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U.S. Citizenship
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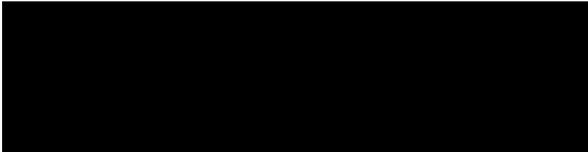
MAR 21 2005



FILE: WAC 03 079 52857 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental practice. It seeks to employ the beneficiary permanently in the United States as a dentist. 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.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 23, 1997. The proffered wage as stated on the Form ETA 750 is \$8,300 a month, which amounts to \$99,600 annually. The petitioner also noted that the beneficiary would work 37 and a half hours a week.

With the petition, the petitioner submitted IRS Form 1120, the petitioner's federal corporate income tax return for the year 2001, as well as documentation of the beneficiary's educational credentials. The petitioner established that it is structured as a personal service corporation, was established in 1984, and has ten employees.¹

Because the evidence was insufficient to establish the beneficiary's qualifications or the petitioner's ability to pay the proffered wage as of the priority date, on May 6, 2003, the director requested a copy of the beneficiary's diploma, as well as evidence that the beneficiary possessed the experience listed on Form ETA 750. In addition,

¹ The petitioner's federal income tax documents indicate that the petitioner was established in 1994.

the petitioner requested evidence of the petitioner's ability to pay the proffered wage from 1997 to 2002. The director indicated that evidence of this ability should be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response the petitioner submitted the beneficiary's diploma from the University of Antioquia, Medellin, Colombia, a letter from the [REDACTED] where she worked as a dentist, and a letter from the Department of Admissions and Registration, Health Section, University of Antioquia, that listed the beneficiary's courses in odontology. In addition, the petitioner submitted IRS Form 1120 for 1998, 1999, 2000, and 2001.

On August 13, 2003, the director sent a second request for additional evidence and requested evidence of the beneficiary's dental license for the state of California. In response, the petitioner submitted a copy of the beneficiary's dental license from the Dental Board of California, which was issued in 1994 and valid until November 30, 2003.

Finally, on September 15, 2003, the director requested the petitioner's federal income tax form for 1997, with accompanying schedules and attachments. In response, the petitioner submitted the petitioner's federal tax returns for 1997.

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 October 8, 2003, denied the petition. The director stated that the petitioner's 1997 federal income tax return indicated a taxable income of -\$44,665, with assets of \$184,820. For the year 1998, the director stated the petitioner had taxable income of \$114,989, with assets of -\$5,591. For the year 1999, the director noted that the petitioner had taxable income of \$127,812, with assets of -\$179,485, and for the year 2000, taxable income of \$15,001, with assets of -\$131,103. Finally the director stated that the petitioner's taxable income for 2001 was \$116,283, with assets of -\$4,342. The director noted that the proffered salary was \$99,600 a year.

On appeal, counsel states that in 1997, the petitioner was affected by the impact of a restructuring process in which several dental practices were bought while others were closed. These activities affected the overall income of the petitioner. Counsel also notes that the petitioner presently has dentists that work on salary and as independent contractors and that at some point the beneficiary would replace. Finally counsel submits a letter from [REDACTED] the petitioner's accountant, to explain in more detail the petitioner's income tax returns for the years in question.

Mr. [REDACTED] in his letter, states that his firm is surprised by the director's analysis and conclusion. The accountant points out from 1997 to 2001, the petitioner's average income was approximately \$98,000 which is the amount required to show adequate financial resources. Mr. [REDACTED] also points out that the petitioner had gross receipts of over \$800,000, and there were sufficient resources to pay someone at the rate of \$99,000 for the last nine weeks of 1997. The accountant also states that during the 1997 corporate year, one of many operational restructurings took place, which entailed taking on debt and attempting to merge several different accounting systems which made it necessary to amend the petitioner's tax returns for that year.

The accountant then states that the assets information provided by the director in his decision is not consistent with figures in his office files. The accountant states that in 1997, his records reflect that the petitioner had \$116,272 in taxable income with \$36,610 in assets, and gross receipts of \$812,435. The accountant stated that the petitioner's annual gross receipts are the more relevant number to examine as the petitioner could have reduced spending in other, discretionary areas. The accountant states that in 1998, his files reflect that the petitioner had \$114,989 in taxable income with \$47,724 in assets and gross receipts of \$843,210. The accountant also states that in 1999, the petitioner had assets in excess of \$50,000.

The accountant also states that in 2000, significant disputes rose among the shareholders of the petitioner, which affected the petitioner's income, as the hours of operation were restricted. The accountant states that notwithstanding the disputes, his offices files reflect an asset figure of \$29,286. With regard to the tax year 2001, the accountant states that the assets figure reflected on the tax return is \$70,082. The accountant states that CIS may be using historical and carryover losses from the purchase of other dental practices to arrive at the negative analysis. The accountant asserts that if this is the case, CIS is not only applying data that is outside the period of inquiry, but appears to be doubling the effect of any loss, in essence requiring the petitioner to need a net income of \$198,000 instead of \$99,000. Finally the accountant notes that the petitioner paid significant sums in salaries and outside services to dentists working both on salary and as independent contractors. The accountant notes that some of these temporary, part time professionals will be replaced by the beneficiary who would receive a salary that otherwise would be paid to the temporary, part-time employees. Finally, the accountant states that during the time period in question, the petitioner was part of an overall corporation. If the petitioner's income and expenses were separated out, the returns would show that the petitioner, at whose office the beneficiary would work, was very successful and was the heart of the business after the business split in 2001. Although not explicitly stated in either counsel's or the petitioner's accountant's letter, IRS 1120 Forms for 1997, 1998, 1999, 2000, and 2001 are submitted to the record.

With regard to counsel's and the petitioner's accountant's remarks on a corporate split in 2001, restructuring, and the replacement of temporary, part time dentists by the beneficiary, there is no additional evidentiary documentation to further substantiate these assertions. The record is devoid of any evidentiary documentation on the current full time or part time present employee structure of the petitioner, and on any corporate split or restructuring in 2001. The assertions of counsel and the petitioner's accountant do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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. The petitioner did not claim to have employed the beneficiary as of the priority date. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 1997 and onward.

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.² 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 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, now CIS, should have considered income before expenses were paid rather than net income.

With regard to the instant petition, in response to the director's request for further evidence, the petitioner submitted an IRS Form 1120 for the year 1997 signed and dated by the petitioner's accountant on September 18, 2003. Based on this document, the director identified the petitioner's net income in 1997 as -\$44,665. On appeal, counsel or the petitioner's accountant presents a second IRS Form 1120 for 1997. In this document, the petitioner's net income is identified as \$116,272. There is no indication on the second document that the petitioner submitted an amended 1997 IRS income tax form, as claimed by the petitioner's accountant. In addition, both tax returns have the same taxpayer identification number, namely, [REDACTED]. Thus, the petitioner presents contradictory evidence with regard to the petitioner's ability to pay the proffered wage as of October 23, 1997, the priority date. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Based on the conflicting nature of the information contained in the two 1997 income tax returns, neither will be considered in these proceedings. Thus, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date.

With regard to the remaining years of 1998 to 2001, the petitioner's tax returns indicate a net income of \$114,989 in 1998; a net income was \$127,812 in 1999; a net income of \$15,001 in 2000; and a net income of \$116,283 in 2001.³ Thus, in the years 1998, 1999, and 2001, the petitioner's net income was sufficient to pay the proffered wage of \$99,800. Only in the years 2000, did the petitioner have insufficient net income to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate the petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during 2000, if any,

² Net or taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

³ The petitioner submitted two IRS Form 1120 documents for the year 2001. The first was submitted with the petition, is undated, and indicates the petitioner has two officers and a net income of \$174,637. The second Form 1120 was submitted in response to the director's third request for evidence and indicates that the petitioner had one officer and a net income of \$116,283. While either net income figure is sufficient to establish the petitioner's ability to pay the wage in 2001, the discrepancies in the tax forms require further clarification. *See Matter of Ho*.

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. In addition, 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.⁴ 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 proffered wage out of those net current assets. As noted previously, the petitioner's contradictory information tax returns for 1997 are not being considered in these proceedings. In addition, the petitioner has established that it had sufficient net income to pay the proffered wage in 1998, 1999, and 2001. Therefore, only the petitioner's tax return for 2000 is examined with regard to net current assets. The petitioner's tax return for the year 2000 reflects the following information:

Taxable income	\$ 15,001
Current Assets	\$ 10,343
Current Liabilities	\$ 222,508
Net current assets	\$ -212,165

Based on the petitioner's negative net current assets in 2000, the petitioner cannot establish that it had the ability to pay the proffered wage during 2000 based on its net current assets. Although the petitioner's tax returns establish that it had the ability to pay the proffered wage in three of the five years in the period of time following the priority date of October 23, 1997, without more persuasive evidence with regard to the years of 1997 and 2000, the petitioner has not established the ability to pay the proffered wage from the priority date and onward. Although counsel refers to restructuring problems in 1997, and the petitioner's accountant states that in 2000, disputes arose between shareholders and the petitioner's hours of operation were restricted, their assertions are not sufficient to substantiate any further explanation of the petitioner's actual net income and net current assets in 1997, or lowered net income and net current assets in 2000. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). In addition, without further explanation or clarification, the conflicting evidence with regard to the petitioner's 1997 income tax returns prevent any examination of the petitioner's ability to pay the proffered wage in 1997. Without more persuasive evidence, the petitioner has not established that it had the ability to pay the proffered wage in 1997 or that the petitioner's year of lowered net income and net current assets in 2000 is an uncharacteristically difficult year in the framework of successful years. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

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. However, 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.

Substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. In the instant petition, Schedule E of the petitioner's tax returns in 1997, 1998, 1999, 2000, and 2001, indicate that [REDACTED] and [REDACTED] are officers of the corporation, that both men own 100 percent of their company's stock, and that they received no compensation. As noted previously, a second Form 1120 for 2001 dated July 6, 2003 was submitted to the record. The Schedule E for the second Form 1120 for 2001 lists one officer, [REDACTED] and indicates that this officer owns 100 percent of the company's stock and received compensation of \$350 for the year. Such documentation does not clarify or add any evidentiary weight to the petitioner's ability to pay the proffered wage based on its structure as a personal services corporation in which the shareholders can set their own salaries based on the profitability of their corporate dental practice. Thus, the analysis of the petitioner's corporate structure does not provide any additional documentation to establish that it can pay the proffered salary based on its structure as a personal service corporation.

With regard to the beneficiary's qualifications, the petitioner established that she is qualified for the position, and at time of the priority date in 1997 possessed the requisite dental license for the state of California. She continued to possess the license at the time of the initial adjudication of the petition at the service center.

As stated previously, the petitioner established that it has the ability to pay the proffered wage for three of the five years from 1997 to 2001. While the director's decision with regard to the petitioner's ability to pay the wage

during 1998, 1999, and 2001 appears to be based on faulty analysis of the petitioner's tax returns, nonetheless the petitioner failed to establish its ability to pay the proffered wage in 1997 or 2000.

In view of the foregoing, the previous decision of the director will stand. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.