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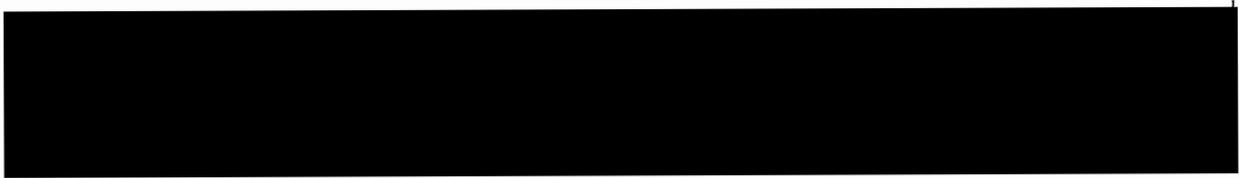
U.S. Department of Homeland Security
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Washington, DC 20529



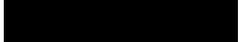
U.S. Citizenship
and Immigration
Services

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FILE:



SRC 06 008 50318

Office: TEXAS SERVICE CENTER

Date: SEP 05 2007

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 employment based immigrant visa petition was denied by the Director, Texas Service Center. The matter 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 records technician. 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)(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, 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$28,163 per annum. 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 Immigrant Petition for Alien Worker (I-140), filed on October 12, 2005, the petitioner claims to have been established on February 15, 1986, to have a gross annual income of \$311,401, a net annual income of \$8,717, and to currently employ three workers.

In support of the petitioner's continuing financial ability to pay the proffered wage, the petitioner initially provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2004. The returns indicate that the petitioner files its taxes using a standard calendar year. They contain the following information:

	2001	2004
Gross receipts/sales	\$ 505,474	\$311,401
Officer compensation	\$ 40,000	\$ n/a

Salaries and Wages	\$ 67,285	\$ 63,648
Other deductions	\$ 253,629	\$169,853
Taxable Income before		
net operating loss (NOL) deduction	\$ 551	\$ 8,717
Current Assets (Schedule L)	\$ 1,657	\$ 18,232
Current Liabilities (Schedule L)	\$ -0-	\$ -0-
Net current assets	\$ 1,657	\$ 18,232

As set forth above, net current assets are the difference between the petitioner’s current assets and current liabilities.¹ 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 are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18 of 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.

On October 28, 2005, the director issued a notice of intent to deny the petition. She noted that the federal tax returns supplied to the record did not establish the petitioner’s ability to pay the proffered salary through either net income or net current assets. The petitioner was afforded thirty (30) days to respond. The director additionally instructed the petitioner to provide copies of its 2002 and 2003 tax returns, as well as any Form 1099s (Miscellaneous Income) if the beneficiary had been working for the petitioner.

On appeal, counsel additionally provides copies of the petitioner’s 2002 and 2003 tax returns. They reflect the following information:

Year	2002	2003
Gross receipts/sales	\$113,852	\$268,816
Officer compensation	\$ -0-	\$ n/a
Salaries and Wages	\$ -0-	\$ 69,800
Other deductions	\$ 159	\$130,453
Taxable Income before		
net operating loss (NOL) deduction	-\$ 159	\$ 9,396
Current Assets (Schedule L)	\$ 1,498	\$ 10,494
Current Liabilities (Schedule L)	\$ -0-	\$ -0-
Net current assets	\$ 1,498	\$ 10,494

Counsel’s transmittal letter accompanying the petitioner’s response suggests that the director should consider that closely held medical corporations’ normal accounting practices typically minimize tax liability by withdrawing

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

profits as compensation and that a 2003 AAO decision recognized this as a basis to sustain the petitioner's appeal.²

On December 1, 2005, the director denied the petition. The director acknowledged counsel's assertion based on the reasoning set forth in the 2003 AAO decision, but noted that the petitioner in that case demonstrated that its income was "ample and growing," and that the petitioner had paid the beneficiary more than the proffered wage in the months before the appeal. The director determined that the facts suggested in that case were not present in the instant matter and concluded that the petitioner had not established its ability to pay the certified wage.

On appeal, counsel renews his contention that the 2003 AAO case supports an approval in the instant matter, relying on the petitioner's total income reported in each of the relevant years. This figure is presented on line 11 of page 1 of the corporate tax return and represents income before the expense and deductions are taken. In this case, the petitioner's total income was \$505,474 in 2001, \$469,195 in 2002, \$268,816 in 2003, and 311,401 in 2004.

Counsel also provides a letter from [REDACTED] and a copy of the petitioner's 2002 federal tax return that has been submitted for the first time on appeal and which counsel states "should have been initially submitted." No explanation is provided as to why it was not provided earlier or which tax return was actually filed with the Internal Revenue Service (IRS). This return reflects the following:

	2002
Gross receipts/sales	\$469,195
Officer compensation	\$ n/a
Salaries and Wages	\$ 44,251
Other deductions	\$295,278
Taxable Income before net operating loss (NOL) deduction	\$ 13,050
Current Assets (Schedule L)	\$ 17,483

² 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 compensation 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. 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, in some cases, recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

Current Liabilities (Schedule L)	\$ n/a
Net current assets	\$ 17,483

██████████ asserts that according to ██████████, if he could have secured the beneficiary's services as a medical records technician during the years 2001 through 2004, he could have eliminated or reduced expenses taken for "billing services" or "outside services" or "contract labor." ██████████ presents figures for billing services and contract labor deductions taken each year, and concludes that when combined with net profit would have provided sufficient funds to pay the certified wage.

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. Wages paid that are less than the certified salary will also be considered. If either a petitioner's net income or net current assets can cover any shortfall between actual wages paid and the certified salary during a given period, the petitioner will be deemed to have demonstrated its ability to pay the full proffered wage for that period of time. 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 some cases, as in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), 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. In *Matter of Sonogawa*, the Regional Commissioner sustained an appeal where the expectations of increasing business and profits supported the petitioner's ability to pay the certified wage. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the four tax returns contained in the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. Rather, as shown above, the petitioner has reported both net income and net current assets substantially below the proffered wage of \$28,163 per

year. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Similarly, we concur with the director's observation that the facts presented in the 2003 AAO decision are distinctly different from the facts in this case. As noted by the director, the petitioner's gross income has not been ample and growing, but has declined by approximately 38% from 2001 to 2000. Moreover, the petitioner has not employed the beneficiary at more than the proffered wage as was stipulated in that case. It is further noted that, except for 2001 when the petitioner distributed \$40,000 as officer compensation, no officer compensation was declared in either 2002, 2003, or 2004. We find that the considerations employed in reviewing the unique position of a personal services corporation do not outweigh the information set forth in the record.

's observation that if the petitioner's principal shareholder could have employed the beneficiary during the 2001 through 2004 years, it may have diverted funds from being outsourced is noted. However, before such an assertion is accepted, particularly in view of lump sums taken as "billing service" deductions, as well as "contract labor," it must be supported by first-hand evidence identifying the service performed, and establishing to what extent it would be performed by the beneficiary as part of the job duties included on the ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In this matter, in 2001, neither the petitioner's net income of \$551 before the NOL deduction nor its net current assets of \$1,657 could cover the certified wage of \$28,163 or demonstrate its ability to pay in this year.

In 2002, the petitioner's net income of \$13,050 before the NOL deduction was not sufficient to cover the proffered salary. Its net current assets of \$17,483 were also insufficient to cover the proffered salary. The petitioner has not established its ability to pay the proffered wage for this year.

Similarly, in 2003 and 2004, the petitioner failed to demonstrate its ability to pay the proffered salary. Both its net income of \$9,396 before the NOL deduction in 2003 and net income of \$8,717 were insufficient to pay the \$28,163 certified salary. Net current assets of \$10,494 in 2003 and \$18,232 in 2004 also were substantially less than the certified wage. As the record currently stands, the petitioner failed to demonstrate its continuing ability to pay the proffered wage beginning at 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 not met that burden.

ORDER: The appeal is dismissed.