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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUL 01 2008

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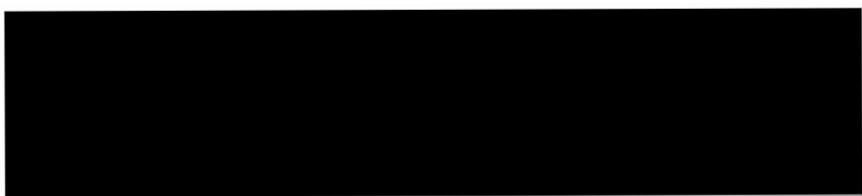
Petitioner:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be sustained.

The petitioner is a pain treatment center. It seeks to employ the beneficiary permanently in the United States as a supervisor, receivables and collection. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the Department of Labor (DOL). 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 had not established that the beneficiary was qualified to perform the duties of the proffered position. 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 September 13, 2006 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the 1998 priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary has sufficient work experience in the proffered position or as a finance supervisor to perform the duties of the proffered position. The AAO will examine both issues in these proceedings.

First, the AAO will examine the petitioner's ability to pay the proffered wage.

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.

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 CFR § 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

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<sup>1</sup> The petitioner filed a prior I-140 petition (LIN 00 255 52397) for the beneficiary that the director denied on January 25, 2001 based on the petitioner's inability to pay the proffered wage. The petitioner submitted a motion to reopen the matter that the director dismissed on December 8, 2004. The petitioner subsequently submitted an appeal to the AAO that was dismissed on April 23, 2004.

of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$26.40 per hour (\$54,912 per year). The Form ETA 750 states that the position requires a four-year bachelor degree in business administration or accounting, and five years of experience in the job offered or in the related occupation of finance supervisor.

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 any new evidence properly submitted upon appeal<sup>2</sup>. On appeal, counsel submits the following evidence:

A copy of an unpublished AAO decision that sustained a petitioner's assertion that as a sole owner personal corporation, it was able to establish its ability to pay the proffered position;

A copy of an article entitled "Current Issues in Establishing a Petitioner's Ability to Pay," written by A. James Vazquez-Azpiri and Amy Reinhorn, *Immigration Briefings*, March 2004, in which the findings of the unpublished AAO decision are discussed;

Minutes of a Special Planning Commission meeting held at the Greenfield City Hall, January 18, 2004. This document describes the petitioner's owner's proposal for a new medical office building at 4710 West Loomis Road, Greenfield and the city council approval of the site, building and landscaping plan; and

The petitioner's bank statements from tax years 1998 to 2006 from either Firststar Bank, Milwaukee, Wisconsin or USBank, St. Paul, Minnesota;

Other relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for tax years 1998 to 2004; the petitioner's owner's Forms 1040 for tax years 1998 to 2004; and a final pay stub for the beneficiary for tax year 2005 that indicates she earned \$49,404 as of December 23, 2005.<sup>3</sup>

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<sup>2</sup> 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).

<sup>3</sup> This document was submitted with the instant I-140 petition.

The record also contains W-2 Forms for the beneficiary for tax years 1998, 1999 and 2000 that indicate the petitioner paid the beneficiary \$29,115.61 in tax year 1998, \$29,413.18 in 1999 and \$34,818.48 in 2000. The record also contains the petitioner's W-3 Transmittal of Wage and Tax Statements for tax years 1998 and 1999 that indicate the petitioner paid wages to 16 employees, including the sole officer, in 1999, and to 15 employees, including the sole officer, in 1998.<sup>4</sup> Finally the record contains a letter from [REDACTED] CPA, CFE, [REDACTED] Co., S.C. Milwaukee, Wisconsin, dated January 10, 2006. In his letter, Mr. [REDACTED] identified himself as an accountant and tax advisor to medical practices. Mr. [REDACTED] stated that based on his review of the petitioner's corporate tax returns, profit and loss statements, individual income tax returns of the petitioner's physician-owner, and the beneficiary's wage statements from the tax years 1998 to 2004, the petitioner had sufficient funds available to pay the proffered wage. Mr. [REDACTED] examines the tax consequences of the petitioner's personal service corporation status, and its distribution of available profit to its physician-owner to avoid double taxation and a high corporate tax rate. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a personal service corporation. On the petition, the petitioner claimed to have been established on January 1, 1993,<sup>5</sup> to have a gross annual income of \$1.5 million dollars, and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claimed to have worked for the petitioner since December 1993.

On appeal, counsel asserts that the petitioner has always had the ability to pay the proffered wage as of the 1998 priority date year based on the petitioner's filing status as a professional service corporation. Counsel states that the AAO has recognized the unique taxation consequences of professional service corporations and cites an unpublished AAO decision to support his assertion. Counsel notes that similar to the physician/owner in the unpublished AAO decision, the petitioner reduces its net business income tax each tax year through compensation to the owner to avoid the high double taxation rates, and that the petitioner's owner and sole shareholder is not earning a subsistence wage. Counsel also provides a breakdown of the petitioner's business income from January to November of tax years 1998 to 2004, along with the January to November wages paid to the physician/owner and the available year-end net income. Counsel also examines the petitioner's bank records from January 1998 to September 2006 and states that the ending balances for each month for which records are available demonstrated that the petitioner maintained substantial sums of money in its bank account each and every month. Counsel states that since the beneficiary's monthly salary based on the proffered wage of \$54,912 would be \$4,576, the petitioner had sufficient available funds on a month-to-month basis to pay the proffered wage as of the January 14, 1998 priority date.

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

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<sup>4</sup> The beneficiary's W-2 Forms and the W-3 Forms were submitted with the petitioner's previous I-140 petition filed for the beneficiary.

<sup>5</sup> The petitioner's tax returns indicate an incorporation date of June 25, 1991.

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).

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 not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1998 onwards.

The record indicates that the petitioner paid the beneficiary \$29,115.61 in tax year 1998, \$29,413.18 in 1999 and \$34,818.48 in 2000. As previously stated, the record also contains a final pay stub for the beneficiary for tax year 2005 that indicates she earned \$49,404 as of November 23, 2005, and the beneficiary's pay stubs as of September 29, 2006 that indicate she earned \$42,240 as of this date. Although Mr. [REDACTED] in his letter states that he has examined the beneficiary's wage statements from tax year 1998 to 2004, the record does not contain any wage statements for the years 2001 to 2004. While the documentation found in the record indicates that the petitioner did employ the beneficiary as of 1998 to 2000, and then again in 2005 and 2006, none of the wage documents indicate a salary equal to or greater than the proffered wage of \$54,912, therefore the petitioner has not established its ability to pay the proffered wage based on the wages it paid to the beneficiary as of the 1998 priority date and onward. Therefore the petitioner has to establish its ability to pay the difference between the beneficiary's wages in tax years 1998, 1999, and 2000, the entire proffered wage in tax years 2001 to 2004, and the difference between the beneficiary's actual wages in 2005 and 2006 and the proffered wage.

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, 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 Chang* at 537.

The tax returns demonstrate from the priority year of 1998 to tax year 2003, the petitioner's Form 1120 stated net income of \$0 (zero). In tax year 2004, the petitioner's Form 1120 stated a net income of -\$31,710. Therefore, for the years 1998 to 2004, the petitioner did not have sufficient net income to pay the proffered wage.<sup>6</sup>

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.<sup>7</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.

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<sup>6</sup> The petitioner filed the instant I-140 petition on March 31, 2006, prior to the required filing of the petitioner's 2005 corporate income tax return. The record closed as of the director's September 13, 2006 denial of the petition. While the petitioner's 2005 tax return should have been available when the record closed, it was not submitted to the record. Neither counsel nor the petitioner provide any explanation for why the 2005 return is not part of the record. Nevertheless, the AAO will examine the tax returns submitted to the record.

<sup>7</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 during 1998 were \$1,360.
- The petitioner's net current assets during 1999 were \$540.
- The petitioner's net current assets during 2000 were \$1,833.
- The petitioner's net current assets during 2001 were \$3,407.
- The petitioner's net current assets during 2002 were \$3,092.
- The petitioner's net current assets during 2003 were \$2,428.
- The petitioner's net current assets during 2004 were -\$39,836.

Therefore, for the years 1998 through 2004, the petitioner did not have sufficient net current assets to pay 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.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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 paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Finally, if the 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 which 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.

On appeal, counsel states that the petitioner is structured as a personal medical service corporation, and CIS should have taken this business structure into account when analyzing 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."<sup>8</sup> Pursuant to *Matter of Sonogawa, supra*, the AAO notes that 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.

The tax return documentation presented here indicates that [REDACTED] was a 50 percent shareholder with [REDACTED], another 50 percent shareholder, in tax years 1998 to 2001. The record also indicates that [REDACTED] received significantly lower compensation than the petitioner's other owner, and that in tax years 2001 through 2004, [REDACTED] received all reported officer compensation.<sup>9</sup> The record also reflects that Henry Rosler is a board certified physician in physical medicine and rehabilitation and that he performs the personal services of the petitioner. According to the petitioner's IRS Forms 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$339,191 in 1998, \$433,815 in 1999; \$410,502

<sup>8</sup> The petitioner also submitted documentation from the website of the Wisconsin Department of Financial Institutions that indicate as of May 1, 1996 the petitioner was restored to good standing as a service corporation.

<sup>9</sup> The record also contains an affidavit signed by [REDACTED] dated March 21, 1996 that states the corporate minute book of the petitioner was irretrievably lost and that [REDACTED] is the petitioner's sole shareholder. Other documents signed by [REDACTED] in March 1996 also indicated that he is the petitioner's sole officer and director.

in 2000; \$519,100 in 2001; \$686,887 in tax year 2002;<sup>10</sup> \$535,794 in tax year 2003; and \$520,774 in tax year 2004. We note here that the compensation received by the company's owner during these years was not a fixed salary.

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. Thus, the AAO would not consider the sole shareholder's personal bank account as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In the present case, CIS would not be examining the personal assets of the petitioner's owner and sole shareholder, but, rather, the financial flexibility that he as the sole owner has in setting his salary based on the profitability of his personal service corporation. Within an historical perspective, the petitioner's fiscal year tax returns also reflect varying amounts of owner compensation, and increases in the amount of general wages paid to its employees, in addition to the negative net income for tax years 1998 to 2003. Clearly, the petitioning entity is a profitable enterprise for its sole officer and owner. Furthermore, in the cover letter submitted with the instant I-140 petition, the petitioner's owner does address the petitioner's ability to use his compensation as a source of additional financial resources with which to pay the proffered wage.

As previously noted, the pain treatment practice earned a gross profit of over one million dollars during tax years 1998 to 2004. We concur with the arguments presented by counsel on appeal. 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 \$54,912 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 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.

The AAO will now address the second issue the director noted in his decision. As stated previously, the director in his decision also stated that the petitioner had not established that the beneficiary had the requisite five years of prior work experience in either the proffered position or in the related profession of finance supervisor. In his decision, the director stated that although the beneficiary had a foreign equivalent baccalaureate degree, he was not convinced that the beneficiary's previous work experiences as a financial analyst with the Corporacion Nacional De Desarrollo and with the Economy and Finance Ministry of the

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<sup>10</sup> The year the petitioner's tax returns indicate [REDACTED] became the petitioner's only shareholder.

Republic of Peru constituted work experience in the job offered or in the alternate occupation of finance supervisor.<sup>11</sup>

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. §204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must 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). Here, the Form ETA 750 was accepted on January 14, 1998.

As stated previously, 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<sup>12</sup>. On

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<sup>11</sup> The director did not raise any further questions as to whether the beneficiary had the requisite U.S. bachelor's degree or foreign equivalent degree. The AAO notes that the record contains a copy of the beneficiary's diploma from the University of Lima, Lima, Peru, that states the beneficiary obtained a bachelor's degree in administrative science in 1984. A copy of the University's description of the beneficiary's coursework from 1979 to 1984 is also in the record. Also contained in the record is a Statement of Evaluation-Advisory Interpretation, dated August 11, 2000 written by [REDACTED] Education International, Wellesley, Massachusetts. In his evaluation, [REDACTED] stated that the beneficiary had the equivalent of at least a baccalaureate degree in business administration at an accredited U.S. institution.

<sup>12</sup> 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).

appeal, counsel submits an affidavit from [REDACTED]. Ms. [REDACTED] states that in October 1985, she was reappointed from the Peruvian Ministry of Economics and Finances to the National Council of Development (CONADE), and that in this position she knew the beneficiary as a co-worker. Ms. [REDACTED] states that the beneficiary was in charge of the financial and economical analysis of companies, of preparing quarterly reports, verifying the fulfillment of operating plans as well as the fulfillment of investment programs. Ms. [REDACTED] states that the beneficiary had four financial analysts under her supervision, all in the accounting and financial areas, and that the beneficiary was liable for the supervision of the implementation of the financial reporting systems to obtain financial and statistical information to use in the analysis of investment projects. Counsel also submits an additional document from CONADE entitled "Work Certificate" that affirms Mrs. [REDACTED]'s position with CONADE from October 4, 1985 to December 20, 1996.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, Mandany 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Supervisor, Receivables and Collection. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
  - Grade School                      grad
  - High School                        grad
  - College                              4
  - College Degree Required Bachelor degree
  - Major Field of Study            **Business Administration or Accounting**

The applicant must also have 5 years of experience in the job offered, or in the related occupation of finance supervisor. The duties of the proffered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she has worked for the petitioner in the proffered position since December 1993 to the date she signed the Form ETA 750, Part B, namely January 12, 1998. She also represented that she had worked from October 1985 to January 1991 as a senior financial analyst for the

Corporation for National Development (CONADE) in Peru, and that from April 1983 to September 1985, she had worked as a senior financial analyst for the Ministry of Economy and Finance, in Peru. She does not provide any additional information concerning her employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) **General.** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) **Skilled workers.** If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record also contains letters of work verification from [REDACTED], director general of the National Development Corporation in Peru and from [REDACTED], Personnel Director, Department of General Administration, Ministry of Economy and Finance, Lima, Peru. In Mr. [REDACTED]'s letter, he stated that the beneficiary worked from April 1983 to September 1985 as a financial analyst and that her duties involved the revision of financial feasibility studies of different projects belonging to government companies; assistant to the director in charge of companies' budgeting, and economic and financial analysis of state companies and elaboration of an annual budget report, among other duties. In Mr. [REDACTED]'s letter, he stated that the beneficiary's duties involved implement of report systems to provide CONADE with statistical and financial information, and gathering of financial statistics from the public corporate sector level, as well as supervision of four financial analysts.

Finally in the cover letter submitted with the instant I-140 petition, Dr. [REDACTED], the petitioner's owner and president, stated that the beneficiary had worked for the petitioner since December 1993 and had worked as a supervisor, receivables and collection. Among her duties were examining, evaluating and developing new billing methods using automated systems, reviewing and auditing client accounts and processing and editing bills before sending them to clients, among other duties.

In his decision, the director did not examine any of the beneficiary's claimed work experience with the petitioner prior to the 1998 priority date, but only looked at the beneficiary's work experience with CONADE and the Ministry of Economy and Finance in Peru. Upon review of the record, both the petitioner and the beneficiary stated that the beneficiary's work experience with the petitioner as a supervisor, accounts receivables and collection began in 1993. The record does contain the beneficiary's W-2 Forms for the claimed employment with the petitioner from tax years 1995 to 1997. However, the petitioner provided no

evidentiary documentation with regard to the claimed employment from 1993 to 1995. Thus, the record contains evidence as to the beneficiary's work experience with the petitioner for three years prior to the 1998 priority date. With regard to the remaining two years of requisite work experience stipulated on the Form ETA 750, the work experience outlined in the letters of work verification submitted by CONADE and the Ministry of Economy and Finance to the record for work performed by the beneficiary from 1983 to 1991, although performed at a macro economic level, establish some similarity to the duties of a finance supervisor, the related occupation identified on the Form ETA 750. The AAO thus finds that the beneficiary has the requisite five years of relevant work experience, and is qualified to perform the duties of the proffered position.

The AAO thus finds that the petitioner has established its ability to pay the proffered wage and has established that the beneficiary is qualified to perform the duties of the proffered position. The director's decision will be withdrawn and the petition will be approved. The appeal is sustained. 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.