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U.S. Citizenship
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Services

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FILE:

[Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: OCT 05 2006

IN RE:

Petitioner:
Beneficiary:



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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private medical group. It seeks to employ the beneficiary permanently in the United States as an internist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. 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 denied the petition accordingly.

On appeal, counsel submits a brief. As will be explained below, counsel is not responsive to the director's valid concerns.

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. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 24, 2002. The proffered wage as stated on the Form ETA 750 is \$142,646 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1998 and six employees. The petitioner did not list its gross annual income or net income as requested. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Returns for an S Corporation for 2003 and 2004 and evidence of the beneficiary's income from other sources.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 31, 2005, the director requested additional evidence pertinent to that ability. The director determined that the information on the petitioner's tax returns did not establish the petitioner's ability to pay the proffered wage and that the record lacked the petitioner's 2002 tax return. The director noted that payment of wages to the beneficiary could be counted towards an ability to pay those wages.

Finally, the director noted that the weekly wages listed on the petition were less than the proffered wage but within five percent of the proffered wage.

In response, the petitioner submitted its 2002 tax return and tax returns for the individual who signed the petition on behalf of the petitioner. Counsel requests that the proffered wage be prorated for 2002 and asserts that as a Chapter S corporation, the petitioner can rely on the assets of its shareholders. Counsel further asserts that the weekly wage listed on the petition was in error. Finally, counsel asserts that the beneficiary will generate additional income for the petitioner.

The tax returns reflect the following information for the following years:

	2002	2003	2004
Net income	\$3,453	\$8,320	\$3,682
Current Assets	\$8,255	\$11,980	\$5,325
Current Liabilities	\$0	\$0	\$0
Net current assets	\$8,255	\$11,980	\$5,325

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 9, 2006, denied the petition. The director specifically determined that the tax returns submitted were not those of the petitioner's sole shareholder and that the record lacked evidence of the current number of patients or that would allow the director "to objectively establish an anticipated increase in the number of the petitioner's customers."

On appeal, counsel reiterates the assertions advanced in response to the director's request for additional evidence.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 did not establish that it has ever employed and paid the beneficiary.

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). 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 CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner 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 petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner'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 petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002, 2003 or 2004. During those years, the petitioner shows a net income of only \$3,453, \$8,320 and \$3,682 respectively and net current assets of only \$8,255, \$11,980 and \$5,315 respectively. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage through its net income or net current assets.

Counsel's reliance on the assets of [REDACTED] is not persuasive. A corporation, even a Chapter S corporation, is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover,

¹ 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.

counsel fails to respond to the director's valid observation that Mr. [REDACTED] is not a shareholder of the petitioning corporation. Rather, the sole shareholder is [REDACTED]

Counsel requests that CIS prorate the proffered wage for the portion of 2002 that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. Regardless, the percentage of the year remaining after July 24, 2002 is 44 percent. Forty four percent of the proffered wage is \$62,764.24, far above the petitioner's net income or net current assets in 2002. Moreover, prorating the proffered wage in 2002 will not demonstrate an ability to pay the proffered wage in 2003 and 2004.

We acknowledge the assertion that the beneficiary, an internist, will allow the petitioner to accept more patients and increase its income. The petitioner, however, fails to respond to the director's valid concern that the record lacks evidence that would allow an objective analysis of the additional income the beneficiary's services might generate. Thus, any discussion of this claim on our part would be pure speculation.

In summary, the petitioner has not demonstrated an ability to pay the proffered wage through its net income or net current assets. Counsel fails to respond to the director's valid concerns that Mr. [REDACTED] is not a shareholder and that the record lacks evidence that would allow an objective analysis of how much additional income the beneficiary might generate. As such, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2002 or subsequently during 2003 and 2004. 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.