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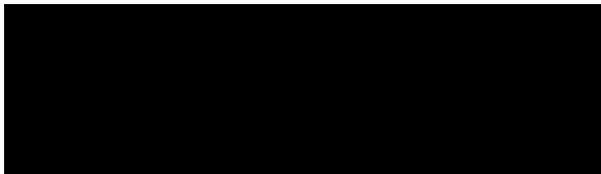
Office: VERMONT SERVICE CENTER

Date: NOV 03 2005

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, Director
Administrative Appeals Office

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

The petitioner is an ophthalmology practice professional corporation. It seeks to employ the beneficiary permanently in the United States as a medical assistant (ophthalmologic). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, the 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$11.76 per hour (\$24,460.80 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: a letter from the employer describing the medical practice and the offered position; the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; a copy of IRS Form 1120 tax return for 2000; a letter from a certified public accountant; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R.

§ 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director specifically requested:

* * *

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$24,460.80 as of April 23, 2001, the date of filing and continuing to the present.

If the beneficiary was employed by you in 2001, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a statement from a certified public accountant.

The director denied the petition on April 27, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the physician may in her business discretion hire a medical assistant. Also, she contends that the regulation at 8 C.F.R. § 204.5(g)(2) allows the introduction of supporting evidence to, in this instance, demonstrate the ability to pay the proffered wage on the priority date. Finally, she asserts that the accountant's statement because the petitioner's medical practice is structured as a personal service corporation has probative value under the facts of this case.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax return submitted demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$24,460.80 per year from the priority date, April 23, 2001:

- In 2000, the Form 1120 stated taxable income¹ of \$12,349.00.²

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage from the priority date April 23, 2001 to October 31, 2001. As is noted below, the petitioner's tax year for year 2000 ends on October 31, 2001.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120 U.S. Income Tax Returns submitted by the petitioner, Schedule L found in that returns indicates the following:

- In 2000, the petitioner's Form 1120 return stated current assets of \$0.00 and \$21,909.00 in current liabilities. Therefore, the petitioner had <\$21,909.00> in net current assets for 2000. Since the proffered wage was \$24,460.80 per year, this sum is less than the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Despite the results of the examinations discussed above of taxable income and net current assets, in certain limited circumstances relating to the chosen form of business organization, the same tax return may prove the ability to pay the proffered wage. The petitioner is a personal service corporation as is indicated by the election made on the tax return in evidence and the accountant's letter in evidence.

Counsel asserts in her brief accompanying the appeal that the petitioner has made an election to be treated for tax purposes as a personal service company as evident from its tax return submitted into evidence. For substantiation of this fact a letter was submitted by petitioner according to the regulation at 8 C.F.R. § 204.5(g)(2). That regulation states in pertinent part " ... In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner"

The letter dated December 10, 2003, from a certified public accountant who had reviewed the petitioner's financial data stated in pertinent part:

¹ IRS Form 1120, Line 28.

² The petitioner's fiscal year for tax purposes begins on November 1, 2000, and ends on October 31, 2001.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

You [CIS] state that the corporation's net income of \$12,549 and net current liabilities of \$21,909 indicate that ... [the physician who is the sole shareholder of the corporation] does not possess the ability to meet the proffered wage ... As a personal service corporation, each year ... [the] corporation pays all or nearly all of its net income to the ...[the physician] ... The reason it does this is because any net income is taxed at the highest corporate tax rate. Therefore, the corporation will never show very much, if any, taxable income. The true profit of the corporation is more correctly represented by the \$117,280 of officer's salary that was paid to ... [the physician and sole shareholder]. Had the corporation paid the proffered wage to the petitioner that year {i.e. 2000-2001}, the officer's salary would have been \$93,220 instead of \$117,280

The accountant states that the payment of the corporation's net income is discretionary. He explains that the payment is completely controlled by the sole shareholder who is the physician owner of the medical practice.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that the physician owner holds 100% percent of the company's stock and perform the personal services of the medical practice. According to the petitioner's 2000 IRS Form 1120 Schedule E (Compensation of Officers), the owner/officer elected to pay herself \$117,280.00.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on

the profitability of their personal service corporation medical practice. Clearly, the petitioning entity is a profitable enterprise for its owner. As previously noted, the medical practice earned a gross profit of \$454,287.00 in 2000. Counsel asserts that the amount paid to the owner is determined by the profitability of the corporation. None of these numbers represent fixed expenses. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$24,460.80 per year 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 return 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 our case, counsel has made the assertion that the compensation of the physician owner and officer of the corporation is discretionary. Counsel's assertion has been supported both by the tax return submitted for tax year 2000, and, the accountant's letter of explanation. This discretionary payment is different from wages paid or other business expenses that by their nature are not discretionary.

The amount of officer compensation, \$117,280.00 for fiscal year 2000, is greater than the proffered wage, which is \$24,460.80 per year. Because, as the accountant in the above letter pointed out, there exists a significant difference between the two figures, it is credible to believe that officer compensation could have been modestly adjusted to pay the proffered wage for tax year 2000.

The tax return submitted does show the personal service company election, and, since the officer receiving the compensation must be the sole owner/stockholder or majority owner/stockholder, these two facts lend credence to the assertion that the officer had the discretion to set her own compensation.

The ophthalmology practice has been in operation since 1990 with two full time employees. The weight of the evidence presented demonstrates that the petitioner is a viable, profitable enterprise.

The petitioner has proven that it had the ability to pay the proffered wage from the priority date. 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.