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File: [Redacted]  
WAC-04-072-51722

Office: CALIFORNIA SERVICE CENTER Date: DEC 31 2007

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:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center (“director”), denied the immigrant visa petition based on the petitioner’s failure to document its ability to pay the proffered wage, and based on the petitioner’s failure to demonstrate that the beneficiary met the qualifications of the certified Form ETA 750. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO affirmed the director’s decision in part, that the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage, and sustained the decision in part, on the basis that the petitioner overcame the grounds for denial related to the beneficiary’s qualifications. The petitioner filed a Motion to Reconsider the AAO decision. Upon reconsideration, the AAO affirms its prior decision, and the appeal remains dismissed.

The petitioner operates a medical clinic, and seeks to employ the beneficiary permanently in the United States as a Medical Assistant. The petition filed was submitted with a copy of Form ETA 750A, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the AAO director’s June 27, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

On August 25, 2006, the petitioner filed a Motion to Reopen and Reconsider the denied appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) 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 Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner has provided new and relevant evidence to the matter at hand. We will reopen the petition and reconsider the matter.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on November 16, 2001. The proffered wage as stated on Form ETA 750 is \$10.00 per hour based on a 40 hour work week, which is equivalent to an annual salary of \$20,800. The labor certification was approved on August 13, 2003, and the petitioner filed the I-140 Petition on the beneficiary's behalf on January 15, 2004. The petitioner listed the following information: established: 1984; gross annual income: \$512,887; net annual income: \$31,406; and current number of employees: three.

On November 9, 2004, the director denied the petition on the basis that the evidence submitted was insufficient to demonstrate the petitioner's ability to pay the proffered wage as the petitioner only submitted its 2002 federal tax return and no other evidence related to its ability to pay. Further, the director found that the petitioner failed to establish that the beneficiary met the requirements of the certified Form ETA 750, in that the petitioner failed to show that the beneficiary had an Associate's degree in the required major. The petitioner appealed.

On appeal, the petitioner submitted additional tax returns for the years 2001, and 2003, bank statements for two months, as well as documentation related to the beneficiary's associate degree and program of studies. On June 27, 2006, the AAO determined that the petitioner had failed to establish its ability to pay the instant beneficiary, as well as a second beneficiary that the petitioner had sponsored for permanent residence. On that basis, the AAO affirmed the director's decision and dismissed the appeal. The AAO did determine, however, that the evidence submitted on appeal was sufficient to overcome the basis for denial related to the petitioner demonstrating that the beneficiary had an Associate's degree in the requisite area of study. The petitioner then filed a Motion to Reopen and Reconsider the decision on the basis of the remaining ground for denial.

We will initially examine the petitioner's ability to pay based on the evidence in the record, and then examine the petitioner's additional arguments raised on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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. On Form ETA 750B, signed by the beneficiary on November 12, 2001, the beneficiary listed that she has not been employed from May 1998 to the present (date of signature). The petitioner did not claim to have employed the beneficiary, and did not submit any evidence that it previously employed the beneficiary. Therefore, the petitioner cannot establish its ability to pay the beneficiary the proffered wage through prior wage payments.

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. 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 *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.

The petitioner's tax returns reflect that it is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	\$23,973
2002	\$36,383
2001	\$1,142

Based on the petitioner's net income, it is unable to demonstrate its ability to pay the proffered wage in 2001, but could establish its ability to pay one of the two beneficiaries in the years 2002, and 2003. In the petitioner's Motion to Reconsider, it provided evidence that it filed for a second beneficiary for the same position, who would also be paid \$10.25 per hour. Accordingly, the petitioner would need to demonstrate that it could pay \$41,600 in the years above. The petitioner's net income would not reflect its ability to pay the proffered wage for both sponsored individuals in any of the above years.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets are as follows:

<u>Tax Year</u>	<u>Net Current Assets</u>
2003	\$10,786
2002	\$6,820
2001	\$7,913

<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.

The petitioner's net current assets would not reflect its ability to pay the proffered wage for either beneficiary. The petitioner would need to demonstrate that it could pay the proffered wage for both beneficiaries from the respective priority dates.

The petitioner had additionally submitted two bank statements dated November 30, 2001, and December 31, 2001. The statements, however, listed two individual doctor's names and, therefore, it was not clear that the documentation related to the petitioner's bank account, but rather it appeared that the statements related to the individual physician's personal bank accounts. The petitioner is structured as a corporation, which is a separate and distinct legal entity from its owners and shareholders. The 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the owners' assets, or profits from other corporations would not be relevant to the petitioner's ability to pay the proffered wage.

Further, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." Even if the petitioner could demonstrate that the statements related to the petitioner and not the individual physician's, the petitioner's cash assets listed on Schedule L, would have already been considered in calculating the petitioner's net current assets. Additionally, the bank statements would reflect a short time period two months, and not the petitioner's continuing ability to pay the proffered wage.

The AAO director provided in the June 27, 2006 decision that the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa*, 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.

CIS (legacy INS) 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, the AAO would not examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their personal service corporation medical practice.

The director further noted, however, that the tax returns did not reveal how the officers split their compensation.

In the petitioner's Motion to Reopen and Reconsider, counsel seeks to address this point of the decision, and specifically cites to the decision that, "the tax returns, however, do not reveal how many officers split the figures for officer compensation because the Schedule E for 2001 is blank, both copies of the petitioner's tax returns for 2002 in the record do not contain the Schedule E, and the Schedule E for 2003 is blank."

The petitioner provided a statement from its CPA, which provided that "the income from said corp is distributed to the two owners each year as officers [sic] payroll. In this corporation there were two principal shareholders . . . each own 50% of the stock." The CPA further provided that, "the officers [sic] compensation for 2001 was \$207,000.00, for 2002, was \$193,500.00, for 2003, was \$229,500.00 and for 2004 was \$216,000.00. Their compensation varies every year based on the earning of corp."

The petitioner, however, did not provide any other supporting evidence to document the compensation paid to the officers, such as W-2 statements, Forms 1099, or Forms 1040 for the individual physicians dividing the officer's compensation. Further, the petitioner's corporate officers did not provide a statement that they were willing, or able to waive, part of their income in the past, or future to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner has failed to establish that the beneficiary met the requirements of the certified ETA 750. 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.