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U.S. Citizenship
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Services

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20 2005

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 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 sustained. The petition will be approved.

The petitioner is a Colorado-based corporation doing business in Illinois that recruits emergency room physicians for rural areas. It seeks to employ the beneficiary permanently in the United States as a physician. 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, the petitioner submits a statement and additional evidence. Counsel also submits a brief with additional evidence.

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 July 8, 2002. The proffered wage as stated on the Form ETA 750 is an annual salary of \$130,000.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 1999, 2000, and 2001. The petitioner also submitted an offer of employment for the beneficiary with no specific place of employment noted, and a brochure on the work done by the petitioner in staffing emergency room departments of small hospitals. With regard to the beneficiary's qualifications, the petitioner submitted the beneficiary's diploma from the College of Medicine, University of Baghdad, Iraq, and a certificate from the state of Illinois Department of Professional Regulations that stated the beneficiary was a licensed physician and surgeon.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 14, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of annual reports, or audited financial statements to establish its ability to pay the proffered wage. The director also requested the

petitioner's articles of incorporation, and documentation that validated the petitioner's business address and telephone number, along with public advertisements or brochures about the petitioner, describing the type of business and services offered.

The director stated that the I-140 petition indicated that the petitioner had four employees, and requested copies of the petitioner's most recent Form 941, Employers Quarterly Federal Tax Form and State Unemployment Compensation Report Form, or a comparable form from the state of Illinois. The director requested that documents be accompanied by the quarterly wage and withholding supplements that identified all employees by name and social security number. The director asked the petitioner to indicate whether this total of employees was nationwide or at one specific location. If there were more employees nationwide, the director asked that the total number be indicated.

The director noted that the address on the I-140 petition was for Mt. Vernon, Illinois, while the petitioner's U.S. federal income tax returns showed the petitioner's address in Boulder, Colorado. The director requested that the petitioner provide a copy of the letter the petitioner received from the Department of the Treasury that assigned the petitioner its employer tax identification number.

With regard to the beneficiary's work experience, the director requests a letter from current or former employers giving the name, address and title of the employer and a description of the experience of the beneficiary including specific dates of employment and duties. The director also requested an advisory evaluation of the beneficiary's academic credentials

In response, counsel resubmitted the petitioner's Form 1120 corporate tax return for the year 2001. Although counsel stated that the petitioner submitted a request for an extension to file its 2002 tax returns, the record only contains a sheet of paper with the words "Accountant Has filed for extention [sic] on 2002 Taxes." The petitioner also submitted corporate income tax documents from the states of Florida, and Alabama. With regard to other financial resources, the petitioner submitted the petitioner's monthly checking account statement from South Pointe Bank, Carbondale, Illinois, and an unaudited balance sheet and profit and loss sheet for the period ending June 2002. Counsel also stated that the petitioner had contracts in excess of \$4 million dollars for fiscal year 2003.

With regard to the petitioner's corporate structure, the petitioner submitted the following documents:

Articles of Incorporation for the state of Colorado for Medicorp Center, USA, Inc. The date is illegible on the document. It appears that five individuals are designated as directors:

Sheets, with three of these individuals identified as incorporators.

A undated document referring to stock information that lists no officers or directors, and is signed by

State of Colorado Statement of Change of Registered Office or Registered Agent or Both, dated October 7, with the year illegible. The document stated that the address of the corporation's place of business in Colorado and the address of the business office of the registered agent as

changed, will be identical. The address of the place of business in Colorado is identified as Englewood, Colorado. [REDACTED] signed this document as president.

A document entitled Articles of Amendment to the Articles of Incorporation that stated on August 1, 1987 the board voted to authorize the corporation to issue 5,000,000 shares of preferred stock. This document was signed by [REDACTED] as both president and director, and Bodo Schneider as [illegible].

Form BCA-13.15 Application for Certificate of Authority to Transact Business in Illinois. This document was dated May 2, 1994 by the Secretary of State's office and identified the principal corporate office in Illinois as Physician Services of Illinois, Ltd., in Edwardsville, Illinois and the principal office as Medicorp Center USA, Inc. in Denver, Colorado. The document listed the names and officers and directors as follows:

Secretary [REDACTED] director.
This document is signed by [REDACTED] secretary, and [REDACTED] president.

A certificate of authority to transact business in the state of Illinois issued on May 2, 1994 for Medicorp Center USA, Inc.

Form BCA-4.15/4.20. A state of Illinois document, Application to Adopt, Change or Cancel An Assumed Corporate Name. The document stated that Medicorp Center USA, Inc. intended to adopt and transact business under the assumed corporate name of Physician Services of Illinois, LTD, as of May 1, 1995. This document is attested by [REDACTED] Secretary, and [REDACTED]. The document identified the business to be transacted in Illinois as "physician recruitment."

Form BCA-5.10 NFP-105.10. A state of Illinois document, Statement of Change of Registered Agent an/or Registered office, filed on August 17, 1998. This document noted the change of address for [REDACTED] the petitioner's registered agent and for the petitioner's registered office from Edwardsville, Illinois to Mt. Vernon, Illinois.

The second page of a document dated April 30, 1998, that indicated a change by the registered agent, and that was attested to by [REDACTED] identified as director/secretary, and [REDACTED] identified as president. There is no indication on this document as to the nature of the change.

The petitioner also submitted a document entitled Results from Corporation Search that identified the petitioner, noted a registered agent change on August 17, 1998, and also stated that the unnamed secretary resigned. The petitioner provided no further explanation as to the contents of the document. The petitioner also submitted materials from its Internet website, as well as a general brochure on the work done by Medicorp Center U.S.A., Inc. Finally the petitioner submitted a monthly statement for its check cashing account with South Pointe Bank, Carbondale, Illinois, dated August 30, 2002, which showed an ending balance of \$114.78, and an unaudited three page document identified as the petitioner's balance sheet and profit and loss statement as of June 30, 2002.

With regard to the petitioner's employees, the petitioner submitted Form UI-3/40, Employer's Contribution and Wage Reports, for the quarter ending September 30, 2002. This document indicated that the petitioner paid \$17,417 in wages to four employees. A FAX coversheet in the record to counsel states that the petitioner requested that its accountant fax Form 941 directly to the counsel; however, there is no Form 941 in the record.

With regard to the beneficiary's qualifications, the petitioner submitted an educational evaluation report, as well as the beneficiary's test results from the U.S. Medical Licensing Exam (USMLE).

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 June 19, 2003, denied the petition. The director stated that there was no corporate income tax return in the record for 2002, the year in which the priority date was established, and examined the petitioner's 2001 Form 1120, corporate income tax return. The director stated that the petitioner claimed gross receipts or sales of \$3,669,045; total income of \$930,423; compensation of officers of \$126,000; salaries and wages of \$244,159; depreciation of \$5,596, and taxable income of \$5,406. The director determined that the taxable or net income of the petitioner for 2001 was insufficient to pay the proffered salary of \$130,000. The director also stated that the previous tax years of 1999 and 2000 showed considerable losses and thus it could not be concluded that 2001 was an uncharacteristically unprofitable year for the petitioner.

On appeal, [REDACTED] submits a statement. He describes himself as the sole director and shareholder of the petitioner. [REDACTED] states that the petitioner provides medical services, namely, emergency room physicians, to hospitals in rural areas that are understaffed. He further states that he utilized out-sourcing as a business concept initially, however, he now realizes that it is more cost effective to hire in-house physicians who are employed directly by the corporation and assigned to work at various hospitals. [REDACTED] asserts that while the petitioner generated gross revenues of \$3,669,045 in 2001, the cost of goods sold, or vendor contracts, was \$2,724,911. In addition, [REDACTED] asserts that the petitioner pays a fee of \$25,000 to a recruiter for each physician contracted, and that the petitioner also paid the physicians approximately \$220,000 a year which included the cost of their self-provided malpractice insurance. [REDACTED] asserts that it would be more profitable if the petitioner hired its own physicians, paid them a prevailing wage and paid for the malpractice insurance. According to [REDACTED] independent contractor physician had been eliminated and the beneficiary would replace him at a cost of \$130,000 plus \$30,000 in malpractice premiums.

[REDACTED] states that there are only four in-house employees for the year 2001, including him and the clerical staff. He also asserts that for the year 2003, the beneficiary will be shown as a W-2 employee. [REDACTED] states that it is his intent and desire to eliminate all outsourced physicians over time.² [REDACTED] also states that the petitioner has no contracts with the out-sourced physicians, and they are engaged and terminated at will.

[REDACTED] then examines the petitioner's 2001 Form 1120, specifically line 13 that shows employee wages of \$244,159. He states that the three clerical employees earned \$70,159 for the year while the remaining wages of

¹ Although [REDACTED] refers to the recruited physicians as outsourced, the AAO views the status of the recruited physicians as independent contractors.

² Based on [REDACTED] remarks, it appears the petitioner has recruited five physicians as independent contractors. He referred to outsourcing physicians over time and "five for the year, 2003."

\$174,000 were paid to [REDACTED] as the petitioner's medical director. [REDACTED] refers to Line 12 of the petitioner's Form 1120, and notes that he also received \$126,000 in compensation in 2001 as the petitioner's officer. [REDACTED] states that he personally has the discretion to pay the beneficiary by reducing either his salary as medical director or by not taking the additional money of \$126,000 as officer compensation. [REDACTED] also notes that Schedule L of the Form 1120 lists prepaid insurance of \$62,922. [REDACTED] describes this as money available to pay the beneficiary. [REDACTED] also notes on line 6 of Schedule L that \$370,000 is listed in accounts receivable from shareholders and that in 2001, he, as the sole shareholder, only took \$42,121. [REDACTED] states that this money is also available to pay the beneficiary. Finally, [REDACTED] states that \$45,595, the money supplied by the petitioner to buy a corporate condo, is also available to pay the beneficiary.

[REDACTED] also states that based on his current salary received from the petitioner, and his compensation as an officer, he has more than sufficient income to repay loans which he owes personally to the petitioner, of which he is the sole shareholder and director. [REDACTED] then states that he took loans from the petitioner for a legitimate business purpose, namely, that if the petitioner is sued for malpractice and the amount exceeds the amount of liability insurance, the petitioner has limited collectable assets. [REDACTED] also states that loans are taken also to avoid taxation on retained earnings. [REDACTED] resubmits the petitioner's 2001 Form 1120. The petitioner's 2001 tax return lists him as its sole officer with 100 percent of his time devoted to the corporation. [REDACTED] submits no further evidentiary documentation to support his assertion that he is the petitioner's sole shareholder.

The petitioner submits another letter dated September 29, 2003 with supplemental evidence. [REDACTED] states that he is the sole owner and shareholder of Medicorp Centers U.S.A. d/b/a Physician Services of Illinois. [REDACTED] states that the articles of incorporation of the Colorado corporation with authorization to do business in the state of Illinois provided evidence of this fact, and that all documentation reflects the fact that [REDACTED] is the sole owner. [REDACTED] submits a IRS Form 1099-MISC for 2001 issued to him from the petitioner, and his W-2 form from the petitioner showing his earnings as the petitioner's director. He also submits his personal federal income tax return for the year 2001. [REDACTED] states that Line 22 of his personal income tax return for the year 2001 establishes that he took the sum of \$370,181 from the petitioner which is triple the prevailing wage for the beneficiary's position. [REDACTED] states that even after the deduction of taxes due to the IRS, he had \$279,358 with which to pay the prevailing wage. [REDACTED] also submits Forms W-2 for the petitioner's three clerical employees, and five Forms 1099-MISC. The latter forms establish the names and levels of compensation for five individuals as follows: [REDACTED] Bloomington, Illinois, \$215,497; [REDACTED]

In a reference to the *Elatos* case law referenced by the director in his denial of the petition, [REDACTED] states that he is not a Greek restaurant. [REDACTED] states he is a professional who operates a professional medical corporation providing professional services, and the money that he draws from his corporation is used by him at his discretion to operate and expand his business. He determines the salary that he draws as sole director and the earnings that he takes as sole shareholder. [REDACTED] states that the money paid to him is based upon how much he believes he will earn in the future, based upon the sound business practice of hiring an in-house employee to service hospital emergency rooms with which he has contracted to provide medical services.

Also in the record is a letter from counsel that is attached to a letter from the beneficiary's congressperson. The letter dated February 4, 2004 states that counsel is submitting additional documentation in the form of a contractual commitment obtained by [REDACTED] to provide emergency room physician services for Tazwell Community Hospital in Virginia. Counsel states that the daily close report states a bi-weekly income paid to Medicorp Centers U.S.A. of \$100,038. Counsel states the income from the Tazwell contract, valid from December 1, 2003 to November 20, 2006, to be \$2.4 million dollars. Counsel states that only doctors licensed in the state of Virginia will be hired by the petitioner for the Tazwell contract and that the excess income is money retained by the petitioner. Counsel finally states that the \$2.4 million of income from the Tazwell contract is in addition to the income generated by Medicorp in the state of Illinois and elsewhere. The record does not contain a copy of the contract to which counsel refers.

In a subsequent brief dated October 11, 2004, counsel examines the assertions made by the petitioner in its initial appeal, and refers to an AAO decision, which counsel identifies as *Matter of VSC*, EAC 01 018 50413 (AAO January 31, 2003). According to counsel this decision held that "where the sole shareholder of a medical corporation routinely minimizes taxable income by taking it as compensation to avoid double taxation, the net profit on the return should not control." Counsel cites to 8 No. 18, *Bender's Immigration Bulletin* 1528-29, (Sept. 15, 2003). Counsel states that [REDACTED] as sole shareholder of the petitioner, derived income of \$300,000 from his corporation in the form of compensation as a medical director and as the corporate president. Counsel asserts that this income in combination with the loan made to him by the corporation of \$42,121 gave Schneider a disposable income of \$342,121, which is nearly triple the prevailing and proffered wage. Counsel further asserts that the corporate loans made to [REDACTED] reflect accounts receivable payable to the corporation and as such they are non-taxable to the petitioner, or to [REDACTED]. Counsel states that it is erroneous to only look at the net income of the corporation without considering [REDACTED] sole ownership of the petitioner.

Counsel submits an affidavit from [REDACTED] that states [REDACTED] is a physician licensed in the state of Illinois, sole director, shareholder, and president of Medicorp Centers, U.S.A., Inc., a Colorado for profit corporation doing business in Illinois, and that he has served in these capacities since the inception of the corporation. The affiant further states that in his capacity as sole director and shareholder, he controls the operation of the corporation and sets the salaries paid to himself and others, as both a corporate officer/director and as a physician of the corporation. The affiant finally states that the net income of the petitioner is not relevant but rather the affiant's income that controls the payment for the beneficiary's services.

Counsel also submits a one page document on plain paper entitled "Action by Sole Shareholder," that states [REDACTED] as owner of record of all the shares of the corporation, nominates and selects himself to act as the sole director of said corporation and to hold office to the next annual meeting of the shareholder of said corporation or until a successor shall be elected and qualify. This document is dated May 2, 1994. Counsel provides no further explanation for this document, or information as to the filing of the document in 1994, and the purpose for the filing. Counsel also submits an excerpt from *Kurzban's Immigration Law Sourcebook* with reference to *Matter of _____*, Vermont Service Center, the AAO decision referenced above.

It is noted that the priority date for the instant petition is July 8, 2002, and that the petitioner only has to establish that it has the ability to pay the proffered wage from this priority date to the present. With regard to establishing the petitioner's ability to pay the proffered wage as of the 2002 priority date, the petitioner's income tax returns for 1999, 2000, and 2001 are not dispositive. Since the petition was filed on November 18, 2002, and prior to April 15, 2003, when the petitioner's income tax return for 2002 would have been filed with the Internal Revenue

Service (IRS), the petitioner submitted its federal corporate income tax returns for 2001. As previously stated, although the record contains a note that the petitioner had filed for an extension on its 2002 income tax return, there is no IRS form in the record that documents such a request for an extension. Since the record contained no other corporate income tax information, the director examined the petitioner's 2001 income tax return in his denial of the petition. The AAO will also examine the petitioner's 2001 tax return.

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. With regard to the instant petition, the petitioner's unaudited balance sheet provides financial information that would require further clarification simply to corroborate other evidence that the petitioner submits. For example, the balance sheet indicates cash in its South Pointe Bank checking account of \$153,504 as of June 30, 2002, while the one monthly balance statement submitted by the petitioner for a checking account with South Pointe Bank indicates an opening balance of \$5,053 and a closing balance of \$141.78 as of August 30, 2002. It is not possible to provide any evidentiary weight as to the petitioner's ability to pay the proffered wage to either document without further clarification. In the case of the balance sheet and profit and loss statements, as previously stated, these documents would have to be audited to be given any weight.

On appeal, both counsel and [REDACTED] assert that pre-paid malpractice insurance, the petitioner's corporate condominium, and loans to shareholders should be viewed as additional assets to be used to pay the proffered wage. However, neither counsel nor petitioner provide any further documentation to further substantiate their assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, such assets are not usually sufficiently "liquid" to be considered as additional assets available to pay the proffered wage. For example, the petitioner would have to sell the corporate condominium or be reimbursed for the prepaid malpractice insurance in order to use these assets as a source of income to pay the proffered wage. The proceeds from either sale, both of which would be a one-time occurrence, would not necessarily ensure the petitioner's ability to pay the proffered wage.

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. Nevertheless, the AAO recognizes that there are instances in which the ability of employee/owners to set their own salaries or other compensation may be utilized to examine whether a job offer is realistic and whether the petitioner has the ability to pay the proffered wage. Personal service corporations are one such business structure in which the AAO has examined this issue.

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 recognizes the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The AAO does allow for the examination of the compensation of officers or shareholders for such personal services corporations in establishing a petitioner's ability to pay the proffered wage. This examination of other assets, such as the compensation of officers, can be utilized with other corporations, if the evidence is sufficient to establish that the directors and officers of the corporation do indeed have the authority to reduce their own compensation. Issues that the AAO would examine with regard to other types of corporations could include, but not necessarily be limited to, whether the petitioner or counsel actually raise the issue of the discretionary nature of the compensation of officers, whether the amount of officer compensation is greater than the proffered wage in all of the pertinent years, whether the amount of officer compensation varies over the course of the pertinent years, demonstrating that the amount does not represent some contractually obligated and fixed amount of compensation, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder, thus lending credence to the argument that the officer had the discretion to set his or her own compensation. In addition, the totality of the petitioner's circumstances, as established by evidence in the record, that would support the fact that the petitioner is a viable, profitable enterprise, could be considered.

With regard to the petitioner, although counsel refers to a previous AAO decision which concerned a medical practice, and [REDACTED] describes himself as medical director of the petitioner, there is no further evidentiary documentation that establishes the petitioner as a personal services corporation, a professional medical service corporation or a medical practice. The brochures submitted by the petitioner suggest that the petitioner is a company directed by a physician that primarily recruits physicians for small hospitals, and that the sole officer functions as the director of the corporation, as opposed to providing medical services to patients.

While the petitioner's tax returns indicate significant income revenues, neither counsel nor the petitioner's officer has presented a clear picture of the petitioner's present business structure. On appeal, counsel states that the petitioner has a contract with a Virginia hospital; however, no copy of the contract is submitted to the record. The petitioner's officer states that the petitioner outsources physicians without contracts, which suggests that the individual hospitals contract with the individual physicians, and the petitioner submits Forms 1099-MISC for five individuals with compensation all over \$200,000, which would establish that petitioner's contracts with the

hospitals include the payment of compensation to the individual physicians.³ Although the three tax returns submitted by the petitioner vary in their description of how physicians get paid, and whether the physicians have been in-house or independent contractors from 1999 to 2001; however, the petitioner states that it will hire the beneficiary as an in house W-2 employee. Thus, the petitioner appears to be the actual employer of the beneficiary.

Nevertheless, both [redacted] and counsel bring up the issue of double taxation and the payment to officers of the profits of the corporation to avoid such taxation, as well as the issue of using the compensation of officers as a source of revenue to pay the proffered wage. Neither the petitioner nor counsel are suggesting that CIS examine the personal assets of [redacted] but, rather, the financial flexibility that the employee/director has in setting his salary based on the profitability of the petitioner. Accordingly, given the issues raised by counsel and the petitioner, the AAO will examine the instant petition to ascertain whether the issues addressed in personal services corporations and similar employee/owner corporations are applicable to the petitioner. An issue that the AAO will examine is first whether [redacted] has sufficiently established that he is the sole director/shareholder of the petitioner.

Although [redacted] attests in his affidavit that he has been the sole director, shareholder, and president of the petitioner, since its inception, the petitioner's articles of incorporation in the state of Colorado and Illinois clearly establish that this is not the case. In the articles of incorporation in Colorado, five individuals are listed as directors, while two documents involved in the incorporation and assumption of different corporate name in the state of Illinois clearly identify [redacted] as president. In addition some of the documentation submitted by the petitioner is inconclusive. This is especially true with regard to the document signed by [redacted] in 1998 as to a change in the corporation. However, as established by the Office of the Secretary of State for the State of Illinois [redacted] is presently listed as the president of the petitioner, and [redacted] is identified as a previous director. This fact in combination with the petitioner's corporate income tax that identifies [redacted] as the sole officer are sufficient to establish that there are no other officers of the corporation. The documentation submitted to the record with regard to the identity of the petitioner's shareholder(s) is either incomplete or inconclusive. Therefore the petitioner has only established that [redacted] is the sole director of the corporation. Nevertheless as sole director of the petitioner, [redacted] appears to have the authority to set his own salary and additional compensation as the petitioner's sole officer.

As correctly noted by the director, the petitioner's federal income tax returns for 1999 and 2000 both reflect negative net incomes. Nevertheless, within the context of personal services or similar corporations and the owners of such corporations and their ability to use their compensation to pay for other employees, the actual net incomes, as previously stated, may not be dispositive. The tax returns also reflect salaries paid to the sole director in the range of \$126,000, as well as additional salaries and wages paid out beyond the salaries of other physicians. While the petitioner did not specifically identify any compensation earned by him as medical director of the corporation in the years 1999 and 2000, they do indicate a recurring compensation of \$126,000 as the petitioner's sole officer. The tax returns also provide some indication of the monies available to the petitioner's director that on a discretionary basis could be allocated to the beneficiary's salary. With regard to the petitioner's tax return for

³ It is assumed that the five individuals identified in the Forms 1099-MISC are physicians. The petitioner provided no further documentation to establish this fact.

2001, as noted by counsel, [REDACTED] was compensated over \$300,000 for his duties as medical director and sole officer of the petitioner, which is sufficient to cover the beneficiary's proffered wage of \$130,000.

Thus, the petitioner has established that the combined compensation and salary of [REDACTED] is sufficient to cover the proffered wage of \$130,000, and that [REDACTED] has the authority to reduce his salary and to use his compensation to pay the beneficiary. In addition, in view of the totality of circumstances as established by evidence in the record, the petitioner appears to be a viable enterprise. A review of the petitioner's gross profits and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$160,000 can be paid by the petitioner.

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 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.

With regard to the beneficiary's qualifications, the petitioner submitted sufficient documentation to establish that the beneficiary possesses the requisite education, experience, and medical license. As stated previously, the petitioner has established that based on the discretionary salary and compensation of the petitioner's sole director, it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall be withdrawn, and the petition shall be approved.

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. The petition is approved.