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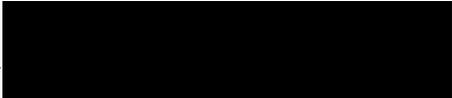
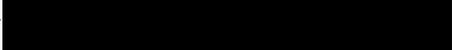
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*Ab*  
MAR 08 2008

FILE: WAC 02 214 54950 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a civil engineering and land development firm. It seeks to employ the beneficiary permanently in the United States as a draftsman. 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 submits a brief and additional evidence.

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) 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is 16.73 per hour, which amounts to \$34,798.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not initially claim to have worked for the petitioner, but by subsequent amendment, summarized her work with the petitioner as a self-employed draftsman during 1997 and 1998.

On the petition, the petitioner claims to have been established 1980, to have a gross annual income in excess of three million dollars and to currently employ twenty-four workers. In support of the petition, the petitioner submitted a partial copy of its Form 1120, U.S. Corporation Income Tax Return for 2000. It shows that the petitioner is a personal service corporation and files its returns using a fiscal year running from March 1<sup>st</sup> until February 28<sup>th</sup> of the following year. The tax return reflects that the petitioner declared over \$3,000,000 in gross receipts and sales, paid officer compensation of \$299,199, paid \$1,156,803 in salaries and wages, and reported a net income of \$96,313. Schedule L of the return shows that the petitioner had \$5,606 in current assets and \$256,117 in current liabilities, resulting in -\$250,511 in net current assets. Net current assets are the difference

between the petitioner's current assets and current liabilities.<sup>1</sup> 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.

On October 22, 2002, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. He requested the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements in order to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its corporate tax returns for the petitioner for the years 1998, 1999, 2000, and 2001. By cover letter, the petitioner informed the director that the 1997 return could not be located. The tax returns for 1998, 1999, and 2001 reflect the following information for the following years:

|                      | 1998        | 1999        | 2001        |
|----------------------|-------------|-------------|-------------|
| Gross receipts/sales | \$1,508,219 | \$1,741,907 | \$2,877,973 |
| Officer compensation | \$ 247,740  | \$ 278,070  | \$ 364,899  |
| Salaries and Wages   | \$ 574,977  | \$ 677,806  | \$1,055,619 |
| Net Income           | -\$ 4,720   | \$ 17,185   | \$ 41,776   |
| Current Assets       | \$ 21,489   | \$ 22,721   | \$ 122,615  |
| Current Liabilities  | \$ 252,576  | \$ 251,616  | \$ 223,550  |
| Net current assets   | -\$ 231,087 | -\$ 228,895 | -\$ 100,935 |

On May 20, 2003, the director issued a notice of intent to deny, finding that the petitioner had failed to submit signed tax returns as evidence of its ability to pay. The director then requested that the petitioner submit copies of the Internal Revenue Service (IRS) computer printouts of its tax returns from 1998 to the present.

The petitioner complied with the director's request and submitted the tax returns. It didn't provide its 2002 return, but provided evidence that it had filed an extension of time. It did, however offer a copy of its 1997 return. This return covers the period from March 1, 1997 until February 28, 1998. It shows that the petitioner reported gross receipts or sales of \$1,396,375, officer compensation of \$313,999, and \$428,462 in salaries and wages paid. It further shows that the petitioner reported \$29,413 in net income. Like the other returns, Schedule L shows that the petitioner's current liabilities exceeded his assets.

The director subsequently denied the petition, finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage out of its net income, focusing on 1998 and 1999 where the petitioner's net income of -\$4,720 and \$17,185 was substantially less than the proffered wage of \$34,798.40.

<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.

On appeal, counsel submits additional evidence in the form copies of the beneficiary's Form 1099, Miscellaneous Income, reflecting compensation paid to her by the petitioner for drafting projects from 1998 to 2002. As summarized by ██████████ the petitioner's accountant, who submits a letter on appeal, the petitioner paid the beneficiary, \$30,411.50 in 1998; \$36,166.50 in 1999; \$42,078.80 in 2000; \$41,534 in 2001; and \$31,177.55 in 2002. Ms. ██████████ notes that in 1998 and 2002, the beneficiary was not employed for the entire year. Ms. ██████████ further emphasizes that as the corporation is a personal service corporation and is taxed at the highest tax rate, it makes certain that all bills and bonuses are paid so that the year-end corporate income is minimized as much as possible. She asserts that for this reason, the net income set forth on the tax returns is not a true reflection of the corporation's ability to pay its workers.

Citing earlier non-precedent AAO decisions, counsel asserts that the substantial sums that the petitioner has paid in salaries and wages and officer compensation, as well as its history of significant gross receipts, supports the petitioner's ability to pay the proffered wage.

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 the instant case, the petitioner has paid the beneficiary as an independent contractor. While it is not possible to make a dollar for dollar comparison to a salaried employee, it is noted that the beneficiary received gross compensation in excess of the proffered wage in 1999, 2000 and 2001.

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.

As the petitioner's net income was sufficient to pay the proffered wage in 2000 and 2001, the 1997, the 1998 and 1999 tax returns become the focus of the review. As noted above, the petitioner paid compensation to the beneficiary slightly in excess of the proffered wage in 1999. The tax return also shows that it reported net income of \$17,185. In 1998, the shortfall of \$4,386.90 between the compensation paid to the beneficiary in 1998 and the proffered wage, could not, however, be met by either the petitioner's net income or net current assets.

If a 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.

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, 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 two or three shareholders accounted for the entire officer compensation of \$313,999 and \$247,740 paid in 1997 and 1998, respectively. 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 salary 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 this case, the focus on the financial flexibility of the employee-owners to set their salaries is appropriate. The petitioning entity appears to be a profitable operation as indicated by the documentation contained in the record showing gross revenue in excess of 1.3 and 1.5 million dollars in 1997 and 1998, respectively. In this case, we concur with the accountant's assertion that the taxable income is not the best measure of 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 appeal is sustained.