

Identifying info deleted to prevent invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY

[Redacted]

[Handwritten signature]

JUN 06 2005

FILE: [Redacted] EAC 03 223 54606

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

[Handwritten signature of Robert P. Wiemann]

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 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 19, 2001. The proffered wage as stated on the Form ETA 750 is 9.50 per hour, which amounts to \$19,760 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

On the petition, the petitioner claims to have been established 1995, to have a gross annual income of \$950,000, and to currently employ seven workers. In support of its ability to pay the certified wage, the petitioner initially submitted a copy of its federal employer's quarterly tax return (Form 941) for the last quarter of 2002. It shows that the petitioner paid \$262,115.28 in total wages and other compensation.

On August 28, 2003, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. Pursuant to 8 C.F.R. § 204.5(g)(2), the director advised the petitioner to provide annual reports, federal income tax returns or audited financial statements in order to establish its ability to pay.

In response, the petitioner supplied copies of its of its Form 1120, U.S. Corporation Income Tax Return for 2001 and 2002. They show that the petitioner is a personal service corporation and files its returns using a standard calendar year. They reflect the following information:

	2001	2002
Gross receipts/sales	\$ 872,898	\$982,249
Officer compensation	\$ 274,000	\$341,500
Salaries and Wages	\$ 129,762	\$155,469
Taxable Income before		
net operating loss (NOL) deduction	\$ 18,312	-\$ 22,676
Current Assets	\$ 8,292	-\$ 16,222
Current Liabilities	\$ 456	\$ n/a
Net current assets	\$ 7,836	-\$ 16,222

As set forth above, net current assets are the difference between the petitioner's current assets and current liabilities.¹ Besides net taxable income, CIS will review a petitioner's net current assets as an alternative method of determining the petitioner's financial ability to pay a proffered salary. A corporation's year-end current assets and current liabilities are shown on 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 January 12, 2004, the director denied the petition. She determined that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage of \$19,760 out of either its net income or net current assets.

On appeal, counsel provides an unsigned statement on an accounting firm's letterhead. This statement and counsel assert that as a personal service corporation under the Internal Revenue Code (IRC), the petitioner pays out all or nearly all of what would be taxable income to avoid the flat 35% tax on income. Since such compensation is typically made at the end of the year, the excess of current liabilities over current assets would not be unusual and would not be indicative of the petitioner's ability to pay the proposed wage offer. Counsel cites the level of officer compensation distributed and the substantial cumulative wages that the petitioner has paid in maintaining its payroll. Counsel additionally states that the salary is not for a newly created position.

We note that 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 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*

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.

proof of the petitioner's ability to pay the proffered wage. 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 this case, the proffered wage of \$19,760 could not be covered by either the petitioner's taxable income of \$18,312 or its net current assets of \$7,836 in 2001. Similarly, the proffered wage could not be met in 2002 by either the petitioner's taxable income of -\$22,676 or its net current assets of -\$16,222.

If a petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition that had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the 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. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, as noted by counsel, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa, supra*, 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, and as referenced by the petitioner's accountant, 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 significant factor to be considered in determining its ability to pay.

The documentation presented here indicates that one shareholder accounted for the entire officer compensation of \$274,000 and \$341,500 paid in 2001 and 2002, respectively. CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of a corporation's owner or shareholder 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.

Particularly in view of the petitioner's status as a personal service corporation, however, an owner's salary would go up or down based on the profitability of the business so as to minimize the corporate tax liability, rather than be set at a fixed amount. In this case, the focus on the financial flexibility of the employee-owners to set their salaries is appropriate. The petitioning entity appears to be a profitable operation as indicated by the documentation contained in the record showing gross revenue in excess of \$872,000 and \$972,000 in 2001 and 2002, respectively. In unique circumstances of this particular case, we concur with the assertion that the sole owner's officer compensation can augment the petitioner's ability to pay the proffered salary.

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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.