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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

BE

[REDACTED]

FILE: [REDACTED]
EAC 05 106 52056

Office: VERMONT SERVICE CENTER

Date: **AUG 29 2008**

IN RE: Petitioner:
Beneficiary:

[REDACTED]

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a general surgery medical 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.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 28, 2006, the single 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 or seasonal 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 28, 2001. The proffered wage as stated on the Form ETA 750 is \$35.75 per hour or \$74,360 annually.

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 appeal.¹ Relevant evidence submitted on appeal includes counsel's statement and a letter dated April 1, 2006, from [REDACTED] P.C. Other relevant evidence includes copies of the petitioner's 1999 through 2001 Forms 1120, U.S. Corporation Income Tax Returns, for the fiscal years October 1 through September 30 for each year and a copy of a 2003 compiled financial statement for the period ending September 30, 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1999 through 2001 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$35,986, -\$82,163, and \$89,878, respectively. The petitioner's 1999 through 2001 Forms 1120 also reflect net current assets of -\$49,680, -\$146,989, and -\$32,744, respectively.²

The petitioner's compiled financial statements for the period ending September 30, 2003 reflects a net loss of -\$10,671 and net current assets of -\$68,751.³

The letter dated April 1, 2006 from [REDACTED] CPA states:

Please be advised that [the petitioner] has the ability to pay [the beneficiary] \$74,000 per annum for a position as Office Manager. Additionally, please note that the gross revenue of [the petitioner] was \$902,151 for the fiscal year ended September 30, 2005 and has been at relatively the same level for the past several years. With some reduction of officers' compensation, [the petitioner] should be able to pay the salary of [the beneficiary].

¹ 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).

² It is noted that the petitioner's 1999 Form 1120 is for the fiscal year prior to the priority date of April 28, 2001, and, therefore, has limited evidentiary value when determining the petitioner's continuing ability to pay the proffered wage of \$74,360 from the priority date. Therefore, the AAO will not consider the petitioner's 1999 Form 1120 except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's compiled financial statement for the period ending September 30, 2003 except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$74,360 based on its compensation of officers.

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, 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).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 28, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, for the pertinent fiscal years (2000 and 2001). Therefore, the petitioner has not established that it employed the beneficiary in fiscal years 2000 and 2001. Hence, the petitioner must establish that it had sufficient funds to pay the entire proffered wage of \$74,360 in fiscal years 2000 and 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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 supported by federal case law. *See 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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 Chang*, 719 F. Supp. at 537.

In fiscal years 2000 and 2001, the petitioner was organized as a “C” corporation. For a “C” corporation, CIS considers net income to be the figure shown on line 28 of the petitioner’s Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner’s Form 1120-A. In the instant case, the petitioner’s 2000 and 2001 net incomes were -\$82,163 and \$89,878, respectively. The petitioner could have paid the proffered wage of \$74,360 from its net income in fiscal year 2001, but not fiscal year 2000. Therefore, the petitioner has established its ability to pay the proffered wage in 2001.

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. 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 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.⁴ 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 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. The petitioner’s net current assets in fiscal year 2000 (the petitioner has already established its ability to pay the proffered wage in fiscal year 2001 from its net income in fiscal year 2001) were -\$146,989. The petitioner could not have paid the proffered wage of \$74,360 from its net current assets in fiscal year 2000.

On appeal, counsel asserts the petitioner has established its ability to pay the proffered wage of \$74,360 based on its compensation of officers.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a “personal service corporation.” Pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

In the present case, the documentation presented here indicates that the two owners each hold 50 percent of their company's stock and perform the personal services of the medical practice. According to the petitioner's fiscal year 2000 IRS Form 1120 the two owners elected to pay themselves \$330,000 with each owner receiving compensation of \$165,000 each.

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 and the petitioner's CPA are not suggesting that CIS examine the personal assets of the owners, but, rather, the financial flexibility that the two 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. It is noted that the medical practice earned a gross profit of \$1,243,184 in fiscal year 2000. Counsel and the petitioner's CPA assert that the amount paid to the owners could be reduced slightly to pay the proffered wage to the beneficiary in fiscal year 2000. The AAO is in agreement. A review of the petitioner's gross profit, the amount of compensation paid out to the employee-owners,⁵ and the petitioner's longevity (more than 33 years) confirms that the job offer is realistic and that the proffered salary of \$74,360 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 and although the record could have been better developed in this case, 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.

While the petitioner has overcome the director's basis of denial, the petition is not approvable in the classification sought. Specifically, the record in this case also lacks documentary evidence as to whether the ETA 750 as certified by the Department of Labor supports the classification requested on the Form I-140. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

⁵ It is noted that the proffered wage of \$74,360 is less than ¼ of the compensation of officers paid out to the two owners in fiscal year 2000.

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires no education, training, or experience. Block 15 states that the beneficiary must be trained in MSWORD.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of office manager requires no education, training, or experience, but only requires training in MSWORD.

In the instant case, counsel submitted a letter, dated January 17, 2006, from Supervising ESS, Alien Labor Certification Office, for the state of New Jersey that states:

The purpose of this letter is to confirm that the above-referenced Labor Certification application was for a position that required at least two years of experience. The original ETA 750A, received in our office on April 28, 2001, included the requirement of 2 years experience. In March of 2002, our agency requested modifications to the application. When the document was returned to our office as an original document, the 2 years experience was again noted in Item 14 of the ETA 750A. A second request was made by our office for additional information in February 2004. The ETA 750A was again submitted as an original; however, the number "2" for experience was inadvertently omitted. Unfortunately this third "original" was the ETA 750A that was transmitted to the Regional Office of the U.S. Department of Labor for certification. The original ETA 750A with the 2 years experience should have been the document sent to the Regional Office.

We hope that this clears up any discrepancy with regard to the intended number of years of experience for the job that is the subject of this Application and for which certification was issued.

In spite of [REDACTED] letter acknowledging the mistake that was made in regard to the ETA 750A that was submitted to the U.S. Department of Labor, the fact remains that the Department of Labor certified the labor certification application without the two year requirement of a skilled worker; and, therefore, the AAO may not consider the visa petition classification as a skilled worker. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Under the present conditions, the visa petition would need to be considered as an "Other Worker."

The regulation at 8 C.F.R. § 204.5(1)(4) provides that the determination as to whether the petition is for a skilled worker will be based on the job requirements certified by the Department of Labor.

Since the position, as certified by the Department of Labor, does not appear to be that of a skilled worker, the director must afford the petitioner reasonable time to provide evidence that the position offered to the beneficiary

is that of a skilled worker to possibly include a statement from the *U.S.* Department of Labor declaring that with reference to the minimum requirements for the proffered position, the ETA 750 was certified in error and is hereby amended or corrected. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.