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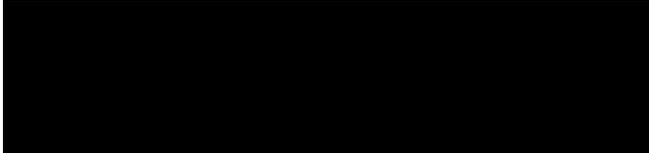
U.S. Department of Homeland Security
20 Mass. Rm. N.W., Rm. A3042,
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]

Office: VERMONT SERVICE CENTER

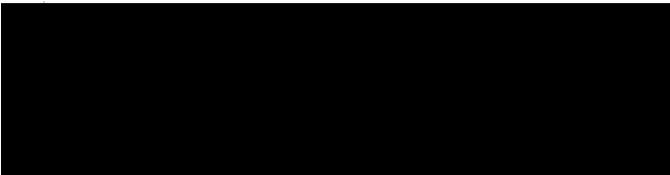
Date: NOV 18 2004

IN RE: Petitioner:
Beneficiary:



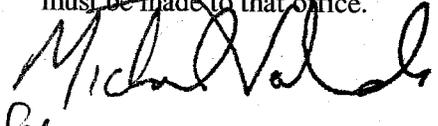
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


For Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner, a personal service corporation, is an optometry business. It seeks to employ the beneficiary permanently in the United States as an optometric assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 asserts that the petitioner, a personal service corporation with 100% of its common stock owned by a single owner, 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 of its profit as income for its owners.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 9, 2001. The proffered wage as stated on the Form ETA 750 is \$13.03 per hour, which amounts to \$27,102.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from September 2000 to the present.

On the petition, the petitioner claimed to have been established in 1989 and to currently employ 25 workers. In support of the petition, the petitioner submitted copies of pay records for the beneficiary for the pay period ending April 6, 2001, June 1, 2001, June 15, 2001, October 19,

2001, November 2, 2001, November 16, 2001, November 30, 2001, and December 14, 2001. The gross year to date wages paid to beneficiary as of December 14, 2001 was \$18,047.91.

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 March 12, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide a copy of the petitioner's most recently filed federal income tax return for a full year. The director acknowledged the previously submitted pay statements for the beneficiary showing a \$9 per hour wage.

In response, the petitioner submitted a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement, and a letter from the petitioner's accountant attesting to the petitioner's average gross income of over \$565,000 on the last three completed tax returns. The Form W-2 reflected wages earned by the beneficiary of \$18,102.36 for the year 2001.

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 December 17, 2002, denied the petition.

On appeal, the petitioner submits a copy of its 2000 and 2001 Form 1120, U.S. Corporation Income Tax Return. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$525 and net current assets of \$3,225. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of -\$4,498 and net current assets of \$2,651. Counsel asserts:

New evidence (federal income tax return) will prove that petitioner (as a professional practice) has the ability to pay beneficiary's salary as of April 2001 and continuing to the present.

The difference of \$9,000 between the offered salary and that actually paid to beneficiary can easily be made up or generated from petitioner's personal income of more than \$100,000 per annum.

The inconsistencies in the amount of reported income can be explained by the fact that petitioner owns several optometry practices and thus has multiple income reporting requirements.

The INS was in error for ruling that when a company is organized as a corporation, the owner's personal income cannot be considered in determining ability to pay the offered wage, for the reason that the case at hand involves a single-owner personal service corporation, to which a different set of rules applies.

The rule that a corporation is a separate and distinct legal entity from its owners or stockholders does not apply to this case, because in certain instances, the doctrine of "piercing the veil of corporate identity" applies instead, such as in this case.

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 that 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 employed and paid the beneficiary the full proffered wage in 2001.

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. 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

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

proffered wage out of those net current assets. The petitioner's net current assets during the year 2001 were only \$2,651 for the address and EIN given.

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.

Counsel contends that CIS should consider the ability of the owner of the business to provide personal income to pay the beneficiary the proffered wage. 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, its employees, retired employees, or their estates hold all of the stock of a personal service corporation. The documentation presented here indicates that [REDACTED] holds 100 percent of their company's stock and perform the personal services of the practice. According to the petitioner's 2000 IRS Form 1120 Schedule E (Compensation of Officers), Dr. [REDACTED] elected to pay himself \$131,481. According to the Schedule E for 2001, Dr. [REDACTED] paid himself \$113,960. We note here that the compensation received by the company's owner during these two years was not a fixed salary and amounted to over \$100,000 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 Dr. [REDACTED] but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of the personal service corporation practice. In presenting an analysis of the petitioner's Federal Tax Returns (Form 1120) for 2000 and 2001, counsel offers a compelling argument in regard to this issue. The 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 owner. As previously noted, the practice earned a gross profit of \$582,588 in 2000 and \$582,709 in 2001. Counsel notes: "At any rate, the bottom line is, Dr. [REDACTED] professional practice is doing very well and hence he is very capable of providing an additional \$9,000 on top of the \$18,000 previously paid to the beneficiary." 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-owner confirms that the job offer is realistic and that the proffered salary of \$27,102.40 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of 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). Although the record could have been better developed in this case, the AAO concludes 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.

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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.