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U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

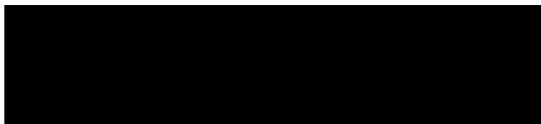
Date: JUN 14 2005

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IN RE:

Petitioner:

Beneficiary:



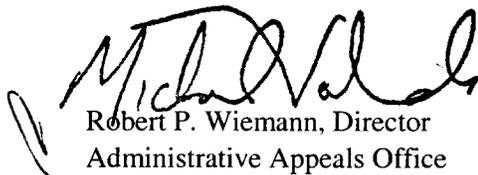
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was denied by the Director, California 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 an office 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 submits a brief and additional evidence.

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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$34.33 per hour, which amounts to \$71,406.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to have worked for the petitioner since 1994.

On Part 5 of the petition, the petitioner claims to have been established in 1990, to have a gross annual income of \$399,798, a net annual income of -\$5,169, and to currently employ eight workers. In support of its ability to pay the proffered wage, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for 2000 and 2001. It shows that the petitioner is a personal service corporation and files its returns using a standard calendar year.

	2000	2001
Gross receipts/sales	\$399,798	\$375,187
Officer compensation	\$ 92,500	\$ 60,000

Salaries and Wages	\$128,000	\$159,897
Taxable Income before net operating loss (NOL) deduction	-\$ 5,169	-\$ 42,332
Current Assets	\$ 14,357	\$ 9,274
Current Liabilities	\$ 435	\$ 341
Net current assets	\$ 13,922	\$ 8,933

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> Besides net income, CIS may review a petitioner's net current assets as an alternative method of evaluating the ability to pay a proffered wage. 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 March 10, 2003, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. He requested the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements in order to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. He further specified that the petitioner provide copies of the beneficiary's Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary for the period between 1998 and the present.

In response, the petitioner resubmitted its corporate tax returns for 2000 and 2001, as well as its tax returns for 1998, 1999, and 2002. The tax returns for 1998, 1999, and 2002 reflect the following information for the following years:

	1998	1999	2002
Gross receipts/sales	\$322,665	\$368,898	\$532,972
Officer compensation	\$ 66,800	\$116,000	\$ 84,000
Salaries and Wages	\$ 78,550	\$ 94,492	\$201,324
Taxable Income before net operating loss (NOL) deduction	-\$ 3,021	\$ -0-	\$ 29,880
Current Assets	\$ 74,340	\$ 64,466	\$ 63,912
Current Liabilities	\$ 211	\$ 253	\$ 308
Net current assets	\$ 74,129	\$ 64,213	\$ 63,604

Counsel also submitted copies of the beneficiary's W-2s. They reflect that the petitioner paid her the following wages:

Year	
1998	\$21,754

<sup>1</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.

1999	\$26,673
2000	\$30,152
2001	\$28,980
2002	\$33,600

The director subsequently denied the petition, finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage out of its net income, focusing on 2000 and 2001 where the petitioner's taxable income before the NOL deduction or the petitioner's net current assets were insufficient to meet the shortfall between the proffered wage and the actual salary paid to the beneficiary.

On appeal, counsel submits additional evidence in the form of copies of the petitioner's bank statements covering the period during 2000, 2001, and January through May 2003. Counsel asserts that the cash flow represented by the monthly balances supports the petitioner's ability to pay the proffered wage. Counsel also urges that the petitioner's depreciation expense should be added back to the calculation of available funds to pay the proposed wage offer because it represents only a paper loss. Counsel further emphasizes that the petitioner's sole shareholder took a \$49,241 deduction for continuing education in 2001 that supports his ability to pay the certified funds. Counsel contends that as a small corporation held by a sole shareholder, the net income set forth on the tax returns is not a true reflection of the corporation's ability to pay its workers and that the sole shareholder could have added to the available funds by reducing his remuneration.

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* proof of the petitioner's ability to pay the proffered wage. If the salary is less than the proffered wage, the ability to pay the proffered wage is deemed established if either the petitioner's net current assets or net taxable income could make up the difference between the actual wages paid and the proffered wage. As mentioned above, the petitioner paid the beneficiary \$49,652.40 less than the proffered wage in 1998; \$44,733.40 less than the proffered wage in 1999, and \$37,806.40 less than the proffered wage in 2002. In each of these years, however, the petitioner's net current assets could pay these respective shortfalls.

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 also 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.

As the petitioner's net income was sufficient to pay the proffered wage in 1998, 1999, and 2002, the 2000 and 2001 tax returns become the focus of the review. As noted above, the petitioner paid compensation to the beneficiary \$41,254.40 less than the proffered wage in 2000 and \$43,326.40 less than the certified wage in 2001. The tax returns also show that these differences, could not, however, be met by either the petitioner's taxable net income before the NOL deduction or net current assets in either year.

It is further noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise portrays an inaccurate financial picture of the petitioner. Bank statements reveal only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect a petitioner's ability to pay a certified wage. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not included on its tax return, such as the cash specified as part of the current assets on Schedule L.

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, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, 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 the sole shareholder accounted for the entire officer compensation of \$92,500 in 2000 and \$60,000 in 2001, 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 the unique circumstances of this particular case, the focus on the financial flexibility of the employee-owner to set his remuneration is appropriate. The petitioning entity appears to be a profitable operation as indicated by the documentation contained in the record showing, with the exception of 2001, increasing gross receipts or sales during the entire period. In this case, we concur with the assertion that the taxable income can be augmented by officer’s compensation to show 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.