDR was in fact a successor-in-interest to the petitioner. Apparently because of the lack of evidence the director conducted its own research and investigation, checking Dunn and Bradstreet's "Who Owns Whom 2002-2003 Edition," and Florida's Corporations On-line Public Inquiry to try to assess the relationship and identities of the petitioner and MDR Fitness. While acknowledging the evidence submitted reflects two separate corporate entities existing and operating in the state of Florida, the director could not ascertain a successor-in-interest relationship between the two through documentary evidence. The director noted that the proposed regulation relied upon by counsel was never finalized and thus not controlling, but even if utilizing the language contained within the proposed regulation, the petitioner failed to show "substantial continuity" with MDR Fitness.

On appeal, counsel asserts the following:

> The record indicates that both companies are owned and controlled by the same shareholders and officers. All employees will occupy the same positions, perform the same duties, work in the same area of intended employment and earn the same salaries with [the petitioner] as they had with [MDR Fitness]. [The petitioner] merely acts as the management company for all employees of the corporate family. The record reflects a "substantial continuity" between the predecessor and the surviving entities.

Counsel cites *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) as well as a letter written to a private attorney by [redacted] Director, [CIS] Business and Trade Services," in 2001 for the premise that a "substantial continuity" test and evidence that an entity has assumed all immigration-related liabilities of a company it acquired or merged with is sufficient to prove a successorship.

The issues in this case are whether or not the petitioning entity, MDR Health Corp., is the successor-in-interest to MDR Fitness, the entity that filed the Form ETA 750, and whether MDR Fitness and the petitioning entity, if determined to be a successor-in-interest to MDR Fitness, both had the continuing ability to pay the proffered wage as of the date of the priority date.

The record of proceeding does not contain sufficient evidence that the petitioner qualifies as a successor-in-interest to MDR Fitness. This status requires documentary evidence that the petitioner has assumed all of the

rights, duties, and obligations of the predecessor company. This analysis is not restricted to assuming immigration sponsorships but a divestment of one company into another.[3] Even if the petitioner were doing business at the same location as the predecessor, this would not establish that the petitioner would be a successor-in-interest. The AAO concurs with the director's detailed findings concerning the evidence that was submitted to prove this purported fact. The record contains assertions by both counsel and the petitioner's representatives but no documentation to support their assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

Contrary to counsel's assertions, there is no evidence that the petitioner and MDR Fitness share owners, only that they share common officers and directors. There is no evidence concerning the petitioner's ownership in the record of proceeding. There is no evidence concerning MDR Fitness' ownership in the record of proceeding. The petitioner failed to carry its burden of proving that it assumed all of the assets, liabilities, and obligations of MDR Fitness. There is no purchase or acquisition agreement, tax documentation, or corporate filing to substantiate the claims of a "spin-off" or other relationship among the entities. The AAO concurs with the director's findings that the record of proceeding does not present clear and convincing evidence of the petitioner's successorship to MDR Fitness and thus, the AAO does not find that the petitioner is a successor-in-interest to MDR Fitness.

In any event, even if the petitioner were determined to be a successor-in-interest to MDR Fitness, as noted above, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the continuing ability to pay the proffered wage beginning on the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). If the petitioner is a successor-in-interest to MDR Fitness, both entities must show an ability to pay the proffered wage. While this issue is beyond the decision of the director, an application or 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).

As noted above, the petitioner submitted a letter dated June 28, 2002 by [redacted] Controller, that stated that the petitioner employs 120 persons. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.) Given the record as a whole, we find that CIS need not exercise its discretion to accept this letter as dispositive proof of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, the director had clear discretion to seek the petitioner's

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[3] Counsel takes one sentence from Mr. [redacted] letter out of context, and regardless, letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

complete tax returns and the petitioner's failure to comply cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The incomplete tax returns that were submitted by the petitioner reflect the following limited information for the following years for each entity:

For the petitioner:

	2001
Net income[4]	$2,388
Current Assets	$n/a
Current Liabilities	$n/a
Net current liabilities	$n/a

For MDR Fitness:

	2001
Net income[5]	$530,567
Current Assets	$n/a
Current Liabilities	$n/a
Net current liabilities	$n/a

In determining a petitioning entity's or successor-in-interest's ability to pay the proffered wage during a given period, CIS will first examine whether the predecessor and/or successor-in-interest employed and paid the beneficiary during that period. If the predecessor and/or successor-in-interest 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 predecessor's and/or successor-in-interest's ability to pay the proffered wage. In the instant case, neither MDR Fitness nor the petitioner, if it could establish that it is a successor-in-interest to MDR Fitness, established that it employed and paid the beneficiary the full proffered wage in 2001 or 2002. MDR Fitness' quarterly wage report of 2001 indicates that it paid the beneficiary $8,504.03 in wages. The petitioner's quarterly wage report of 2002 indicates that it paid the beneficiary $6,140.80. Thus, assuming, *arguendo*, that the petitioner could prove that it actually did assume all assets and liabilities of MDR Fitness in January 2002, then MDR Fitness would need to establish that it could pay the remaining proffered wage of $33,095.97 in 2001 and the petitioner would need to establish that it could pay the remaining proffered wage of $35,459.20 in 2002.

If the predecessor and/or successor-in-interest does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the predecessor's and/or successor-in-interest's federal income tax returns, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioning entity's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v.*

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[4] Ordinary income (loss) from trade or business activities as reported on Line 21.

[5] Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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). Showing that the predecessor's and/or successor-in-interest's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the predecessor and/or successor-in-interest paid wages in excess of the proffered wage is insufficient. 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 a petitioning entity's net income figure, as stated on the petitioning entity's corporate income tax returns, rather than the petitioning entity's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If a successorship could be proven by clear and convincing evidence, then MDR Fitness' net income of $530,567 would be sufficient to cover the proffered wage of $33,095.97 in 2001. However, the petitioner's net income of $2,388 is insufficient to cover the remaining proffered wage of $35,459.20 in 2002.

Nevertheless, the predecessor's and/or successor-in-interest's net income is not the only statistic that can be used to demonstrate a predecessor's and/or successor-in-interest's ability to pay a proffered wage. If the net income the precedessor and/or successor-in-interest demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the predecessor's and/or successor-in-interest's assets. The predecessor's and/or successor-in-interest's total assets include depreciable assets that the predecessor and/or successor-in-interest uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the predecessor's and/or successor-in-interest's total assets must be balanced by the predecessor's and/or successor-in-interest's liabilities. Otherwise, they cannot properly be considered in the determination of the predecessor's and/or successor-in-interest's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the predecessor's and/or successor-in-interest's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the predecessor and/or successor-in-interest is expected to be able to pay the proffered wage out of those net current assets. The petitioner, if properly a successor-in-interest to MDR Fitness, failed to submit complete tax returns with Schedule L that reports its net current assets in 2001. No evidence was submitted from the petitioner of its net current assets in 2002. Thus no determination can be made that the petitioner showed a continuing ability to pay the proffered wage while it purportedly controlled sponsorship of the visa petition in 2002. Thus, an ability to pay the proffered wage out of net current assets has not been demonstrated in 2002.

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[6] 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.

In 2002, the petitioner did not present evidence of its ability to pay the proffered wage. The petitioner, purportedly a successor-in-interest, shows a net income of only $2,388 and no evidence of net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

The record of proceeding does not contain sufficient evidence that the petitioner is a successor-in-interest to MDR Fitness. Even if successorship could be proven, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage in 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.