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

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ADMINISTRATIVE APPEALS OFFICE
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File: SRC 01 227 51483 Office: NEBRASKA SERVICE CENTER

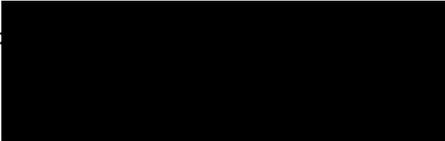
Date: DEC 13 2003

IN RE: Petitioner:
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:



INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner.
Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a podiatry practice. It seeks to employ the beneficiary permanently in the United States as a medical secretary. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by 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. The director also determined that the petitioner had not established that the beneficiary has the education required to fill the proffered position.

On appeal, counsel submits a 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.

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.

Eligibility in this matter hinges on the petitioner's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on December 24, 1997. The proffered wage as stated on the Form ETA 750 is \$440 per week, which equals \$22,880 per year.

The petition in this matter was postmarked June 25, 2001. With

the petition counsel submitted copies of the petitioner's nominal 1996, 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Returns.

Those returns report the petitioner's income based on a fiscal year from November 1 of the stated year to October 31 of the following year. The 1996 return, therefore, reports income from November 1, 1996 to October 31, 1997. Because the priority date is December 24, 1997, information from the petitioner's nominal 1996 return bears no direct relevance to the petitioner's ability to pay the proffered wage or to any other issue in this case.

The 1997 tax return reports income from November 1, 1997 to October 31, 1998. That return shows that the petitioner declared a loss of \$2,322 as its taxable income before net operating loss deduction and special deductions during that fiscal year. The corresponding Schedule L states that at the end of that year the petitioner had current assets of \$6,131 and no current liabilities, which yields net current assets of \$6,131.

The 1998 return reports income from November 1, 1998 to October 31, 1999. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$0 during that fiscal year. The corresponding Schedule L states that at the end of that year the petitioner had current assets of \$7,567 and current liabilities of \$3,082, which yields net current assets of \$4,485.

The 1999 tax return reports income from November 1, 1999 to October 31, 2000. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,889 during that fiscal year. The corresponding Schedule L states that at the end of that year the petitioner had current assets of \$6,008 and no current liabilities, which yields net current assets of \$6,008.

Counsel also submitted a letter, dated June 19, 2001, from the petitioner's owner. The petitioner's owner observed that the petitioner's combined taxable income before net operating loss deduction and special deductions and compensation to officers for its fiscal year 1999 equals \$80,889. The petitioner's owner states that this combination of income and compensation demonstrates the ability to pay the proffered wage.

An undated, unsigned, unattributed note submitted with the petition states that the petitioner is a subchapter S corporation and that, therefore, the addition of the petitioner's line 28 compensation of officers and the line 28 taxable income before net operating loss deduction and special deductions equals the petitioner's total income. Why that might be the appropriate treatment is unclear to this office, but, as appears below, this office need not reach that issue.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Nebraska Service Center, on February 27, 2002, requested additional evidence pertinent to that ability.

In response, counsel submitted the first pages of the 1997, 1998, 1999, 2000, and 2001 Form 1040 joint income tax returns of the petitioner's owner and the owner's wife. Those returns indicate that the petitioner's owner and owner's wife declared an adjusted gross income ranging from \$104,100 to \$255,769 during those years. The petitioner did not provide the its nominal 2000 income tax return, although the petitioner's 2000 fiscal year, if it followed the pattern of previous years, would have ended on October 31, 2001.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage. In addition, the director noted that the Form ETA 750 states that the proffered position requires one year of college with a major in practical nursing and resulting in a practical nursing degree. The director denied the petition on August 16, 2002.

On appeal, counsel stated that the petitioner is a subchapter S corporation and referred to the adjusted gross income of the petitioner's owner as evidence of the corporation's ability to pay the proffered wage. Counsel also stated that evidence submitted with the petition demonstrated that the beneficiary met the educational requirement.

With the appeal, counsel resubmitted a photocopy of a certificate of completion from the Sheridan Vocational Technical Center stating that, on March 30, 1995, the beneficiary had met the requirements of a program of training in practical nursing.

Counsel also submitted certificates showing that the beneficiary subsequently attended continuing education seminars during September 1995 and August 1997.

Counsel flatly states that the petitioner is an S corporation but submits no evidence of that assertion. This office notes that during each of the salient years the petitioner filed a Form 1120 U.S. Corporation Income Tax Return, rather than a Form 1120S U.S. Income Tax Return for an S Corporation. Ordinarily, the Form 1120 U.S. Corporation Income Tax Return is filed by C corporations and not by S corporations. That the petitioner filed 1120 returns is persuasive evidence that the petitioner is a C corporation, rather than an S corporation. The petitioner shall be treated in all respects as a C corporation for the purposes of this petition and appeal.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.* See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). The personal income tax returns of the petitioner's owner and the owner's wife, therefore, are irrelevant to this matter and will not be further considered.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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 both CIS and 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 that INS (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. 623 F. Supp. at 1084. The court specifically rejected the argument that INS should have considered income before expenses were paid rather than net income.

Counsel urges that the compensation the petitioner paid to officers should be treated differently from other expenses. The record contains no evidence that the petitioner was not contractually obliged to pay some or all of that compensation. That compensation, therefore, shall be treated in the same way as the petitioner's other expenses.

The priority date is December 24, 1997. The proffered wage is \$22,880 per year. The determination of the petitioner's ability to pay the proffered wage is complicated by the petitioner's election to report its taxes based on a fiscal year rather than a calendar year. Further, the petitioner is not obliged to show

* This office notes that this treatment would be the same whether the company was a C corporation or an S corporation. That is; even if counsel had established that the petitioner is an S corporation, the income and assets of the owner would not be considered in determining the petitioner's ability to pay the proffered wage.

the ability to pay the entire proffered wage during fiscal year 1997, but only that portion which would have been due if the petitioner had hired the beneficiary on the priority date. On the priority date, 53 days of that 365-day fiscal year had already elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 312 days. The proffered wage multiplied by $312/365^{\text{th}}$ equals \$19,557, which is the amount the petitioner is obliged to show the ability to pay during its 1997 fiscal year.

During fiscal 1997, the petitioner declared a loss of \$2,322 and finished the year with net current assets of \$6,131. The petitioner has not demonstrated that it was able to pay the appropriate portion of the proffered wage out of either its income or its assets during fiscal year 1997. The petitioner has not shown that any other funds were available to pay the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during fiscal year 1997.

The petitioner is obliged to show the ability to pay the entire proffered wage during fiscal year 1998 and ensuing years. During fiscal 1998, the petitioner declared taxable income before net operating loss deduction and special deductions of \$0 and ended the year with net current assets of \$4,485. The petitioner has not demonstrated that it was able to pay the proffered wage out of either its income or its assets during fiscal year 1998. The petitioner has not shown that any other funds were available to pay the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during fiscal year 1998.

During fiscal 1999, the petitioner declared taxable income before net operating loss deduction and special deductions of \$2,289 and ended the year with net current assets of \$6,008. The petitioner has not demonstrated that it was able to pay the proffered wage out of either its income or its assets during fiscal year 1999. The petitioner has not shown that any other funds were available to pay the proffered wage. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during fiscal year 1999.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1997, 1998, and 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Further, while the record indicates that the beneficiary received instruction and practical training in nursing, the petitioner has not established that this equates to one year of college as required by the labor certification.

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.