

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5



FILE: [REDACTED]
LIN 07 051 51491

Office: NEBRASKA SERVICE CENTER

Date: APR 16 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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. The appeal will be sustained and the petition will be approved.

The petitioner is a physicians group. It seeks to employ the beneficiary permanently in the United States as a neurologist/epileptologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we are satisfied that the petitioner, a personal service corporation, has demonstrated its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 2, 2002. The proffered wage as stated on the ETA Form 9089 is \$150,000 annually. On the Form ETA 750, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 2002.

On the petition, the petitioner claimed to have an establishment date in 1974, a gross annual income of \$6,000,000, a net income of \$2,500,000 and 65 employees. In support of the petition, the petitioner submitted the first pages of its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2001 through 2004 and Forms W-2 for the beneficiary reflecting that the petitioner paid the beneficiary \$133,883 in 2002, \$127,728 in 2003, \$124,995 in 2004 and \$126,000 in 2005.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 2, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R.

§ 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted evidence that the petitioner paid the beneficiary \$179,191 in 2006 and the petitioner's complete tax returns for 2002 through 2005.

In the notice of denial, the director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage from 2002 through 2005.

On appeal, counsel asserts that the director failed to consider that the petitioner is a Qualified Personal Service Corporation.

The tax returns reflect the following information for the following years:

	2002	2003	2004	2005
Gross Income	\$8,663,600	\$9,751,302	\$10,512,073	\$10,818,853
Net income	\$0	(\$35,924)	\$12,534	\$10,910
Compensation of officers	\$2,379,112	\$2,718,966	\$2,842,773	\$3,010,954
Number of officers	12	15	17	17

As noted by the director, the petitioner showed current liabilities that exceed current assets in each of the above years.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 paid the beneficiary a substantial portion of the proffered wage in 2002 through 2005 and above the proffered wage in 2006. The difference between the wages paid and the proffered wage in 2002 through 2005 was \$16,117, \$22,272, \$25,005 and \$24,000 respectively

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). Showing that the petitioner's gross

receipts 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.

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. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 has not demonstrated that it paid the full proffered wage prior to 2006. In 2002 through 2005, the petitioner shows a net income of less than the difference between the wages paid and the proffered wage and negative net current assets. The petitioner, therefore, has not demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

Counsel's assertion that the director should have considered the petitioner's status as a personal service corporation is persuasive. Typically, money expended by a company, including on wages, are no longer available to pay the proffered wage. Thus, counsel's assertion that the petitioner's history of paying its employees should be considered is not persuasive. Moreover, a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of

¹ 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.

individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Thus, the assets of the petitioner's shareholders are typically not relevant.

Nevertheless, the petitioner has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for personal service corporations, as designated on the IRS Form 1120.

As in *Matter of Sonogawa*, 12 I&N Dec. at 612 (Reg. Comm. 1967), the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, 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.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that between 12 and 17 officers own 100 percent of the company's stock. According to the petitioner's IRS Form 1120 Schedules E (Compensation of Officers), these officers elected to pay themselves over \$2 million in 2002 through 2005, with each officer earning well over \$100,000.

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 is not suggesting that CIS examine the personal assets of the officers, of which the beneficiary is one, but, rather, the financial flexibility that the employee-owners have in setting their salary 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, their firm earned a gross profit of several million dollars in 2002 through 2005. We concur with the assertions presented by counsel on appeal. A review of the petitioner’s gross profit and the amount of compensation paid out to the employee-owner confirms that the job offer is realistic and that the proffered salary of \$150,000, most of which was actually paid to the beneficiary as of the priority date, 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 petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.