



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] EAC 03 081 50504

Office: VERMONT SERVICE CENTER

Date: **JUL 22 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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:

[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
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 dismissed.

The petitioner is a medical practice firm. It seeks to employ the beneficiary permanently in the United States as an office manager. 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.

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 or seasonal nature, for which qualified workers are not available 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. 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 petition's priority date, which is the date 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). The priority date in the instant petition is March 30, 2000. The proffered wage as stated on the Form ETA 750 is \$1,058 per week, which amounts to \$55,016 annually. On the Form ETA 750B, signed by the beneficiary on March 16, 2000, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on December 11, 2002. On the petition, the petitioner claimed to have been established on May 6, 1993, to currently have four employees, and did not specify amounts for its gross annual income or its net annual income.

In support of the petition, the petitioner submitted:

- A Form G-28;
- An original copy of the Form ETA 750;
- A copy of a translated statement, sworn to in the Philippines on October 31, 2002, certifying the beneficiary's experience as an office manager in a Filipino business from November 1989 to December 1999; and,

- A signed copy of the petitioner's 2000 form 1120 tax return, checked for personal service corporation.

In a request for evidence (RFE) dated February 27, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, along with more evidence of the beneficiary's work experience because the evidence was "for only 1 year." The director also specified that the director wanted all copies of Form W-2 Wage and Tax Statements issued to the beneficiary, and further wanted to know if it would be a position new in the petitioner's business.

In response to the RFE, counsel asserted that the 2000 Form 1120 showed \$27,342 in depreciation and a year-end cash balance of \$84,423. Counsel also submitted the petitioner's bank statements for 2000, including checking statements that, he asserted, showed an average monthly collection of \$19,684.93, which would exceed the monthly allotment of the proffered wage, or \$4,584.67.

In a decision dated January 7, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, both as of the priority date and until the beneficiary obtains lawful permanent residence. He accordingly denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that part-time help are currently performing the work the beneficiary would do if she had work authorization, costing the petitioner more than the proffered wage. He also asserts the amount deducted from depreciation from 2000 to 2002 did not represent actual expenditures, since the petitioner had already paid for structural improvements under its lease.¹ Counsel reiterates his earlier assertion, that the bank statements reflect average monthly income that would exceed the beneficiary's monthly allotment of proffered wage.

On appeal counsel submits:

- A January 29, 2004 letter from an accounting services company stating that the company hired "several part time employees [at a cost of] \$49,840, \$88,426 and \$96,330 from 2000 to 2002, respectively. In addition, the company paid a total of 411,735 for billing services, which could have been part of Ms. Aguilera's duties;" and,
- A form W-2 showing \$18,200 in wages paid a [redacted] whom counsel states is "the person who performed this [office manager] duty for the petitioner in 2001."

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document that has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, the director specifically requested none of the documents submitted for the first time on appeal. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. The record contains no copies of Form

¹ In his brief counsel would "draw your attention to statement 1 of petitioner's Tax Return of 2001," even though the only return submitted for the record was the petitioner's Form 1120 return for 2000.

W-2 Wage and Tax statements of the beneficiary, as shown in the table below. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income in the table below.

<u>Tax Year</u>	<u>Net income</u>	<u>Wage increase needed to pay the proffered wage</u>	<u>Surplus or deficit</u>
2000	\$14,940	\$40,076	-\$40,076

Since the net income is less than the proffered wage, it fails to establish the ability to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets would be converted to cash as the proffered wage comes due each month. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

<u>Tax Year</u>	<u>Net Current Assets</u>	<u>Wage increase needed to pay the proffered wage</u>
2000	\$17,540	\$37,476

Since net current assets total less than the proffered wage, this method also fails to establish the ability of the petitioner to pay the proffered wage.

The petitioner's accounting service, in its January 29, 2004 letter, asserts that the petitioner paid more than the proffered wage for temporary help from 2000 to 2002. However, aside from the Form W-2 for 2001 listing wages of \$18,200, counsel provides no documentation in support of his assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts that would be sufficient to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The director correctly noted that presenting the account balances does not establish ability to pay when not coupled with the petitioner's recurring or foreseeable expenditures.

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, 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 its employees, retired employees, or their estates hold all of the stock of a personal service corporation. The documentation presented here indicates that the [REDACTED] each hold 50 percent of their company and perform the personal services of the medical practice. According to the petitioners's 2000 IRS Form 1120 Schedule E (Compensation of Officers) [REDACTED] elected to pay themselves \$175,024 apiece. However, the record does not have a similar schedule E for 2001 or any part of the 2001 tax returns, and accordingly, it cannot be ascertained whether or not the compensation received by the company's two owners was a fixed salary.

This office notes that the RFE requested proof of the petitioner's ability to pay as of the priority date to the present. Since the director issued the RFE on February 27, 2003, it is likely that the petitioner could have submitted the 2001 return at that time, but for whatever reason, chose not to.

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 has not raised the matter of the petitioner's personal service corporation status and is therefore not suggesting that CIS examine the personal assets [REDACTED] or indicating that the petitioner has enough financial flexibility to enable the two employee-owners to set their salaries based on the profitability of their personal service corporation medical practice. The record, further, does not include any quarterly federal tax returns (Form 941) to demonstrate that the petitioner exercises a large degree of financial flexibility in setting employee salaries, no does the record contain any information about the petitioner's financial flexibility in 2001.

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, based upon the scant amount of financial information the petitioner has submitted, it cannot be established that the petitioner had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

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.