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Date: AUG 22 2006

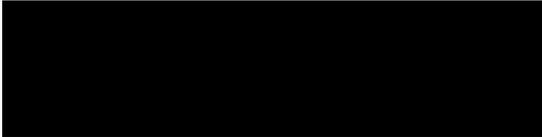
IN RE:

Petitioner:  
Beneficiary:



PETITION: 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, Chief  
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 petition will be approved.

The petitioner is a medical and rehabilitation center. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140). 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.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 10, 2004 decision denying the petition, the single issue in this case is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. 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:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. The priority date for Schedule A occupations is established when the I-140 is properly filed with CIS, (formerly the Service or the INS). 8 C.F.R § 204.5(d). The priority date in the instant petition is October 1, 2003. The proffered wage as stated on the Form ETA 750 is \$57,000.00 per year.

The AAO reviews appeals on a *de novo* basis. See *Dorr v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief and additional evidence. Relevant evidence submitted on appeal includes a letter from a certified public accountant and two copies of a letter from the beneficiary. Other relevant evidence in the record includes a copy of the petitioner's Form 1120 corporate income tax return for 2002; a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003, copies of earnings statements of the beneficiary, and copies of licensing and educational documents of the beneficiary.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel states that the petitioner's tax returns show substantial gross receipts and substantial expenses for salaries and wages. Counsel also states that the evidence shows that from August 2003 to December 2003 the petitioner paid the beneficiary at the level of the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on September 23, 2003, the beneficiary claimed to have worked for the petitioner beginning in August 2003 and continuing through the date of the ETA 750B.

The record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for the year 2003. That is the year of the priority date. No other year is at issue in the instant petition, since the director's decision was issued on November 10, 2004, at which time tax information for calendar year 2004 was not yet available. The beneficiary's Form W-2 for 2003 shows compensation from the petitioner as shown in the table below.

| Year | Beneficiary's actual compensation | Proffered wage | Wage increase needed to pay the proffered wage. |
|------|-----------------------------------|----------------|---|
| 2003 | \$22,016.00                       | \$57,000.00    | \$34,984.00                                     |

The record also contains copies of three earnings statements of the beneficiary for pay periods ending September 18, 2003, October 3, 2003, and October 17, 2003. Those pay statements are found in the record among documents submitted in support of the beneficiary's I-485 Application to Register Permanent Resident or Adjust Status, which was filed on November 7, 2003, about one month after the instant I-140 petition.

The beneficiary's pay statements show pay at the rate of \$2,192.00 every two weeks, which is equivalent to a rate of \$56,992.00 for 52 weeks. Since the exact length of one year is 52 weeks plus one day (in non-leap years), that rate of pay is slightly higher than the annual proffered wage of \$57,000.00.

Nonetheless, the evidence of wage payments to the beneficiary is not alone sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002. That return is for a tax year beginning on October 1, 2002 and ending on September 30, 2003. That return was the most recent return available as of the October 1, 2003 priority date. As of the date of director's November 10, 2004 decision, the petitioner's Form 1120 tax return for its 2003 tax year, which presumably ran from October 1, 2003 until September 30, 2004, was not yet due. Therefore, the petitioner's Form 1120 for its 2002 tax year is the only relevant return in the instant petition.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax return for its 2002 tax year states an amount for taxable income on line 28 as shown in the table below.

| Tax year | Net income or (loss) | Proffered wage | Surplus or (deficit) |
|----------|----------------------|----------------|----------------------|
| 2002     | \$(8,081.00)         | \$57,000.00    | \$(65,081.00)        |

The petitioner's tax year does not coincide with the calendar year, but the last nine months of the petitioner's 2002 tax year fall within calendar year 2003, that is January through September of 2003. If the beneficiary's earnings for the entire calendar year 2003 are compared with the petitioner's net income for its 2002 tax year, the deficit based on a net income analysis would be -\$43,065.00.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in calendar year 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current

liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table. As noted above, the petitioner's 2002 tax year ended on September 30, 2003.

| Tax year | Net current assets | Proffered wage | Surplus or (deficit) |
|----------|--------------------|----------------|----------------------|
| 2002     | \$228.00           | \$57,000.00    | \$(56,772.00)        |

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in calendar year 2003.

The record also contains a letter dated November 30, 2004 from a certified public accountant. In that letter, the accountant explains the petitioner's tax year and notes that the petitioner's tax year does not coincide with the calendar year, which is the basis for the beneficiary's W-2 forms. The accountant states, "The employee had continuous employment once he was hired." A few sentences later the accountant states the following:

It is the intention of the corporation to pay the offered wages of \$57,000 and in fact, the employee is currently earning a salary at that level of compensation. The corporation has always been able to pay wages to all necessary employees in the conduct of their business and indeed fully expects to be able to afford all necessary wages to conduct business in the future.

(Letter from Certified Public Accountant, November 30, 2004).

The record also contains two copies of a letter dated October 8, 2005 from the beneficiary. Most of the letter consists of explanations of the beneficiary's personal situation, including his family situation, and of his desire to have the I-140 petition on his behalf approved. Those matters are not directly relevant to the instant I-140 petition. However, in the letter the beneficiary also describes his surprise at the director's finding that the employer was not able to pay the proffered wage and he describes his communications with his employer over that issue and his employer's assurances to him that the company was financially stable. Those statements are relevant to the instant I-140 petition as evidence that the beneficiary continued to be employed by the petitioner as of October 8, 2005 and that he had experienced no problems in being paid for his work with the petitioner as of that date.

The petitioner's Form 1120 U.S. Corporation Income Tax Return for its 2002 tax year shows that the petitioner's share are owned by one individual.

CIS 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 basic rule of law concerning corporations 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); *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.

Nonetheless, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. The Form 1120, Schedule E provides for itemizing the amount of compensation for each officer, along with each officer's social security number, percent of time devoted to the business, percent of corporation stock owned, and amount of compensation.

In the instant petition, the Schedule E of the petitioner's Form 1120 for its 2002 tax year shows that the petitioner's sole shareholder was an officer of the corporation, that he devoted 100% of his time to the business, and that his amount of compensation as an officer was \$106,600.00. Since that person owns 100% of the shares of the petitioner, the amount paid to him in officer compensation may be considered as additional financial resources of the petitioner. As noted above, the petitioner's net income for the 2002 tax year was -\$8,081.00. However, if the amount of officer compensation is added to that figure, the result would be \$98,519.00. The additional amount which would have been needed to pay the beneficiary the full proffered wage in calendar year 2003 is \$34,984.00. If that amount is subtracted from the figure calculated above, the amount remaining would be \$64,535.00. The amount remaining would have left the petitioner with adequate funds to pay a substantial amount in officer compensation.

In addition to the information on the Form 1120 tax return for the 2002 tax year and on the beneficiary's Form W-2 for 2003, which are the most current tax documents available, the November 30, 2004 letter from an accountant and the October 8, 2005 letter from the beneficiary both indicate that the beneficiary was still employed by the petitioner as of the dates of each letter, and both letters indicate that the beneficiary was being paid his compensation properly. In addition, the accountant's letter states that the level of the beneficiary's compensation was at the rate of the proffered wage, information which is consistent with the three pay statements from 2003 in the record. The accountant's information on the rate of pay is also consistent with the beneficiary's Form W-2 for 2003, which shows a total of \$22,016.00 paid to the beneficiary that year. As noted above, according to the Form ETA 750B, the beneficiary began working for the petitioner in August of 2003. Although the exact date on which he began work is not specified, that amount of compensation over the last four to five months of 2003 is approximately equal to an annual rate of \$57,000.00.

Finally, the petitioner's Form 1120 tax return for its 2002 tax year show gross receipts or sales of \$1,952,841.00, total income of \$1,927,925, and expenses for salaries and wages, apart from compensation of officers, of \$556,254.00. Those figures indicate that the petitioner is a substantial business with a cash flow which is many multiples in excess of the proffered wage.

The foregoing evidence concerning the petitioner's net income, its officer compensation to its sole shareholder, its gross receipts or sales, its total income, its salary and wage expenses, the rate of compensation to the beneficiary and the continuity of the beneficiary's employment is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, under the principles described in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In her decision, the director correctly analyzed the petitioner's tax returns for its 2002 tax year and correctly concluded that the petitioner's net income and its net current assets failed to establish the petitioner's ability to

pay the proffered wage during the relevant period. The director did not conduct any further analysis based on the principles in *Matter of Sonogawa*. However, in certain circumstances it is appropriate to do so. Under those principles, as shown above, the petitioner's evidence is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director.

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.