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U.S. Citizenship  
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FILE: WAC 01 276 58640 Office: CALIFORNIA SERVICE CENTER

Date: JUN 14 2005

IN RE: Petitioner:

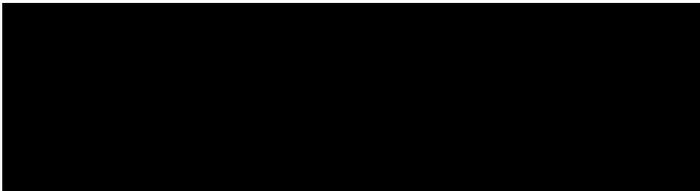


Beneficiary:



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 employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be withdrawn, and the petition will be approved.

The petitioner sought to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is an orthopaedic surgery center. It sought to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was initially denied on May 15, 2002. The director determined that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The AAO initially concurred in this determination and dismissed the appeal on April 15, 2003.

Counsel has moved to reopen and reconsider the case pursuant to 8 C.F.R. § 103.5(a)(2) & (3). He submits a letter from an accounting firm, dated May 13, 2003, along with a copy of the petitioner's corporate income tax return for 2001.

As set forth in 8 C.F.R. § 204.5(g)(2), 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 January 13, 1998. The proffered wage is \$24,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established 1990, to have a gross annual income of \$500,000, a net annual income of \$200,000 and to currently employ four workers. In response to the director's request for evidence and in support of its ability to pay the certified wage, the petitioner supplied copies of its Form 1120, U.S. Corporation Income Tax Return for 1998, 1999 and 2000. They show that the petitioner is a personal service corporation and files its returns using a standard calendar year. The tax returns reflect the following information:

	1998	1999	2000
Gross receipts/sales	\$ 797,058	\$1,122,814	\$796,416
Officer compensation	\$ 269,726	\$ 432,834	\$ 68,590
Salaries and Wages	\$ 41,454	\$ 107,637	\$258,993
Taxable Income before			
net operating loss (NOL) deduction	-\$ 2,262	-\$ 14,202	-\$117,697
Current Assets	\$ 910	\$ -0-	\$ -0-
Current Liabilities	\$106,667	\$ 49,507	\$ 35,378
Net current assets	-\$ 105,757	-\$ 49,507	-\$ 35,378

As set forth above, net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> Besides net taxable income, CIS will review a petitioner's net current assets as an alternative method of determining the petitioner's financial ability to pay a proffered salary. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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's 2001 tax return, submitted on motion, additionally shows that the petitioner reported \$548,420 in gross receipts or sales, officers' compensation of \$7,200, salaries and wages of \$107,758, and a net taxable income of \$111,394 before the (NOL) deduction. As the beneficiary's proffered wage is \$24,000 per year, the beneficiary's proffered wage could be paid out of the petitioner's net income during this period. The accountant's letter clarifies certain write-offs and accounts receivable balances that had been reviewed in the AAO's previous decision and notes that the petitioner was also able to increase its cash reserves, reduce the balance of its shareholder loans, and purchase additional assets. The letter also expresses the principal shareholder's commitment to providing sufficient funds to pay the petitioner through his own adjustment of compensation and the motivation, as a "personal service corporation," to minimize tax liability in the past by distributing additional funds as compensation to the shareholders.

We note that 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 may have 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 this case, there is no evidence submitted to the record suggesting that the petitioner has employed the beneficiary.

If the petitioner does not establish that it may have 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). 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.

In this case, except for the period covering the 2001 tax year, as set forth above, neither the petitioner's proffered wage, nor its net current assets, which all reflected losses, could cover the proposed wage offer in 1998, 1999, or 2000.

If a petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may also consider the overall magnitude of the entity's business activities. Even when the petitioner shows

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 that 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.

In the present matter, as noted by the accountant's letter provided on motion, 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, and as referenced by the petitioner's accountant, 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 significant factor to be considered in determining its ability to pay.

The documentation presented here indicates that one or two shareholders accounted for the entire officer compensation paid of \$269,726 in 1998; \$432,834 in 1999, and \$68,590 in 2000. CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of a corporation's owner or shareholder 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.

Particularly in view of the petitioner's status as a personal service corporation, however, an owner's compensation would go up or down based on the profitability of the business so as to minimize the corporate tax liability, rather than be set at a fixed amount. In the unique circumstances of this particular case, the focus on the financial flexibility of the employee-owners to set their salaries is appropriate. The petitioning entity appears to be a reasonably profitable operation as indicated by the documentation contained in the record showing average gross revenue of over \$800,000 during the relevant period. In this case, we concur with the assertion that the taxable income might be augmented by the officers' compensation to demonstrate the petitioner's ability to pay the proffered salary.

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 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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The previous decisions of the director and AAO are withdrawn. The petition is approved