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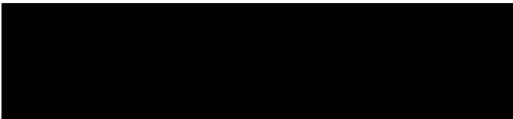
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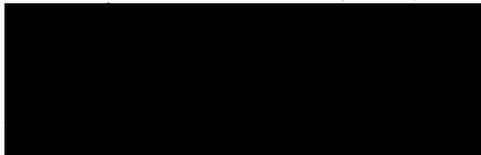
Date: JUN 07 2005

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 Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a health care worker placement agency. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as an education and training manager. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the petitioner's motion, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 103.5(A)(2) states, in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 either 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. Here, the Form ETA 750 was accepted on July 14, 1997. The proffered wage as stated on the Form ETA 750 is \$76,107.20 per year.

With the petition, filed June 6, 2002, counsel submitted:

- A Form G-28;
- An original certified Form ETA 750; and,
- College graduation and marriage documents.

On December 12, 2002, the director sent a request for evidence (RFE) pertinent to the petitioner's ability to pay. Specifically, the director requested:

- Additional evidence to establish the petitioner’s ability to pay, continuously from the priority date;
- The petitioner’s 1997 federal income tax return, or its annual reports for 1997 accompanied by “audited or reviewed financial statements;”
- The beneficiary’s 1997 Form W-2 Wage and Tax Statements issued by the petitioner; and,
- An evaluation of the beneficiary’s education credentials.

In response, counsel submitted:

- A copy of the petitioner’s 1997 Form 1120S tax return, and the petitioner’s 1997 corporate return for the state of New Jersey; and,
- Copies of the beneficiary’s educational documents.

The director determined that the evidence submitted did not establish the petitioner’s ability to pay the proffered wage as of the priority date, and on April 22, 2003, denied the petition.

On appeal, filed May 23, 2003, counsel asserted director error in finding that the petitioner had failed to establish ability to pay and that instead he should have applied a different standard to the petitioner because of its election of Sub-S status. In other words, Sub-S corporations generally only pay tax at the shareholder level, which typically causes Sub-S corporations to distribute their net profits to shareholders. To compensate for this, the director should have evaluated the petitioner’s ability to pay by returning the amounts paid in officer compensation in order to better gauge the petitioner’s ability to pay.

Further, in his brief counsel faulted the director for the petitioner’s payroll of 35 workers and its total earnings that ranged between nearly \$800,000 and \$1.5 million-plus from 1997 to 2002. He also asserted error in the director’s failing to acknowledge the petitioner’s ability to borrow from shareholders should it lack cash to pay the proffered wage.

With the appeal, counsel submitted the petitioner’s 1997-2002 Form 1120S returns.

The tax returns reflected the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>
Net income	-\$10,373	-\$11,437	-\$3,145	-\$3,077	\$35,728	-\$9,947
Current Assets	\$100	\$100	\$100	\$100	\$150	\$100
Current Liabilities	\$0	\$0	\$0	\$0	\$0	\$0
Net current liabilities	\$100	\$100	\$100	\$100	\$150	\$100
Compensation of Shareholders	\$121,023	\$143,081	\$87,782	\$60,438	\$103,078	\$116,285

The AAO dismissed the appeal, finding that the petitioner had not shown that United Health Care and United Marketing, Inc. to be the same company or, if not, that United Health Care was a successor in interest to United Marketing, Inc. The AAO further rejected counsel’s position that electing under Subchapter-S brought the petitioner under different set of ability-to-pay rules from those CIS applies to “common corporations.”

With the motions to reopen and reconsider, counsel submits:

- The petitioner’s articles of incorporation, filed in New Jersey on September 15, 1989;
- The petitioner’s fictitious name registered with New Jersey on October 10, 1989;

- Insurance premium notice addressed to “United Marketing, Inc. dba United Health Care”;
- Information on Subchapter-S corporations; and,
- The petitioner’s 1997 Form 1120S return.

Counsel asserts that “United Health Care” is United Marketing, Inc.’s registered fictitious name; and that CIS should modify its ability to pay rules by looking at the of Sub-S companies’ net incomes enhanced by the amount of their shareholder distributions.

In determining the petitioner’s ability to pay the proffered wage during a given period, 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 did not establish that it employed and paid the beneficiary the full proffered wage during 1997-2002.<sup>1</sup>

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*, the court held that the Service 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. *Supra*, at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

The above tax returns reflect negative amounts for net income in each year but 2001, thereby failing to establish the petitioner’s ability to pay using a net income analysis.

The petitioner’s net income, however, is not the only statistic available to show the petitioner’s ability to pay the proffered wage. If the petitioner’s net income during a given period is added to the wages paid the beneficiary fail to equal at least the proffered wage, the AAO will review the petitioner’s assets as an alternative. Here, however, the petitioner’s total assets are insufficient to pay the proffered wage. The petitioner’s total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner’s current assets, defined as those expected to be converted into cash within a year, may be considered. Further, the petitioner’s current assets cannot be viewed as available to pay wages unless reduced by the petitioner’s current liabilities, defined as those liabilities to be paid within a year. CIS will consider such net current assets, i.e., its current assets minus its current liabilities, in determining if the petitioner has the ability to pay the proffered wage. As is clear from the petitioner’s tax returns, however, it has accumulated few if any assets from which to pay the proffered wage.

Finally, although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity’s business activities should be considered when the entity’s ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the present case, the petitioner is a health-care placement firm in business for more than eight years on the priority date. The petitioner also had gross income of more than \$1.5 million in 1997, when it also

<sup>1</sup> The beneficiary on June 13, 2004, submitted Form W-2s for the years 1997–1999 and 2001–2003, showing the petitioner paid her \$21,050 in 1997, \$18,400 in 1998, \$9,600 in 1999, \$36,500 in 2001, \$23,700 in 2002, and \$37,000 in 2003. She submitted no Form W-2 for 2000.

paid out \$217,673 in wages. In 2002, it claimed but did not document, that it had 35 people on the payroll. And the petition indicated that the proffered position was a new position instead of one replacing a departing employee, which would have shown its ability to pay the proffered wage.

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 shareholders, but, rather, the discretion its three owners have in setting their salaries based on the profitability of the company or in deciding instead to pay a non-shareholder employee. While not claiming the petitioner is a personal service corporation, such as a medical practice, counsel's assertion is plausible. It is not unusual for a business to keep the corporation's net earnings at a minimum by distributing significant amounts to its owner shareholders in order to avoid having to pay income taxes on the same income as it moves from the corporation to the shareholders.

Taking counsel's argument at face value, a year-by-year analysis of the tax returns that segregates shareholder distributions from the other elements making up net income does tend to show an enhanced ability of the petitioner to pay the proffered wage. In 1997, for instance, officer compensation and the beneficiary's wages paid exceed the proffered wage by \$65,945. In 1998, compensation and wages paid exceeds the proffered wage by \$85,353. For each succeeding year except one, through 2002, the petitioner's shareholder compensation and wages paid exceeded the proffered wage: in 1999, by \$21,254; in 2001 by \$63,450; and in 2002, by \$63,857 in 2002. Counsel, however, supplied no Form W-2 of the beneficiary's wages for 2000, when the reverse was true and the proffered wage exceeded officer compensation by \$15,690.

However, several factors dictate against finding the petitioner established the ability to pay during the entire period under review here. First, nothing in the record apart from statements of counsel show that a majority of stockholders pledged to reduce their own annual compensation to enable the petitioner to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the total officer compensation in 2000 is less than the proffered wage. Because net income for that year was negative and because the petitioner did not present evidence it paid wages that year to the beneficiary, the petitioner has not established its ability to pay the proffered wage in 2000. Thus, even assuming, *arguendo*, that counsel is correct and further that the three owner-shareholders had agreed to forgo their annual compensation as need be, the evidence still fails to establish that the petitioner had the continuous ability to pay the proffered wage from the priority date forward.

Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, this office concludes that the petitioner has not established its continuous ability to pay the salary offered. The documentation submitted does not establish that the petitioner had sufficient available funds to pay the salary offered continuously through 2002. Therefore, the objection of the AAO has not been overcome on the motion. 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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The decision of the director is affirmed. The AAO's decision of December 17, 2003, is affirmed. The petition is denied.