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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 25 2008

EAC 06 059 50293

IN RE: Petitioner: [redacted]
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:

[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.

Kevin S. Ponlos for

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 medical practice. It seeks to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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.

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

As set forth in the director's denial dated May 22, 2006, the single 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.

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, 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 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 20, 2001.[1] The proffered wage as stated on the Form ETA 750 is $11.76 per hour ($24,460.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as a nurse.

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[1] It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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, Citizenship and Immigration Services (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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; letters from counsel dated July 10, 2006, and June 20, 2006; an affidavit made June 24, 2006, from [redacted]; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000, 2001, 2002, 2003 and 2004; and [redacted]'s U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005 with his W-2 Wage and Tax Statements attached for the corresponding years; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a personal service corporation.[3] On the petition, the petitioner claimed to have been established in 1970 and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is not based on a calendar year. The petitioner's fiscal year ends on November 30th of each year. On the Form ETA 750, signed by the beneficiary on September 17, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred by not considering all the evidence in the record of proceeding, by basing his decision only on the corporate income tax returns, and by failing to follow the guidelines established by the Board of Immigration Appeals and judicial decisions.

In support of the appeal, counsel submits a legal brief and the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000.

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work."

[2] The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

[3] The box on the petitioner's Form 1120 tax returns is checked indicating that the taxpayer is a personal service corporation.

Counsel contends that the petitioner is a professional corporation solely owned by [redacted] through which he operates his medical practice and, as the sole decision maker, adjusts his personal earnings from the medical practice according to the financial needs of the business. Counsel submits [redacted]'s U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005 with his W-2 Wage and Tax Statement attached for the corresponding years to prove that although the petitioner corporation stated minimal taxable net income, the income that [redacted] received each year from the corporation was substantial. Therefore, counsel asserts that the petitioner has the ability to pay the proffered wage. As will be demonstrated below, counsel is correct.

As already stated, counsel has submitted[4] the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2000, 2001, 2002, 2003 and 2004; and [redacted]'s U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005.

In years 2001, 2002, 2003 and 2004, the petitioner's corporate U.S. federal tax return Form 1120 stated net incomes or loss (Line 28) of $422.00, ,<$1,728.00>, $1,435.00, <$234.00> respectively. The petitioner's net current assets during 2001, 2002, 2003, and 2004 were $17,865.00, $24,642.00, $40,855.00 and $17,630.00 respectively.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa*, 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.

In the present case, according to an affidavit made as of June 24, 2006, and the Form 1120 tax returns in the record of proceeding, all of the stock of [redacted], a personal service corporation, is held by [redacted]. The documentation presented here indicates that [redacted] holds 100 percent of the company's stock and he is the sole shareholder and owner. [redacted] performs the personal services of the medical practice.

[4] The Form ETA 750 was accepted on December 20, 2001. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

The petitioner's U.S. Internal Revenue Service Form 1120 tax returns[5] for 2000, 2001, 2002, 2003 and 2004 demonstrate [redacted] elected to pay himself as compensation of officers[6] for those years $232,000.00, $185,500.00, $134,000.00, $176,000.00, and $192,000.00 respectively. These figures are supported by Dr. [redacted] W-2 Forms statements which were submitted. We note here that the compensation received by the company's sole owner evidenced by the W-2 statements during these five years was not a fixed salary. His salary varied year to year. [redacted]s W-2 Wage and Tax Statement from the petitioner (his medical practice) evidenced wages paid to him (Form W-2, Block 1) for 2001, 2002, 2003, 2004 and 2005 of $222,000.00, $186,500.00, $140,000.00, $156,000.00 and $212,000.00 respectively.

CIS 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, counsel is not suggesting that CIS examine 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 medical practice. In presenting an analysis of the petitioner's corporate and personal tax returns counsel offers a compelling argument in regard to this issue. Both the amounts stated as officer compensation and wages for the periods for which tax returns were submitted show not only that the petitioner exercises a large degree of financial flexibility in setting employee salaries but that the petitioner easily fulfills its salary obligations.

Clearly, the petitioning entity is a profitable enterprise for its owner. The medical practice earned gross profits of $766,939.00, $737,753.00, $716,165.00, $687,519.00 and $685,746.00 in 2000, 2001, 2002, 2003 and 2004 respectively. We concur with the arguments presented by counsel on appeal. A review of the petitioner's gross profits and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of $24,460.00 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 continuing ability to pay the salary offered as of the priority date of the petition.

The evidence submitted establishes that the petitioner has 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.

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[5] The corporate tax returns were not paid on a calendar year. For tax year 2000 the petitioner's fiscal year began on November 30, 2000 and ended according to the tax return on November 30, 2001.

[6] Form 1120, Line 12 and Schedule E, Line 1.