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U.S. Citizenship  
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MAR 11 2004

FILE: LIN 02 216 52949 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner, a personal service corporation, is a medical practice specializing in cardiology. It seeks to employ the beneficiary permanently in the United States as a cardiologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as member of the professions holding an advanced degree. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the petitioner, a personal service corporation with 100% of its common stock split equally between two of its owners, had sufficient financial ability to pay the proffered wage. Specifically, counsel states that the petitioning corporation would have the ability to pay the proffered wage if it elected to pay out less its profit as income for its owners.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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

*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 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 establishes the prospective employer's ability to pay the proffered wage.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is December 3, 2001. The beneficiary's annual salary as stated on the labor certification is \$160,000 per annum.

With the original petition, the petitioner submitted an incomplete copy of Form 1120, U.S. Corporation Income Tax Return, for 2001 and an unaudited financial statement for the period ended March 31, 2002.

On November 27, 2002, the director issued a Request for Evidence instructing the petitioner to submit evidence of its ability to pay the proffered wage in the form of complete federal tax returns, copies of annual reports, audited financial statements, and other Internal Revenue Service (IRS) forms (such as 1099s, W-2s, and 941s) dated from December 3, 2001 to the present.

In response, the petitioner submitted complete copies of IRS Form 1120, U.S. Corporation Income Tax Return, for the tax years ending 2000 and 2001, Form W-2s for co-owner Dr. Fahd Jajeh for 2000 and 2001, and Form 941s from 2000, 2001, and 2002.

The petitioner's tax return for 2000 reflected gross receipts/sales of \$2,169,946; gross profit of \$2,169,946; compensation of officers of \$1,352,051; salaries and wages paid of \$299,445; and a taxable income before net operating loss deduction and special deductions of -\$22,146. The tax return for 2001 reflected gross receipts/sales of \$2,593,853; gross profit of \$2,593,853; compensation of officers of \$1,461,862; salaries and wages paid of \$494,550; and a taxable income before net operating loss deduction and special deductions of \$23,627.

In determining the petitioner's ability to pay the proffered wage, CIS (Citizenship and Immigration Services) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay, CIS will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Service 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS (legacy INS) should have considered income before expenses were paid rather than net income.

As the petition's priority date falls on December 3, 2001, CIS must examine the petitioner's tax return for 2001. The petitioner's IRS Form 1120 for calendar year 2001 presents a net taxable income of \$0. The petitioner could not pay a proffered wage of \$160,000 a year out of this income. We concur with the director's finding in this regard.

If the petitioner does not have sufficient net income to pay the proffered salary, CIS will then review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and

current liabilities.<sup>1</sup> Net current assets identify the amount of “liquidity” that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as CIS is satisfied that the petitioner’s current assets are sufficiently “liquid” or convertible to cash or cash equivalents, then the petitioner’s net current assets may be considered in assessing the prospective employer’s ability to pay the proffered wage.

According to the petitioner’s 2001 IRS Form 1120 balance sheet (Schedule L), the petitioner had current assets in the amount of -\$23,773. The Schedule L reflected total current liabilities in the amount of -\$23. It is apparent that the petitioner could not pay a proffered wage of \$160,000 a year out of the petitioner’s net current assets of -23,750.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity’s business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner’s financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage.

On appeal, counsel states:

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<sup>1</sup> A petitioner’s “current assets” consist of cash and assets that are reasonably expected to be converted to cash or cash equivalents within one year from the date of the balance sheet. As reflected on the petitioner’s balance sheets, current assets include, but are not limited to, the following: cash; accounts receivable; inventories; pre-paid expenses; certain marketable securities, loans, and promissory notes; and other identified current assets. A petitioner’s “current liabilities” are debts that must be paid within one year from the date of the balance sheet. Examples of current liabilities include, but are not limited to, the petitioner’s accounts payable; payroll taxes due; certain loans and promissory notes that are payable in less than one year; and any other identified current liabilities.

Under the interpretation of ability to pay as articulated in the [director's] decision, the corporation could have met the standard of ability of pay by leaving additional ordinary income in the corporation at the end of the year. Had the owners of the business opted to pay themselves slightly less income, the corporation would have had the ability to pay. The decision appears to make an assumption that the owners of the business have a fixed income, the same as salaries for employees, rent, insurance, etc., which cannot be changed.

The owners or principles [sic] of [sic] business enterprise cannot be assumed to have a fixed salary agreement with their businesses. Owners and principles [sic] assume the risk as well as the profits from their enterprise. An individual hired as an employee would normally negotiate a salary prior to hire and this salary would become a liability for the employer at a fixed amount. The owner, on the other hand, takes the profit from the business. The owner's salary would go up or down based on the profitability of the business. An owner would be absolutely correct if at the conclusion of the business year, he or she took all profits as income leaving the corporation with little or no ordinary income and therefore avoiding the payment of corporate taxes.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that Drs. Jajeh and Koch each hold 50 percent of their company's stock and perform the personal services of the medical practice. According to the petitioner's 2000 IRS Form 1120 Schedule E (Compensation of Officers), Drs. Jajeh and Koch elected to pay themselves \$1,027,531 and \$324,520, respectively. According to the Schedule E for 2001, Drs. Jajeh and Koch paid themselves \$1,004,994 and \$456,868, respectively. These figures are supported by Dr. Jajeh's W-2 Forms for 2000 and 2001, which were submitted for the record. We note here that the compensation received by the company's two owners during these two years was not a fixed salary and amounted to almost \$1.5 million per year.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that

a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of Drs. Jajeh and Koch, but, rather, the financial flexibility that the two employee-owners have in setting their salaries based on the profitability of their personal service corporation medical practice. In presenting an analysis of the petitioner's Quarterly Federal Tax Returns (Form 941) from March 2000 through September 2002, counsel offers a compelling argument in regard to this issue. The quarterly tax returns for this period show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries, but that the medical practice easily fulfills its salary obligations. Clearly, the petitioning entity is a profitable enterprise for its two owners. As previously noted, their medical practice earned a gross profit of \$2,169,946 in 2000 and \$2,593,853 in 2001. Counsel notes: "The amount paid to the owners, into profit sharing, and into employee benefit programs [was] determined by the profitability of the corporation. None of these numbers [were] hard and fast fixed expenses." We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$160,000 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the CIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained.