



U.S. Citizenship  
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FILE:



Office: VERMONT SERVICE CENTER

Date: **OCT 24 2006**

EAC-03-266-54994

IN RE:

Petitioner:  
Beneficiary:



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, 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 petitioner is a dentist. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750), 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, counsel submits a brief statement and additional evidence.<sup>1</sup>

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 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. See 8 CFR § 204.5(d). 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*,<sup>2</sup> 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires two (2) years of experience in the job offered. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of \$1,235,525, and to currently employ two (2) workers. On the Form ETA

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<sup>1</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). 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.

750B, signed by the beneficiary on April 17, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for 2001 and 2002 pertinent to the ability to pay the proffered wage. On June 10, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE). In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide additional evidence to establish that the petitioner had the ability to pay the proffered wage or salary of the beneficiary as of April 24, 2001, the date of filing and continuing to the present. The director also specifically requested copies of the beneficiary's Form W-2 Wage and Tax Statements showing how much the beneficiary was paid by the petitioner if the beneficiary was employed in 2001 and 2002. In response, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for 2003.

The director denied the petition on January 13, 2005, finding that the evidence submitted with the petition and in response to the RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits statements of the petitioner's Active Assets Account, amended income tax return for 2003, a letter from the petitioner's accountant and the beneficiary's W-2 form for 2004. Counsel asserts these documents demonstrate that the petitioner had sufficient net income or net current assets to pay the proffered wage in 2001 through the present.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner submitted the beneficiary's W-2 form for 2004. The beneficiary's 2004 W-2 form shows that the petitioner employed and paid the beneficiary \$30,600 in 2004, which was \$600 less than the proffered wage. However, even if the petitioner paid the beneficiary at the level of the proffered wage in 2004, the petitioner is still obligated to demonstrate that it could pay the proffered wage for 2001 through 2003.

If the petitioner does not establish that it 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). Reliance on the petitioner's gross receipts with depreciation is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2003. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage beginning on the priority date.

In 2001, the Form 1120 stated net income<sup>2</sup> of \$(5,155)

In 2002, the Form 1120 stated net income of \$60,798.

In 2003, the Form 1120 stated net income of \$10,498.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$31,200 while the petitioner had sufficient net income to pay the proffered wage in 2002.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2001 tax return shows that the petitioner had current assets of \$9,836 and current liabilities of \$18,734, and thus its net current assets in 2001 were \$(8,898); the petitioner's unamended 2003 tax return shows that the petitioner had current assets of \$58,844 and current liabilities of \$51,294, and thus the petitioner's net current assets in 2003

<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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

were \$7,550<sup>4</sup>. Therefore, the petitioner had insufficient net current assets to pay the beneficiary the proffered wage in 2001 or 2003.

Counsel asserts on appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel submits the statements for the petitioner's active assets account for 2001 through 2003. Counsel's reliance on the balance in the petitioner's active assets account is misplaced. First, assets account 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. Second, assets account statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's assets account statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

On appeal counsel also submits a letter from the petitioner's accountant and contends that the letter explains the petitioner had sufficient income and resources to pay the proffered wage. The accountant letter states in pertinent part:

The tax return showed a net loss of \$5,155. However, the [petitioner] did not experience a net loss for that year on an accrual basis.

For your kind information, the [petitioner] files tax returns on a cash basis. Their 2001 December revenue of \$39,126 was received on 01-03-02 and deposited in 2002. Accordingly, the [petitioner] was profitable for the year 2001 by **\$33,971**.

Similarly the accountant asserts that the petitioner had an actual profit of \$44,105 for 2002 and \$16,562 for 2003 despite its reported net income. The accountant letter is trying to establish the petitioner's ability to pay the proffered wage through an analysis using an accrual accounting method for the petitioner's tax returns. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not

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<sup>4</sup> Counsel submits the petitioner's amended tax return for 2003 on appeal and explains that a prior accountant erroneously prepared the first one by applying an incorrect accounting methodology. The amended tax return does not change the net income reflected on line 28 but the petitioner's net current assets were changed from \$7,550 to \$(29,934). However, the copy of the amended tax return submitted on appeal does not bear any signature from the petitioner's legal representative, nor does it contain any IRS filing stamps. Therefore, the AAO will use the figure from the initial tax return instead of the amended in determining the petitioner's ability to pay.

recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

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 Mohammad Nayeem (Dr. Nayeem) holds 100 percent of the company's stock and performs the personal services of the dental practice. According to the petitioner's 2001 IRS Form 1120 Schedule E (Compensation of Officers), Dr. Nayeem elected to pay himself \$80,000. According to the Schedule E for 2002 and 2003, he paid himself \$200,000 and \$71,492 respectively. We note here that the compensation received by the company's owner during these three years was not a fixed salary and amounted to average more than \$100,000 per year.

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, CIS would not be examining the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of

his personal service corporation dental practice. The tax returns for this period show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries, but that the petitioner fulfills its salary obligations. Clearly, the petitioning entity is a profitable enterprise for Dr. Nayeem. As previously noted, the dental practice earned a gross profit of \$307,545 in 2001 and \$352,415 in 2003. The amount paid to the owner is determined by the profitability of the corporation. None of these numbers represent fixed expenses. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$31,200 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.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on 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 and the petition is approved.