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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 00 255 52397 Office: NEBRASKA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 dismissed.

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 an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition because the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel submits additional evidence.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $26.40 per hour or $54,912.00 per year.

With the initial petition, counsel submits the petitioner's 1998 and 1999 Form 1120 U.S. Corporation Income Tax Return. The Form 1120 for 1998 reflected gross receipts of $1,065,626.00; gross profits of $1,065,626.00; compensation of officers of $460,078.00; wages and salaries of $293,251.00; and, taxable income before net operating loss deduction and special deductions of $0.00. Schedule L reflected current assets of $47,067.00; current liabilities of $48,427.00; and, net current assets of - $1,360.00. The Form 1120 for 1999 reflected gross receipts of $1,189,406.00; gross profits of $1,189,406.00; compensation of officers of $562,751.00; wages and salaries of $267,567.00; and, taxable income before net operating loss deduction and special deductions of $0.00. Schedule L reflected current assets of $111,795.00; current liabilities of $111,255.00; and, net current assets of $540.00 Counsel also submitted copies of the petitioner's bank statements for the period January 31, 2000 through June 30, 2000.

The director determined that counsel had submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated October 31, 2000, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In response to the RFE, counsel submitted a letter from the petitioner's accountant, who stated that the petitioner was a personal service corporation, who would be taxed at a higher tax rate than if the corporate owners filed individually. Thus, the corporation showed $0 profit because if a profit were shown on the books, it would be subject to double taxation. Therefore, the net income is "zeroed out" after said net profit is distributed to shareholders and owners of the corporation. Counsel also submits copies of Form W-2 Wage and Tax Statements for the years 1998 and 1999, reflecting the beneficiary's employment with the petitioner.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits the petitioner's bank statements for the months of October, November and December 2000, additional wage and tax statements, state income tax documents and the beneficiary's W-2 statements from 1995 through 2000. The W-2s reflect that the petitioner paid the beneficiary $29,116 in 1998; $29,413 in 1999; and $34,818 in 2000. Counsel also submitted documentation reflecting the personal wealth of the petitioner and his wife.

In determining the petitioner's ability to pay the proffered wage, CIS will 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).

Counsel's assertion regarding the distribution of profits between the shareholders and owners in order to avoid a higher tax rate is not persuasive. There is no evidence in the record that any distributed funds would be used instead to pay the proffered wage. Further, since the petitioning entity in this case is a corporation, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The proffered wage is $54,912.00 a year. The beneficiary was paid $29,116 in 1998; $29,413 in 1999; and $34,818 in 2000. Thus the petitioner was obligated to pay $23,690.00 in wages for the remainder of 1998 from January 15th; $25,499.00 in remaining wages for 1999; and $20,094.00 in remaining wages for 2000. The petitioner cannot pay the remainder of the proffered wage from its income since every year it is zero. The petitioner's net current assets were - $1,360.00 for 1998 and for $540.00 for 1999; these sums are considerably less than the proffered wage. Net current assets for 2000 were not provided; therefore, it is concluded that the petitioner could not pay the proffered wage during 2000. Based on the stated assets during 1998 and 1999, the petitioner could not pay a proffered wage of $54,912.00 a year or the remaining wages after reducing the proffered wage by wages actually paid to the beneficiary.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition.

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 not met that burden.

ORDER: The appeal is dismissed.