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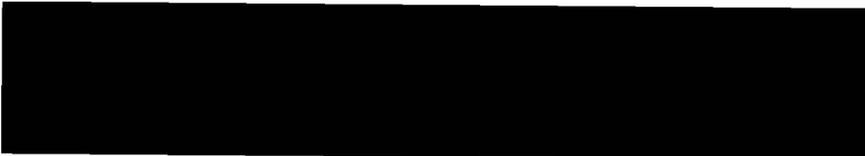
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 27 2006  
WAC-04-072-51722

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:  
[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, Chief  
Administrative Appeals Office

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

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a medical assistant. 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 the petitioner had not established that the beneficiary possessed the required education and skills, and denied the petition accordingly.

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

As set forth in the director's November 9, 2004 denial, two issues exist in this case. The first issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second issue is whether or not the petitioner has established that the beneficiary met the petitioner's qualifications for the proffered position as stated on the Form ETA 750 as of the petition's priority date.

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, which is the date 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). The priority date in the instant

petition is November 16, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour, which amounts to \$20,800.00 annually.<sup>1</sup>

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> Relevant evidence submitted on appeal includes the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001 and 2003, copies of bank account statements for November 2001 and December 2001, a letter from Riverside Community College dated November 18, 2004, a document titled "Guideline for Majors at Nearby 4 Year Institutions," an admission letter from the University of California Riverside dated March 2, 2004, and Riverside Community College's course descriptions. Other relevant evidence in the record includes the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2002, a copy of the beneficiary's Associate in Science degree from Riverside Community College, the beneficiary's transcript from Riverside Community College, and a copy of the beneficiary's Award of Completion of EKG/Monitor Technician from Riverside Community College. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage, the beneficiary's education, or the beneficiary's skills.

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<sup>1</sup> The director erred in stating that the proffered wage is \$10.25 per hour because according to the Form ETA 750, the proffered wage is \$10.00 per hour.

<sup>2</sup> 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).

Counsel states on appeal that bank accounts and retained earnings can be considered in determining the petitioner's ability to pay the proffered wage. Counsel also states that the beneficiary completed courses for a major in biology and/or chemistry, and the beneficiary took courses related to the specified duties for the proffered position as stated in the job description.

The first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered 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 November 12, 2001, the beneficiary did not claim to have worked for the petitioner.

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 copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002, and 2003. The record before the director closed on January 15, 2004 with the receipt by the director of the petitioner's I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available. On appeal, counsel submits the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2003, and the AAO will also consider the petitioner's 2003 tax return.

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, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$1,142.00	\$20,800.00*	-\$19,658.00
2002	\$36,383.00	\$20,800.00*	\$15,583.00
2003	\$23,973.00	\$20,800.00*	\$3,173.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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 net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
2001	\$7,913.00	\$20,800.00*
2002	\$6,820.00	\$20,800.00*
2003	\$10,786.00	\$20,800.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2001, 2002, and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001.

Counsel states on appeal that additional evidence may be submitted and mentions "bank account statement[s] of owners of the petitioner." The record contains copies of bank account statements of Wei Che Tsai and

Muhammad Akhtar for November 2001 and December 2001. The assets in those bank accounts are the owners' personal assets, and CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners 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.

Additionally, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel also mentions the petitioner's retained earnings. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

The Form ETA 750 indicates that there are multiple positions open for the proffered position of medical assistant. The petitioner has also filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker with a priority date of November 19, 2001. The petitioner must show that it had sufficient income to pay all the wages starting on each petition's priority date, and the record does not contain information regarding the other I-140 petition that was approved by the director. Thus, the AAO cannot determine whether the petitioner had sufficient assets to pay the beneficiary the proffered wage in 2002 and 2003 after it paid the other worker his or her proffered wage in those years.

In the present matter, the petitioner has identified itself on the Form 1120's as a "personal service corporation." Pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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 a 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 stated above, 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. In the present case, however, the employee-owners have financial flexibility in setting their salaries based on the profitability of their personal service corporation practice. According to the petitioner’s tax returns, the figure for officer compensation for 2001 is \$207,000.00, the figure for officer compensation for 2002 is \$193,500.00, and the figure for officer compensation for 2003 is \$229,500.00. The tax returns, however, do not reveal how many officers split the figures for officer compensation because the Schedule E for 2001 is blank, both copies of the petitioner’s tax return for 2002 in the record do not contain the Schedule E, and the Schedule E for 2003 is blank. Moreover, because the petitioner has filed another I-140 petition, the AAO cannot determine whether the petitioner had sufficient assets to pay the beneficiary the proffered wage after it paid the other worker his or her proffered wage.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

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

The second issue in this case is whether or not the petitioner has established that the beneficiary met the petitioner’s qualifications for the position as stated on the Form ETA 750 as of the petition’s priority date.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director’s decision. The evidence submitted for the first time on appeal will then be considered.

The Form ETA 750 states that a two-year associate of science degree in biology, nursery, or a medical related field is needed. It also describes the duties of a medical assistant. The record before the director contains a copy of the beneficiary’s Associate in Science degree from Riverside Community College, the beneficiary’s transcript from Riverside Community College, and a copy of the beneficiary’s Award of Completion of EKG/Monitor Technician from Riverside Community College. The director determined that the beneficiary did not have a major field of study listed on her Associate of Science degree, and the beneficiary’s transcript did not establish a major field of study in biology, nursing, or a medical related field. The director also found that the degree did not provide the necessary skills required for the proffered job, such as measuring vital signs, operating an electrocardiograph (EKG) and other equipments, giving injections or treatments, and performing routine laboratory tests.

On appeal, counsel states that courses completed by the beneficiary would be accepted towards a major in biology or chemistry in a nearby 4-year institution, and the beneficiary’s completed coursework resulted in her admission to the University of California Riverside to major in neuroscience. Counsel also states that “the beneficiary has taken courses that enable her to carry out the specified duties in the job description.” Evidence submitted on appeal includes a letter from Riverside Community College dated November 18, 2004 regarding courses taken by the beneficiary, a document titled “Guideline for Majors at Nearby 4 Year Institutions” showing what courses at Riverside Community College would constitute a bachelor of science degree in biology at a nearby university, an admission letter from the University of California Riverside dated March 2, 2004, and Riverside Community College’s course descriptions. Based on the evidence in the record, the AAO finds that the petitioner has established that the beneficiary received an associate degree in either biology or chemistry as of the priority date. The AAO also finds that the petitioner has established that the beneficiary possessed the necessary

skills required for the proffered job because the beneficiary received a certificate for EKG and took courses in EKG and in cardiac monitoring prior to the priority date. Thus, the petitioner has overcome this portion of the director's decision.

Despite the fact that the petitioner has shown that the beneficiary met the petitioner's qualifications for the position, it has failed to overcome the decision of the director regarding its ability to pay the proffered wage.

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 not met that burden.

**ORDER:** The appeal is dismissed.