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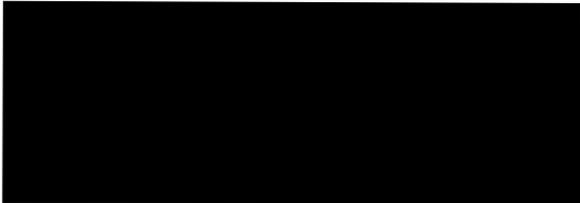
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FILE: WAC 02 193 50645 Office: CALIFORNIA SERVICE CENTER

Date: OCT 18 2007

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, Chief
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 petitioner is a diagnostic medical laboratory.¹ It seeks to employ the beneficiary permanently in the United States as a medical technologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the difference between the beneficiary's actual wages and the proffered wage beginning on the 1997 priority date of the visa petition based on the petitioner's net income and net current assets. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 2, 2002 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 either 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The petitioner's business license certificate with the city of Los Alamitos and the I-140 petition also identify it as a medical corporation.

Here, the Form ETA 750 was accepted on December 29, 1997. The proffered wage as stated on the Form ETA 750 is \$49,973.04 per year. The Form ETA 750 states that the position requires four years of college, a Bachelor's degree in medical technology, a current California clinic lab license, and two years of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a brief. The record also contains the petitioner's Forms 1120 for tax years 1997 to 2001; the beneficiary's W-2 Wage and Tax Statements for tax years 1997 to 2001;³ copies of DE-6 Quarterly Wage Report for the second and third quarters of tax year 2001 and the first and second quarters of tax year 2002.⁴ The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation and a designated Personal Services Corporation. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$3,697,952, a net annual income of \$3,698,470, and to currently employ twenty workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary claimed to have worked for the petitioner from October 1997 to the date she signed the Form ETA 750, on November 25, 1997.

On appeal, counsel asserts that petitioner has demonstrated its ability to pay the proffered wage. Counsel states that while the petitioner has not shown a positive net income during the relevant time period, the petitioner has employed the beneficiary since the priority date and has paid her a salary that is only slightly below the proffered wage of \$49,973.04. Counsel notes that other employees during this period of time received a salary from the petitioner based on the petitioner's DE-6 Forms. Counsel notes that the petitioner paid \$651,594 in wages to employees in tax year 2001.

Counsel also notes that on the petitioner's Form 1120 for tax year 2001, the petitioner indicated it paid over \$1.7 million dollars in compensation to officers. Counsel asserts that the petitioner allocated nearly all net income of the partnership to "guaranteed payments to partners" and recorded it as an expense. Counsel states that to determine the petitioner's income, the officer compensation must be added to the petitioner's ordinary income. Counsel states that the proffered wage could easily be paid out of the petitioner's compensation to its officers. Counsel notes that from the 1997 priority date to the present, the petitioner's officers have been paid

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ These documents indicate the petitioner paid the beneficiary \$33,346.94 in 1997; \$38,729.12 in 1998; \$38,157.67 in 1999, \$38,914.61 in 2000, and \$32,438.97 in 2001.

⁴ The beneficiary is identified as the petitioner's employee during the second and third quarter of 2001 and during the first quarter of tax year 2002. Based on the petitioner's DE-6 Forms submitted to the record, the beneficiary is not identified as the petitioner's employee during the second quarter of tax year 2002. This document also appears to be incomplete.

over a million dollars a year, and that the petitioner has employed at least fifteen people during this period of time.

Counsel also states that the amount of income deducted as depreciation is an amount allowed by the Internal Revenue Services in the calculation of taxable income, and that depreciation does not represent an actual loss of funds. Counsel asserts that amount deducted as depreciation from the petitioner's tax return should be added to the amount of net income, and in support of this proposition, refers to an unpublished AAO decision from the AAO, in which an Associate Commissioner allowed the depreciation deduction to be added back to a petitioner's net income in determining visa eligibility.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel states that depreciation expenses can be added to the actual wages paid the beneficiary to establish that the petitioner can pay the difference between the beneficiary's actual wages and the proffered wage. Contrary to counsel's assertion, the AAO does not consider depreciation deductions to be available cash, but rather examines net income figures in its analysis. Furthermore, counsel refers to a decision issued by the AAO concerning the analysis of a petitioner's ability to pay the proffered wage based on depreciation deductions, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel also refers to several federal court decisions utilized by the AAO in its analysis of a petitioner's ability to pay and states how the instant petition is not analogous to these decisions.⁵ The AAO will comment on the depreciation issue and the federal court decisions below.

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 has established that it employed and paid the beneficiary during the relevant period of time; however, the petitioner did not establish it paid the beneficiary the proffered wage of \$49,973. As stated previously, the petitioner paid the beneficiary \$33,346.94 in 1997; \$38,729.12 in 1998; \$38,157.67 in 1999, \$38,914.61 in 2000, and \$32,438.97 in 2001. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage during tax years 1997 to 2001.

⁵ Counsel cites *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), among others.

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, contrary to counsel's assertions, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$49,973 per year from the priority date:

- In 1997, the Form 1120 stated a net income⁶ of \$0 (zero).
In 1998, the Form 1120 stated a net income of \$1,200.
- In 1999, the Form 1120 stated a net income of \$8,632
- In 2000, the Form 1120 stated a net income of \$12.
- In 2001, the Form 1120 stated a net income of \$0 (zero).

Therefore, for the years 1997 to 2001, the petitioner did not have sufficient net income to pay the difference between the wages paid and the proffered wage \$49,973, ranging from \$11,244 in 1998 to \$17,534 in 2001.

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

⁶The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

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.⁷ 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 during 1997 were -\$23,139.
- The petitioner's net current assets during 1998 were -\$19,467.
- The petitioner's net current assets during 1999 were -\$24,797.
- The petitioner's net current assets during 2000 were -\$55,315.
- The petitioner's net current assets during 2001 were -\$41,919.

Therefore, for the years 1997 to 2001, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 1999.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the officer compensation provided to the four partners in the medical corporation could be used to establish the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts that the compensation provided to officers of the corporation by the petitioner can be considered evidence that the petitioner has the ability to pay the proffered wage. The AAO acknowledges that the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED], and [REDACTED] each hold 25 percent of the company's stock. The record also contains the petitioner's DE-6 form

⁷According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

for two quarters of 2001 and for two quarters of 2002 that indicate the four officers were also paid salaries by the petitioner.

According to the petitioner's 1997 IRS Form 1120 Schedule E (Compensation of Officers), the petitioner's officers elected to pay themselves \$587,382, \$524,838, \$257,099, and \$281,530 respectively. According to the petitioner's 1998 IRS Form 1120 Schedule E (Compensation of Officers), the four officers elected to pay themselves \$485,771, \$470,003, \$252,813, and \$293,713, respectively. According to the petitioner's 1999 IRS Form 1120 Schedule E (Compensation of Officers), the petitioner's officers elected to pay themselves \$592,212, \$427,178, \$259,781, and \$283,454, respectively. According to the petitioner's 2000 IRS Form 1120 Schedule E (Compensation of Officers), the officers elected to pay themselves \$524,028, \$411,534, \$297,511, and \$307,090, respectively. According to the petitioner's 2001 IRS Form 1120 Schedule E (Compensation of Officers), elected to pay themselves \$625,321, \$496,725, \$327,548, and \$335,741 respectively. The Schedule E reflects that all four devote 100 percent of their time to the petitioner. We note here that the compensation received by the company's officers during these years was not a fixed salary and amounted to over \$1 million per year. The DE-6 Forms submitted to the record also indicate that these four officers received salaries from the petitioner, although the record is not clear whether the officers' salaries are included in the wages and salaries line item in the petitioner's tax return, as well as the officer compensation. Based on the reporting requirements of the Form 1120, the officers appear to receive substantial compensation and may also have received salaries.⁸

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, counsel does not suggest that CIS 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. Clearly, the petitioning entity is a profitable enterprise for its owners. As previously noted, the medical services laboratory earned a gross profit of \$3, 217,478 million in 1997 to \$3,697,952 million in 2001. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of \$49,973 can be paid by the petitioner.

In examining a petitioner's ability to pay the proffered wage, 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

⁸ The AAO notes that the petitioner did not submit the four quarters for a specific year when it submitted its Forms DE-6, therefore it is not possible to determine if the salary amounts for all four quarters equal the officer compensation listed in Schedule E. The AAO does note that the salary payments to the four officers do vary in the four DE-6 forms, with some officers not receiving any wages in certain quarters. Furthermore the DE-6 forms are confusing in the listing of wages paid out to either the petitioner's officer or to a family member. For example in the third quarter of 2001, a [REDACTED] earned \$150,000, while another [REDACTED] with a different social security number earned \$9,600 during this quarter. A [REDACTED] is identified as an officer on Schedule E.

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 the present.

The evidence submitted to the record and counsel's assertions on appeal can be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor based on its net income or net current assets.

The evidence submitted does establish that the petitioner 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 met that burden.

ORDER: The appeal is sustained.