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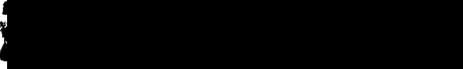
U.S. Citizenship  
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FILE:  Office: VERMONT SERVICE CENTER Date: APR 04 2005  
EAC 03 041 53165

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, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a chiropractic rehabilitation center. It seeks to employ the beneficiary permanently in the United States as a rehabilitation center manager. 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 denied the petition accordingly.

On appeal, counsel states that the petitioner has the ability to pay the proffered wage as of the priority date and submits new documentation.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is an hourly wage of \$42.73, and an annual salary of \$88,878. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1998.

On the petition, the petitioner claimed to have been established in 1987, to have four employees, and to have a gross annual income of more than \$400,000. In support of the petition, the petitioner submitted IRS Forms 1120S, the petitioner's corporate income tax return for 1997 to 2001; the beneficiary's Forms W-2 and Forms 1099-MISC for 1997 to 2000; the summary of accounts page of the petitioner's Chase Manhattan checking

and savings account from August 1998 to June 2002; and an untranslated letter of employment verification with regard to the beneficiary's previous work experience in Italy.

On January 15, 2003, the director requested a translation of the work verification letter, which the petitioner submitted. In addition, 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, on April 10, 2003, the director requested additional evidence pertinent to that ability. The director stated that the petitioner's tax return for 1998 and 1997 showed insufficient income to pay the proffered salary and requested additional evidence to establish that the petitioner had the ability to pay the proffered wage of \$88,878 as of the January 14, 1998 priority and onward. The director also requested that the petitioner submit the beneficiary's Form W-2 if the petitioner employed the beneficiary in 1998.

In response, the petitioner resubmitted the beneficiary's Forms W-2 for 1997 and 1998, and Forms 1099-MISC for 1998, 1999, and 2000. The petitioner also resubmitted its federal income tax returns for 1998 and 2001, and noted that it had \$83,555 in retained earnings in 1998, and \$119,245 in retained earnings for 2001, as reflected in both Schedules L and M. The petitioner described its balance at the end of 1998 as \$83,555 based on the beginning balance of \$56,378 plus the ordinary income at the end of the tax year of \$34,297. The petitioner indicated that the beneficiary's combined income for 1998 was \$20,402, based on the beneficiary's Forms W-2 and 1099-MISC. The petitioner finally stated that its federal income tax return for 2001 showed a balance at the end of that tax year of \$119,245, which the petitioner stated is more than enough to pay the proffered wage.<sup>1</sup>

On August 8, 2003, the director denied the petition. The director stated that the petitioner's retained earnings are considered part of the shareholder's equity position in the corporation and do not represent liquid assets. The director determined that the petitioner's ordinary income of \$34,297 for 1998 and the beneficiary's salary of \$20,402 for 1998 were not sufficient to pay the proffered wage of \$83,555 as of the priority date.<sup>2</sup>

On appeal, counsel states that the director did not explain how he came to the conclusion that retained earnings are part of the shareholder's equity position in the corporation and do not represent liquid assets. Counsel asserts that the director's definition of retained earnings is clearly different than the definition contained in Black's Law Dictionary. Counsel provides the following definition from the 1979 edition of Black's Law Dictionary: "Net income over the life of a corporation less all income distributions (including capitalization through stock dividends); owners equity less contributed capital. That portion of profits which has not been paid out as dividends. See also Surplus." Counsel stated that the retained earnings is a surplus of profits that the corporation has not used and is not part of the shareholder's equity position in the corporation, and as a consequence the petitioner's retained earnings do represent liquid assets since the earnings are a profit that has not yet been used. Counsel states that, based on this analysis, the petitioner has established that it has the capability to pay the proffered wage as of the priority date. Counsel submits an excerpt from the

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<sup>1</sup> The \$119,245 that the petitioner refers to as its balance, is the retained earnings figure listed on Schedule L of its 2001 federal corporate income tax return.

<sup>2</sup> The director stated an incorrect proffered wage. As previously stated, the proffered wage is \$88,878. This figure is based on the hourly wage of \$42.73 multiplied by 2080 annual work hours.

1979 edition of Black's Law Dictionary that includes the definition of retained earnings. Counsel resubmits the beneficiary's Form 1099-MISC for 1998, 1999, and 2000, along with the petitioner's federal income tax return for 1998.

In the petition, the petitioner submitted copies of its sole shareholder's banking and checking accounts. The assets of the shareholder, including the shareholder's checking and savings accounts, are not viewed as corporate assets, and thus cannot be utilized to pay the proffered wage as of the priority date. Citizenship and Immigration Services (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 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); *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. CIS will not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 at 3 (D. Mass. Sept. 18, 2003). In addition, even if the shareholder's assets could have been considered with regard to the petitioner's ability to pay the proffered wage as of the priority date, the shareholder's Chase Manhattan bank and savings statements that were submitted to the record begin in August 1998, which is eight months after the priority date of January 14, 1998.

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. Although the petitioner submitted W-2 salary statements for the beneficiary for the year 1997, since the priority date for the petition is January 14, 1998, the beneficiary's salary and the petitioner's financial resources in the year 1997 are not dispositive in the present proceedings. Therefore, only the IRS Forms W-2 and 1099-MISC from 1998 to 2000 are considered in this proceeding. Based on these documents, the petitioner paid the beneficiary wages or compensation of \$20,402.30 in 1998, \$31,268 in 1999, and \$27,862 in 2000. These wages or compensation figures are considerably less than the proffered wage of \$88,878. In the instant case, although the petitioner established it had employed the beneficiary as of the priority date, it did not establish that it employed and paid the beneficiary the full proffered wage in 1998 and onward.

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). 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. As noted previously, the wage and tax documentation submitted by the petitioner for the year 1997 is not relevant to these proceedings. Therefore, only the petitioner's 1998, 1999, 2000, and 2001 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 1998, 1999, 2000, and 2001 show the following amounts of ordinary income: \$34,297 in 1998, \$38,574 in 1999, \$32,348 in 2000, and \$9,575 in 2001. The net income figures for 1998 to 2000, in combination with the wages or compensation already paid to the beneficiary in the corresponding years, provide the following sums: \$54,699 in 1998, \$69,842 in 1999, and \$60,210 in 2000. None of these figures is sufficient to establish that the petitioner can pay the proffered wage based on its net income, in 1998, 1999, or 2000. In addition, the petitioner's 2001 net income of income of \$9,575 would not be sufficient to pay the proffered wage of \$88,878 in 2001.<sup>3</sup>

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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. The petitioner submitted the following information for tax years 1998 through 2001:

	1998	1999	2000	2001
Ordinary Income	\$ 34,297	\$ 38,574	\$ 32,348	\$ 9,757
Current Assets	\$ 46,814	\$ 43,757	\$ 47,108	\$ 34,441
Current Liabilities	\$ 17,605	\$ 25,643	\$ 2,257	\$ 4,129
Net current assets	\$ 29,109	\$ 18,114	\$ 44,851	\$ 30,312

<sup>3</sup> The petitioner provided no compensation information for the beneficiary for tax year 2001. Therefore the beneficiary's compensation for 2001 is considered \$0.

<sup>4</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary from 1998 to the present. As previously stated, the petitioner did not establish that its net income in the years 1998 to 2001 was sufficient to pay the difference between the beneficiary's actual wages or compensation and the proffered wage.

With regard to the petitioner's net current assets, in 1998, the petitioner shows net current assets of \$29,109, and has not, therefore, demonstrated the ability to pay the difference between the actual wages and compensation paid and the proffered wage, namely \$68,476, out of its net current assets. With regard to the tax year 1999, the petitioner shows net current assets of \$18,114. The petitioner has not demonstrated the ability to pay the difference between the beneficiary's actual compensation in 1999, and the proffered wage out of its net current assets. The petitioner would still lack \$39,496 to pay the proffered wage, if the petitioner's net current assets and the beneficiary's actual compensation in 1999 were combined.<sup>5</sup> With regard to the tax year 2000, the petitioner shows net current assets of \$44,851. The petitioner therefore has not demonstrated the ability to pay the difference between the beneficiary's compensation in 2000 and the proffered wage, out of its net current assets. The petitioner would still lack \$16,165 to pay the proffered wage, if the petitioner's net current assets and the beneficiary's actual compensation were combined to establish the petitioner's ability to pay the proffered wage in 2000.<sup>6</sup> With regard to the tax year 2001, the petitioner shows net current assets of \$30,312. The petitioner provided no documentary evidence with regard to any compensation of the beneficiary during 2001. Consequently, the petitioner's net current assets would have to cover the entire proffered wage of \$88,878 in 2001. Therefore the petitioner has not established its capability of paying the proffered wage through its net current assets from the 1998 priority date to the present.

In addition, counsel's assertion with regard to the definition, and hence, the use of retained earnings is not persuasive. As noted above, net current assets, as a measure of liquidity, are examined as reflected on Schedule L of the petitioner's tax return. Net current assets include only cash or cash equivalents that would reasonably be available to pay the proffered wage during the year covered by the Schedule L balance sheet. They do not take into account the longer-term resources that are reflected in the petitioner's "total assets." Similarly, they only take into account the petitioner's current liabilities as set forth on Schedule L. These do not include retained earnings. Generally Schedule L is a balance sheet that subtracts an entity's total liabilities from its assets. The "balance" (if any) remaining is considered the value of the entity as expressed in shareholder equity. Shareholder equity can include such non-cash items as goodwill, equity in non-current assets, etc. Retained earnings fall under the heading of shareholder's equity on Schedule L and normally represent the non-cash value of the company's assets. Thus, retained earnings do not represent current assets that can be liquefied during the course of normal business, but rather the net income over the life of the corporation, and the owner's equity, minus distributions.

It should also be noted that if the petitioner's retained earnings in 1998 had been demonstrated to be liquid assets, the use of the petitioner's retained earnings to the beneficiary's actual compensation and wages in 1998 to cover the proffered salary of \$88,878 would have depleted the petitioner's retained earnings by

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<sup>5</sup> The petitioner's net current assets of \$18,114 for 1999 combined with the beneficiary's actual compensation of \$31,268 equals \$49,382, or \$39,496 less than the proffered wage.

<sup>6</sup> The petitioner's net current assets of \$44,851 for 2000 combined with the beneficiary actual compensation of \$ 27,862 equals \$72,713, or \$16,165 less than the proffered wage

\$68,476.<sup>7</sup> At the beginning of the next tax year, namely, 1999, the petitioner's retained earnings or balance, as reflected on its Schedule L and M, could have been \$15,079. This figure in turn would have affected the petitioner's retained earnings amounts for the years 2000 and 2001. While the 1998 retained earnings would have provided sufficient funds to cover the proffered wage, it is not feasible that the petitioner could have used this method to cover the proffered wage in successive years.

Therefore, the petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 1998 and continuing to the present date. Therefore, the petitioner has not established that it 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 not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>7</sup> This figure is the amount still needed after subtracting the beneficiary's 1998 actual compensation/wages of \$20,402 from the proffered wage of \$88,878.