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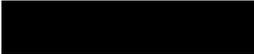
U.S. Citizenship
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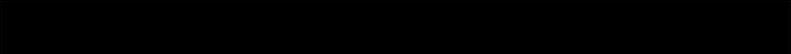
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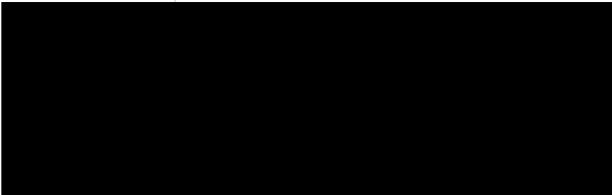
Office: CALIFORNIA SERVICE CENTER Date:

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 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 preference visa petition was denied by the Director, California Service Center, and subsequently appealed to the Director, Administrative Appeals Office (AAO), who dismissed the appeal on November 10, 2004. The Director of the AAO now moves to reopen the appeal. The appeal will be reopened on Service Motion and sustained.

The petitioner is a surgical center. It seeks to employ the beneficiary permanently in the United States as a music therapist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The Director of the California Service Center 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. The petitioner appealed that decision, and on appeal the Director of the AAO concurred with the denial of the petition. Subsequent to the decision of the Director of the AAO to dismiss the appeal, the petitioner filed an individual action for declaratory relief with the United States District Court for the Central District of California challenging the decision.

In that action, counsel repeats the assertions made on appeal that the petitioner has had the continuing financial ability to pay the proffered salary as demonstrated in two manners. First, the petitioner's owner is the sole owner of various other corporations and therefore has sufficient assets to pay the proffered wage. Second, the petitioner has ample flexibility regarding the compensation of the petitioner's sole owner and can therefore pay the proffered wage by reducing the amounts paid to the petitioner's owner.

The regulation at 8 C.F.R. § 103.5(a)(5) provides that when a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision in order to make a new decision favorable to the affected party, the Service officer shall combine the motion and the favorable decision in one action.

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.

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

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. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.23 per hour, which amounts to \$42,078.40 per annum. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the visa petition, the petitioner claims to have been established in 1998 and to currently employ thirty-three workers. In support of its ability to pay the beneficiary's proposed wage offer of \$42,078.40 per year, the petitioner initially submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. It reflects that the petitioner reported -\$4,605 in taxable income before the net operating loss (NOL) deduction. Schedule L of the tax return indicates that the petitioner had \$19,258 in current assets and \$23,267 in current liabilities, resulting in -\$4,009 in net current assets.¹

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence. The director instructed the petitioner to submit copies of annual reports, federal tax returns, or audited financial statements for 2001. The director also instructed the petitioner to submit copies of its state quarterly wage reports for 2001.

In response, the petitioner submitted the requested documents. Its 2001 corporate tax return shows that it reported a taxable income of -\$37,964 before the NOL deduction. Schedule L indicates that the petitioner had \$137 in current assets and \$42,110 in current liabilities, yielding -\$41,973 in net current assets. Its 2001 state quarterly wage reports reflect that the petitioner maintained a payroll of between fifteen and twenty part-time and full-time employees. The wage reports do not show that the petitioner paid any wages to the beneficiary during 2001.

In addition, the petitioner submitted a letter, dated May 24, 2002, from Wells Fargo Bank to the petitioner. The letter advised that a request for business credit had been preliminarily approved, but that further information was needed. The petitioner also provided a letter, dated May 31, 2002, from [REDACTED] a certified public accountant. [REDACTED] states that although the petitioner's 2001 tax return shows a \$37,964 loss, it also shows officer compensation of \$440,400, which would have been available to pay the proffered wage, because the principal shareholder has other income sources.

The director reviewed the petitioner's net income and net current assets as shown on its 2001 corporate tax return, as well as the accountant's assertion relating to the officer compensation expense and denied the petition on September 12, 2002. The director concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of April 30, 2001.

¹ Besides net income, CIS will review a petitioner's net current assets as a measure of its liquidity and as a readily available resource out of which a proposed wage offer may be paid. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets and current liabilities are shown on Schedule L. 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.

On appeal, counsel claimed that the officer compensation should have been considered because it was a discretionary expense and was part of the petitioning corporation's tax avoidance strategy. Counsel also stated that the petitioner has paid the beneficiary more than the proffered salary in 2002. Counsel finally asserted that the sole shareholder's other corporations' income must be considered because of their affiliation through the shared ownership of the petitioner's sole shareholder. Counsel submitted a letter from the petitioner's sole shareholder, [REDACTED] who describes the success of his various health-care businesses and attests to the beneficiary's skills since the petitioner hired him. [REDACTED] does not specify when the beneficiary was hired. Counsel submits copies of various 2002 payroll records, reflecting that the petitioner paid wages amounting to \$23.07 per hour between February and September 2002. Copies of eleven articles of incorporation from different corporations that show [REDACTED] as the principal shareholder of these entities, as well as various other state corporate registration documents have been provided on appeal. Counsel also offers copies of twelve unaudited income statements for the period between January 1, 2002 and July 31, 2002, reflecting various income and expense levels of these different corporate entities, including one provided in the petitioner's name.

For the reasons discussed below, the petitioner's unaudited financial statement covering this period in 2002 is largely irrelevant, as the petitioner's payroll records demonstrate that it paid the beneficiary at least the proffered wage from February to September 2002. It is also noted that unaudited financial statements are not persuasive evidence of a petitioner's continuing ability to pay the proffered salary. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) neither states nor implies that unaudited financial statements may be considered as competent evidence of a petitioner's ability to pay the certified wage.

Counsel subsequently submitted a supplement to the appeal on July 15, 2004. This submission consisted of a copy of the petitioner's 2003 corporate federal tax return, a copy of the petitioner's articles of incorporation, copies of the 2003 federal tax returns from ten of the other corporations of which [REDACTED] the principal shareholder, as well as the corresponding articles of incorporation. In his transmittal letter, counsel referred to copies of the beneficiary's pay stubs and copies of the beneficiary's 2002 and 2003 individual tax returns as proof of payment of the proffered wage, but such documents were not included in the supplemental submission. The petitioner's 2003 tax return revealed that it reported taxable income of \$7,954 before the NOL deduction, and that Schedule L showed that the petitioner had \$4,798 in net current assets. In its initial decision, the AAO noted that neither figure demonstrated the petitioner's ability to pay a proffered annual salary of \$42,078.40.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, while the beneficiary's payroll records, submitted on appeal, establish that the petitioner employed and paid the beneficiary \$2.84 per hour more than the proffered wage between February and September 2002, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate its continuing ability to pay the proposed wage offer as of the

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priority date. In this case, there is no evidence that the beneficiary began working for the petitioner anytime during 2001, the year of the priority date.

In support of his assertion that the petitioner's continuing ability to pay is demonstrated by the submitted payroll records showing the petitioner's payment of the actual wage, counsel cited a 1996 AAO decision. First, all of the facts of that particular case are not presently before the AAO. Each petition's filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In determining statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Second, the prior AAO decision is not a binding precedent decision within the terms of 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that binding precedent decisions are those decisions that are designated and published in bound volumes entitled "Administrative Decisions Under Immigration and Nationality Laws of the United States" or as interim decisions. Third, that decision was based, in part, on evidence that the petitioner had produced evidence that it had actually been paying the proffered wage from the priority date in 1993 through 1995. The petitioner did not provide such evidence in this matter.

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.

Counsel's claim that the petitioner's continuing ability to pay the proffered wage may be based on the income or assets of the petitioner's other affiliated corporations is also not persuasive. Counsel cites a 1996 AAO decision, as well as *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982), in support of this proposition. As noted above, the prior AAO decision is not considered binding precedent in this case. Nor does *Matter of Hughes* provide persuasive guidance in this matter. That case provides clarification of affiliate and subsidiary relationships between companies, not with the assessment of a company's ability to pay a wage.

A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, the assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered salary. 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 (formerly the 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. However, in the present case, CIS is basing its determination solely on the ability to pay of the petitioning corporation. Specifically, CIS is basing its determination on counsel's contention that the petitioner can pay the

wage because it has the financial flexibility to set the annual compensation of its sole owner based on the profitability of the instant incorporated medical practice. In presenting an analysis of the instant petitioner's Federal Tax Returns from the years 2000, 2001, and 2003 (the returns for FY 2002 are not part of the record), counsel offers a compelling argument in regard to this issue. The returns for this period show that the petitioner exercises a large degree of financial flexibility in compensating its sole officer and stockholder. Clearly, the petitioning entity is a profitable enterprise for its owner. In 2000, the petitioner paid \$80,000. In 2001, the petitioner paid 440,000. In 2003, the petitioner paid but in that same year, the petitioner's gross receipts has nearly doubled from \$1,282,626 in 2001 to \$2,040,804 in 2003. Similarly, the amount of salaries and wages paid grew from \$161,741 in 2001 to \$532,288 in 2003. Such a history of growth lends credence to counsel's contention that the petitioner is a viable enterprise and it compensates its sole officer only after satisfying the corporation's other expenses.

Based on these figures and the fact that the petitioner demonstrated that it paid the beneficiary an amount greater than the proffered wage in 2002, this office concurs with the arguments presented by counsel on appeal. A review of the circumstances in this case reveal the instant petitioner's viability as a profitable corporation and confirms that the job offer is realistic and that the petitioner has shown the continuing ability to pay the proffered salary of \$42,078.40 from the priority date. The AAO will consider the totality of the circumstances in assessing an entity's ability to pay. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 met that burden.

ORDER: The appeal is sustained.