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

[redacted]

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Date: DEC 2 7 2012

Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On July 12, 2000, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center (NSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the NSC director (the director) on August 22, 2000, but the approval was later revoked on February 8, 2010. The petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO).[1] Upon review, the director's decision will be withdrawn. The petition will be remanded.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a medical records technician pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).[2] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).[3] The director revoked the approval of the petition, finding that the petitioner was dissolved prior to the date of filing the petition on July 12, 2000.[4]

On appeal, counsel affirmed the petitioner's dissolution before July 12, 2000, but stated that the petitioning business was first continued by [redacted] and then later by [redacted] In essence, counsel argues that [redacted] and [redacted] are the successors-in-interest to the petitioner.

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[1] The AAO at first erroneously rejected the appeal, but later reopened the instant case on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of correcting the error and entering a new decision.

[2] Section 203(b)(3)(A)(i) of 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.

[3] USCIS records show that the labor certification accompanying the petition in this case was previously used to support another employment-based immigrant visa petition filed in 2005 (File EAC 05 161 50055). On December 15, 2005 the Vermont Service Center director denied the petition finding that the petitioner had failed to establish the continuing ability to pay the beneficiary's proffered wage from the priority date. The petitioner appealed the director's decision (File EAC 06 080 51315) to the AAO, and the AAO dismissed the appeal on August 17, 2007.

[4] The petitioner [redacted] according to the records of the Secretary of State of Illinois, was dissolved on May 1, 2000. The records of the Illinois Secretary of State can be accessed at the following website address: http://www.ilsos.gov/corporatellc/ (last accessed December 5, 2012).

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 February 8, 2010 decision, the single issue in this case is whether or not are successors-in-interest to the petitioner.

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the petitioner) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In *Matter of Dial Auto, id.* the petitioner *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 was, in fact, true; the Commissioner, consequently, dismissed the appeal and denied the petition. Here, the petitioner submitted the following evidence to demonstrate that continue the petitioner's business and that both are the petitioning successors:

- A letter dated December 28, 2009 from the petitioner's certified public accountant explaining the change in the structure of the petitioner in 2000;[5]

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[5] In his letter, Certified Public Accountant, stated:

> the owner of in existence from April 4, 2000, and co-owner of [the petitioner], transferred his shares in Inc. and continued the same business operations from the same address under through

- A letter dated October 24, 2000 from offering the beneficiary the same job originally offered on the labor certification;
- A letter dated June 30, 2005 from President, stating that the petitioner was previously known as r and and that the petitioner, and are all operated under the same ownership and located at
- A copy of the Articles of Incorporation issued to the petitioner dated January 19, 1999, listing as secretary, director, and co-owner of the corporation;
- A copy of the Articles of Incorporation issued to listing as the President, treasurer, and director of the company;
- A copy of the business records of the petitioner obtained from the Illinois Secretary of State' website (http://www.ilsos.gov/corporatellc/) (accessed on October 27, 2009);
- A copy of the business records of obtained from the Illinois Secretary of State's website (accessed on October 27, 2009); and
- A copy of the business records of obtained from the Illinois Secretary of State's website (accessed on October 27, 2009).

Considering all of the evidence submitted above, we find that the petitioner has submitted sufficient evidence to show that are the successors-in-interest to the petitioner, and that the job opportunity offered by the new organization is the same as originally offered on the labor certification.

However, both the original petitioner and the petitioning successors must establish eligibility in all respects by a preponderance of the evidence. The petitioner and the successor entities in this case are required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date onwards.

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

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acquisition absorbed some of the assets which belonged to originally created in 1996 underwent a name change on April 24, 2000 at which point it was intended by to serve as a temporary entity which would maintain the business entity he took over from and continued to employ its current workers. In the meantime, on May 1, 2000, (the company originally owned by and then co-owner by) was dissolved. Based on the assets of the (the transitional company) created a new entity, which as a successor company continued the operation under the same location as the original petitioning company,

> *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.

In the instant case, the ETA 750 labor certification was accepted for processing on August 13, 1997. The rate of pay or the proffered wage specified on the ETA 750 is $13.40 per hour or $27,872 per year. The record contains the following evidence to demonstrate that the petitioner and the successor entities have the continuing ability to pay the proffered wage from the priority date:

- Copies of Internal Revenue Service (IRS) Forms 1120S U.S. Income Tax Return for an S Corporation for the years 1997 through 1999;
- Copies of IRS Forms W-2 Wage and Tax Statement issued by for 2002 and 2008;
- A copy of a paystub issued by to the beneficiary for pay period June 16, 2005 – June 30, 2005; and
- Copies of IRS Forms 1065 U.S. Partnership Return of Income for the years 1997 through 1999.[6]

Based on the evidence submitted, the beneficiary received the following compensation from in 2002 and 2008:

Tax Year	*Actual wage (AW) (Box 1, W-2)*	*Yearly Proffered Wage (PW)*	*AW minus PW*
2002	$26,710.59	$27,872	($1,161.41)
2008	$33,766.64	$27,872	Exceeds the PW

Therefore, the petitioner and/or the petitioning successor have established the ability to pay in 2008, but not in any other year from the priority date (August 13, 1997).

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*

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[6] We note that the partnership tax returns above are not relevant for the purposes of determining the petitioner's ability to pay. The employer ID number shown on the tax returns ( ) is not the same as on the Form I-140 petition, and the business activity listed the returns says real estate.

Especial v. Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. (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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner 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 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 USCIS 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).

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 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).

The petitioner's tax returns demonstrate its net income (loss) for the years 1997-1999, as shown below:

Tax Year	*Net Income (Loss)*[7]	*Proffered Wage*
1997	($4,096)	$27,872
1998	$5,199	$27,872
1999	($2,023)	$27,872

Therefore, the petitioner did not have sufficient net income to pay the proffered wage of $27,872 in any of the year shown above.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] 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 the total of a corporation'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 petitioner's tax returns demonstrate its end-of-year net current assets for the years 1997-1999, as shown below:

Tax Year	*Net Current Assets*	*Proffered Wage*
1997	($11,397)	$27,872
1998	(4,231)	$27,872
1999	($3,763)	$27,872

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in any of the year shown above.

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[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 23 (1997-1999) of Schedule K. *See* Instructions for Form 1120S, 1999 at http://www.irs.gov/pub/irs-prior/i1120s--1999.pdf (last accessed May 24, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner's net income for 1997-1999 is found on line 23 of schedule K.

[8] 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.

Additionally, since the record does not include any evidence of the petitioner or the successors' ability to pay (i.e. the beneficiary's Forms W-2 and/or 1099-MISC, the successors' federal tax returns, annual statements, and/or audited financial statements) from 2000 and continuing until the beneficiary obtains lawful permanent residence, we cannot conclude that the petitioner and the successor entities have the continuing ability to pay the proffered wage.

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new NOIR consistent with the analysis detailed above. The director may request any additional evidence considered pertinent or relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Similarly, the petitioner may provide additional evidence not specified or requested by the director within a reasonable period of time. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. If the new decision is contrary to the AAO's findings, it should be certified to the AAO for review.

ORDER: The director's decision to revoke the previously approved petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.