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U.S. Citizenship  
and Immigration  
Services

[Redacted]

SEP 06 2005

FILE: EAC 02 252 50871 Office: VERMONT SERVICE CENTER

Date:

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:

[Redacted]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Acting Center Director (director), Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director to request additional evidence and for entry of a new decision.

The petitioner is a general internal medicine and cardiology medical clinic. It sought to employ the beneficiary permanently in the United States as a medical technologist. As required by statute, the petition is accompanied by an individual labor 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has established its continuing financial ability to pay the proffered salary.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 23, 1997. The proffered wage as stated on the Form ETA 750 is 21.74 per hour, which amounts to \$45,219.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed in July 2002, the petitioner claims to have been established 1978, to have a gross annual income of \$750,000, a net annual income of \$250,000, and to currently employ four workers.

As the petitioner failed to supply evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence pertinent to this ability on April 10, 2003. Although advising the petitioner that it must demonstrate the ability to pay the proffered wage from the priority to the present, the director then advised the petitioner to submit copies of the beneficiary's Wage and Tax Statement for 1997 if it employed the beneficiary. The director also informed the petitioner that if "this information is unavailable," the petitioner may submit its 1997 and 2001 federal income tax returns. The director then stated that "[a]s a last resort," if "the above information is entirely unavailable," the petitioner could provide annual reports for 1997 and 2001, which are accompanied by audited or reviewed financial statements.

In response to the director's request for evidence and in support of its ability to pay the certified wage, the petitioner supplied copies of its Form 1120, U.S. Corporation Income Tax Return for 1997 and for 2001. These

tax returns show that the petitioner is a personal service corporation and files its returns using a fiscal year running from April 1<sup>st</sup> to March 31<sup>st</sup> of the following year. Thus the 1997 return covers the period from April 1, 1997 until March 31, 1998 and the 2001 return spans the period from April 1, 2001 until March 31, 2002. The tax returns reflect the following information:

	1997	2001
Gross receipts/sales	\$ 1,818,686	\$926,465
Officer compensation	\$ 998,107	\$350,000
Salaries and Wages	\$ 380,310	\$172,761
Taxable Income before		
net operating loss (NOL) deduction	\$ 16,496	\$ 8,855
Current Assets (Schedule L)	\$ 99,635	\$ 81,933
Current Liabilities (Schedule L)	\$ 46,168	\$ 127,824
Net current assets	\$ 53,467	-\$ 45,891

As set forth above, net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> Besides net taxable income, Citizenship and Immigration Services (CIS) will review a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of determining the petitioner's financial ability to pay a proffered salary. A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director examined some of the figures contained on the tax returns and concluded that the petitioner had failed to demonstrate its ability to pay the proffered wage. It is noted that the director used the petitioner's taxable income figure rather than its taxable income before the NOL deduction as stated above. Although net income and taxable income may, in some cases, represent different figures, CIS uses a corporate petitioner's taxable income before the net operating loss deduction (line 28 of the corporate tax return) as a basis to evaluate its ability to pay the proffered wage in the year of filing because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing to pay the proffered wage. The director also erred in stating that in 1997, the petitioner's net current assets could not cover the proffered wage. As set forth above, \$53,467 was sufficient to pay the proposed wage offer of \$45,219.20.

On appeal, counsel additionally provides copies of the petitioner's 1998 and 1999 tax returns. They reflect the following information:

Year	1998	1999
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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Gross receipts/sales	\$1,729,163	\$1,010,061
Officer compensation	\$ 830,509	\$ 366,657
Salaries and Wages	\$ 445,814	\$ 381,152
Taxable Income before net operating loss (NOL) deduction	\$ 2,302	\$ 38,482
Current Assets (Schedule L)	\$ 122,104	\$ 70,981
Current Liabilities (Schedule L)	\$ 61,211	\$ 31,689
Net current assets	\$ 60,893	\$ 39,342

Counsel also submits, on appeal, a letter dated March 15, 2004, from a certified public accountant, [REDACTED]

[REDACTED] states that the petitioner's business is 100% owned by a single shareholder who has extensive flexibility to reinvest monies into the petitioning clinic as necessary. He asserts that the analysis employed in reviewing the Schedule L current assets does not factor in the petitioner's substantial accounts receivable because as a cash basis taxpayer, the petitioner's accounts receivable figure is not reflected on the tax return. [REDACTED] contends that the petitioner has historically maintained collectable accounts receivable balances in excess of \$250,000.

We note that in determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence submitted to the record suggesting that the petitioner has employed the beneficiary.

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, as reflected above, although the petitioner's net current assets in 1997 and 1998 could pay the proffered salary of \$45,219.20, neither the petitioner's net taxable income before the NOL deduction, nor its net current assets, could cover the proposed wage offer in 1999 and 2001.

If a petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may also consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition that had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the

employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, as noted by the accountant's letter provided on motion, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, 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 the sole shareholder accounted for the entire officer compensation paid of \$366,667 in 1999 and \$350,000 in 2001. The sole shareholder and one other officer accounted for the whole officer compensation of \$380,310 in 1997 and \$830,509 in 1998. CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of a corporation's owner or shareholder to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders, *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Particularly in view of the petitioner's status as a personal service corporation, however, an owner's compensation would go up or down based on the profitability of the business so as to minimize the corporate tax liability, rather than be set at a fixed amount. In the unique circumstances of this particular case, the focus on the financial flexibility of the employee-owner to set his salaries is appropriate. The petitioning entity appears to be a reasonably profitable operation as indicated by the documentation contained in the record showing average gross revenue of about one million dollars. In this case, we find that the taxable income might be augmented by the officers' compensation to demonstrate the petitioner's ability to pay the proffered salary for the period represented by the 1999 and 2001 tax returns. The fundamental focus of 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). At least for the period represented by the tax returns submitted to the record, we conclude that the petitioner has established that it had the ability to pay the salary offered during those years.

One tax return or other financial documentation covering the fiscal year running from April 1, 2000 to March 31, 2001 is missing. The relevant tax return was omitted from the ones submitted on appeal. In view of the opinion above and the confusing language engendered by the director's request for evidence, however, this case will be remanded to the director to request additional documentation covering the missing fiscal year. If the figures comport with the pattern set forth above in the petitioner's tax returns already submitted to the record, the director is requested to favorably consider the petition.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.