

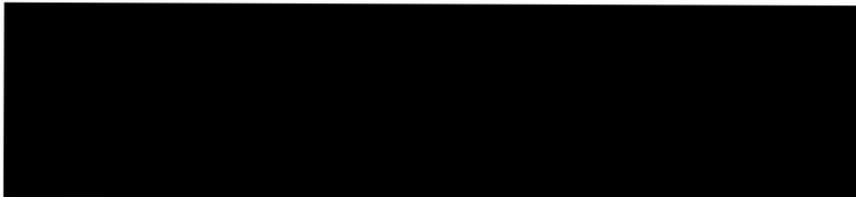
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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MAY 22 2007

FILE: [REDACTED]  
WAC 04 258 52076

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]  
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:



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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a limited liability company that provides network consultants. It seeks to employ the beneficiary permanently in the United States as network engineer. As required by statute, the petition is accompanied by a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification, approved by the Department of Labor for Pacific Net Management<sup>2</sup> located at [REDACTED] San Francisco California 94111. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, that the petitioner has not established by the evidence presented that another company known as WEB 750 LLC assumed ownership and assumption of rights, duties, obligations, and assets of the petitioner. The director 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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, 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 U.S. Department of Labor. *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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 5, 2001. The proffered wage as stated on the Form ETA 750 is \$69,056.00 per year. The Form ETA 750 states that the position requires a Bachelor of Arts Degree in computer science/informational system and two years of experience in the proffered position.

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<sup>1</sup> The individual who signed the Form ETA 750 Part A on October 22, 2001 was Sergey Sharapov.

The Federal Employer Identification Number (FEIN) for Pacific Net Management LLC is [REDACTED]. The number is obscured for privacy purposes.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *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 upon appeal.<sup>3</sup>

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor, and, a joint U.S. Internal Revenue Service (IRS) Form tax return Form 1040 for 2003 filed by Stan and Marina Palatnikov.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>4</sup> 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.

On the petition, the petitioner claimed to have been established in 2000. Under U.S. IRS regulations, if an LLC is a single member LLC, that member must file a Schedule C for the LLC, which is attached to the Form 1040.

#### Request for Evidence of October 27, 2004

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on October 27, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.<sup>5</sup>

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, or, audited financial statements for 2001 and 2002. The director requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements, pay stubs, and/or wage/tax statements from previous employers.

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<sup>3</sup> 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).

<sup>4</sup> 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.

<sup>5</sup> The director also requested evidence pertaining to the beneficiary's previous work experience and education, and also, the director requested evidence to demonstrate how the beneficiary supported himself from 1999 to the present. Since the issue of the beneficiary was not raised in the director's decision, this matter will not be further discussed.

According to the Citizenship and Immigration Services (CIS) Form G-325A signed by the beneficiary on January 13, 2005, he was employed as a network engineer for Pacific Net Management from 1999 to October 2001, and for his own company, First Virtual Group LLC as a network engineer from October 2001 to present.

The director also requested that the petitioner provide California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms were to include the job title and duties for all employees.

Response to Request for Evidence of October 27, 2004

In response to the request for evidence counsel submitted copies of the following documents relative to the director's request above stated: an explanatory letter from counsel dated January 17, 2005; a 2004 and 2005 Business Registration Certificate for WEB750, LLC doing business as WEB750, LLC with a business location at [REDACTED] San Francisco and mailing address of [REDACTED] San Francisco, California 94128; a tax return transcript for the 2000 U.S. tax return Form 1065 of Pacific Net Management LLC stating a loss of <\$5,404.00><sup>6</sup> on gross profits (Line 3) of \$23,210.00; a tax return transcript for the 2001 U.S. tax return Form 1065 of Pacific Net Management LLC stating a net income of \$13,531.00 on gross profits (Line 3) of \$185,327.00; a tax return transcript for the 2002 U.S. tax return Form 1065 of Pacific Net Management LLC stating a loss of <\$32,666.00> on gross profits (Line 3) of \$79,549.00; a profit and loss statement (no company noted) for the period January 1, 2004 through December 31, 2004, stating a profit of \$16,126.41 on total income received on a cash basis of \$93,484.91;<sup>7</sup> approximately 17 pages of Bank of America business checking account statements for 2003 and 2004 for WEB750, LLC, [REDACTED], San Francisco CA 94128-1331;<sup>8</sup> a statement entitled "Web750 LLC Marketing (2000-2005);" approximately 68 printed pages of information from a WEB750, LLC website; four pages entitled "Billing\_Transaction\_Detail" listing the monthly expenses for "Yahoo Listing;" two printed pages from Google™ AdWords' website; two printed pages from DirecTraffic Center® website; two printed pages from EVIServers.net's website; two printed pages from Yahoo! Search's website; three printed pages, each, from Alta Vista Search and Excite-Search's web sites; approximately eight pages from a Google Internet based search on "web 750" accessed January 17, 2005; approximately 31 printed pages from the [www.securepaynet.net](http://www.securepaynet.net) website accessed on January 17, 2005 concerning Web750 Internet Domains; three untranslated printed pages in the Japanese language from [www.web750japan.com](http://www.web750japan.com)'s website accessed January 17, 2005; a "Declaration by [REDACTED]" dated

<sup>6</sup> IRS Form 1065, Line 22. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>7</sup> Counsel's 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.

<sup>8</sup> Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return.

January 15, 2005 that provides a listing of WEB 750, LLC customers; and, information relating to a company owned by the beneficiary called First Virtual Group LLC that was incorporated in the State of Delaware on October 5, 2001 along with business banking statements from that company in year 2004 as well as other documentation.

Intent to Deny Processing of February 7, 2005

The director on February 7, 2005, issued to the petitioner intent to deny processing of the petition. In pertinent part, the director stated that based upon research in the State of California public records, Pacific Net Management LLC was winding up its business affairs and it had submitted a Certificate of Cancellation to the Secretary of State. The director stated that upon consummation of this act of cancellation, and according to the intent to cease business evidenced in the public records by the petitioner, “... it will no longer be an employer as defined in 20 C.F.R. § 656.3 and will no longer be a United States employer as stated in 8 C.F.R. § 204.5(l)(1).”

Response to Intent to Deny Processing of February 7, 2005

In response counsel for the petitioner submitted an explanatory letter dated March 7, 2005, as well as copies of the following documents: a “Declaration by [REDACTED]” a WEB 750 LLC corporate record stating that this company was organized on April 2, 2003; a fictitious business name statement and publication certificate for WEB 750 LLC with a business address at 4416 Fulton Street, San Francisco California 94121; a Schedule E from a U.S. federal tax return Form 1040 for year 2000<sup>9</sup> filed by Stan Palatnikov stating that Pacific Net Management LLC is a partnership with a federal employer identification number (FEIN) [REDACTED] (the FEIN number is obscured for privacy purposes); a tax return transcript for the 2000 U.S. tax return Form 1065 of Pacific Net Management LLC stating a loss of <\$5,404.00> on gross profits (Line 3) of \$23,210.00; a tax return transcript for the 2001 U.S. tax return Form 1065 of Pacific Net Management LLC stating net income of \$13,531.00 on gross profits (Line 3) of \$185,327.00; a tax return transcript for the 2002 U.S. tax return Form 1065 of Pacific Net Management LLC stating a loss of <\$32,666.00> on gross profits (Line 3) of \$79,549.00; a profit and loss statement (no company noted) for the period January 1, 2004 through December 31, 2004, stating a profit of \$16,126.41 on total income received on a cash basis of \$93,484.91; a joint U.S. Internal Revenue Service Form tax return Form 1040 for 2003 for [REDACTED] and spouse; a State of California Limited Liability Company Articles of Organization filed on July 11, 2000 stating that Pacific Net Management LLC was organized for the business purpose of web site hosting and design and it had a business agent named Stan Palatnikov whose address is 4416 Fulton Street, San Francisco, California 94121; a Business Registration Certificate for 2001 for Pacific Net Management LLC doing business as Pacific Net Management LLC located at [REDACTED], San Francisco, California 94111; four printed pages from the website of PNM Web, Internet services provider; approximately 17 pages entitled “Web750 Customers List;” four pages entitled “Billing Transaction\_Detail” listing the monthly expenses for “Yahoo Listing;” and, approximately 17 pages of Bank of America business checking account statements for 2003 and 2004 for “WEB750, LLC, [REDACTED] 1, San Francisco CA 94128-1331.”

Intent to Deny Processing of March 30, 2005

The director on March 30, 2005, issued to the petitioner intent to deny processing of the petition. In pertinent part, the director stated that the petitioner Pacific Net Management LLC had evidenced in the State of

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<sup>9</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

California public records the intent to cease business, and, that Pacific Net Management LLC and WEB 750 LLC are separate companies. Evidence was requested of the present status of these two separate companies to include their business tax returns and proof of a successorship event between the companies such as a buyout, merger, or any other assumption of the rights, duties, obligations, and assets of the original employer (i.e. Pacific Net Management LLC) memorialized by documentation. The director detailed the documentation necessary to show successorship.<sup>10</sup>

Response to Intent to Deny Processing of March 30, 2005

In response to the director's notice counsel for the petitioner submitted an explanatory letter dated April 22, 2005, as well as copies of the following documents: an uncertified U.S. Department of Labor form ETA 750 Part A naming Pacific Net Management as the employer stating that *the offered wage is \$60,000.00 instead of the proffered wage of \$69,056.00 per year*, with Part B;<sup>11</sup> a "Declaration" dated April 21, 2005 by Stan Palatnikov that stated, in pertinent part, that he incorporated "a new entity" WEB 750 LLC that trades and does business in the name of Pacific Net Management, that the company will continue to employ the beneficiary; and, a non-audited profit and loss statement for WEB 750 LLC for 2004 that states total income of \$87,905.69 and total expenses of \$88,705.69 with an "Overall Total" loss of <\$800.00>.

The director denied the petition on May 23, 2005, finding that that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, that the petitioner has not established by the evidence presented that another company known as WEB 750 LLC assumed ownership and assumption of rights, duties, obligations, and assets of the petitioner. The director denied the petition accordingly.

On appeal, counsel asserts generally that the director erred in "citting [sic] that WEB 750 did not assume the rights, duties ... of Pacific Net Management," and, finding that the petitioner did not have the ability to pay the proffered wage.

Counsel contends that the value of the company's assets of \$100,00.00 is evidence of the ability to pay the proffered wage. Further, counsel asserts that the "magnitude" of the petitioner's business as a full service

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<sup>10</sup> In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

<sup>11</sup> The statement that the petitioner will not pay the beneficiary the proffered wage of \$69,056.00 per year, but the offered wage of \$60,000.00, according to the uncertified U.S. Department of Labor form ETA 750 Part A submitted naming Pacific Net Management as the employer is a *per se* employment violation. See 20 C.F.R. § 656.21(e).

provider of Web hosting and Internet connectivity services is evidence of its ability to pay the proffered wage. Counsel incorporates by reference all the exhibits submitted in the matter that are listed above.

Counsel has submitted copies of the following documents to accompany the appeal statement: a legal brief; approximately 15 checks payable by WEB750 LLC to First Virtual Group issued in 2004;<sup>12</sup> information relating to a company owned by the beneficiary called First Virtual Group LLC that was incorporated in the State of Delaware on October 5, 2001; four monthly business checking statements of First Virtual Group LLC in 2004 with a average ending balance of \$1,697.50 for the four month period; and, a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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, the petitioner stated he employed the beneficiary. There was evidence submitted that 15 checks were issued by WEB750 LLC to First Virtual Group in 2004.

According to the record, First Virtual Group was retained as an independent contractor by WEB750 LLC. On Schedule C, of [REDACTED] and [REDACTED]'s tax return, under the business enterprise, designated "web site hosting," (WEB 750) it listed contract labor as \$17,700.00. No evidence was submitted of the identity of this contract labor. According to a Declaration of [REDACTED] dated March 7, 2005, for WEB750 LLC "We continue to wish to employ ... [the beneficiary] with our company ...." This statement is unclear based upon the evidence submitted that the beneficiary was not an employee but an independent contractor.

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, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the

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<sup>12</sup> There is no evidence on the one-sided photocopies that the checks were accepted and processed for payment. According to counsel's brief, the beneficiary is contracted as an independent contractor.

petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Since the proffered wage is \$69,056.00 per year, either cumulatively or separately based on the Schedule C information, there is no evidence that the petitioner could pay the proffered wage in 2003 from the tax return submitted.

For a limited liability company taxed as a partnership, where the LLC's income is exclusively from a trade or business, CIS considers net income to be the figure stated on Line 22 of IRS form 1065. However, where an LLC has income, credits, deductions or other adjustments from sources other than a trade or business, these items are reported on Schedule K. The following<sup>13</sup> demonstrate the following financial information concerning the petitioner's ability to pay:

- A tax transcript of the return for the 2001 U.S. tax return Form 1065 of Pacific Net Management LLC stating a net income of \$13,531.00 on gross profits (Line 3) of \$185,327.00. The transcript provides no information relating to Schedule K, "Partners Share of Income."
- A tax transcript of the return for the 2002 U.S. tax return Form 1065 of Pacific Net Management LLC stating a loss of <\$32,666.00> on gross profits (Line 3) of \$79,549.00. The transcript provides information relating to Schedule K, "Partners Share of Income." The "average loss per partner" was <\$16,333.00>.

A joint U.S. Internal Revenue Service Form tax return Form 1040 for 2003 was filed by [redacted] and [redacted]. The business address stated on each of the Schedule C statements was 4416 Fulton Street, San Francisco California 94121. With the 2003 tax return were submitted three separate Schedule C statements, each statement naming [redacted] as proprietor on Line A, "Principal business or profession, including product or service ...."

	<u>Principal Business</u>	Net Profit or (loss)
	REAL ESTATE	AGENT \$ 0.00
•	INTERNATIONAL BUSINESS CONSULT	CONSULTANT <\$12,491.00>
•	INTERNET SERVICES	WEB SITE HOSTING \$7,766.00

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. No information was received from the tax transcripts submitted concerning Schedule L data. While counsel in his brief stated that he had submitted a tax return for the business for 2004, no tax return was submitted.

<sup>13</sup> The priority date is November 5, 2001. Financial evidence submitted for time periods prior to that date has no probative value in this matter. In 2000, a tax return transcript for the 2000 U.S. tax return Form 1065 of Pacific Net Management LLC stated a loss of <\$5,404.00> on gross profits (Line 3) of \$23,210.00. The limited liability company had two members in 2000, 2001 and 2002 according to the transcript information.

There was no evidence submitted that the petitioner Pacific Net Management LLC had sufficient net income to pay the proffered wage of \$69,056.00 per year. There is no independent, objective and admissible financial evidence submitted for the reputed successor in interest, WEB750 LLC organized on April 2, 2003, to show its ability to pay the proffered wage. There is probative evidence in the record as aforesaid to indicate that Pacific Net Management LLC has or intends to cease doing business.

The above tax transcripts submitted for 2000, 2001 and 2002 are all in the name of Pacific Net Management LLC having the FEIN number of [REDACTED]. The director on March 30, 2005, issued to the petitioner a notice to deny processing of the petition. In pertinent part, the director stated that "... the original labor certification ...lists a different employer than that of the petitioner." Citing the case of *Matter of Dial Auto Repair Shop Inc.*, 19 I&N Dec. 481 (Comm.1981), the director stated that the petitioner must show that the organization noted on the labor certification is a successor in interest. The regulation 8 C.F.R. § 204.5(g)(2) requires copies of annual reports, federal tax returns, or audited financial statements. WEB750 LLC has not produced any admissible evidence in this matter to prove that it is in fact the successor in interest to Pacific Net Management LLC, or, that it has the ability to pay the proffered wage.<sup>14</sup>

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date, or that WEB750 LLC is a successor in interest to Pacific Net Management LLC. A successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

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.<sup>15</sup>

**ORDER:** The appeal is dismissed

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<sup>14</sup> The non-audited financial statement that was submitted, not identified by company, stated a profit of \$16,126.41 for all of 2004. Presumably this refers to WEB750 LLC, since Pacific Net Management LLC had filed a certificate to cease business, but there is also another similar statement that is a non-audited profit and loss statement for WEB 750 LLC for 2004 that states total income of \$87,905.69 and total expenses of \$88,705.69 with an "Overall Total" loss of <\$800.00>. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>15</sup> If this matter is pursued, beyond the decision of the director, the experience letter submitted into evidence is insufficient to demonstrate the beneficiary's qualification as a network engineer. At a minimum, an educational evaluator's certificate should be provided.