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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



File: WAC 02 119 55489 Office: California Service Center

Date:

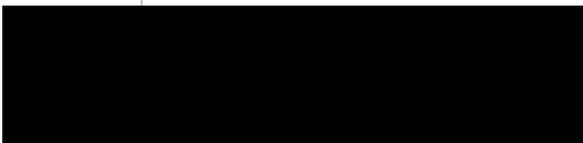
DEC 16 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dental office. It seeks to employ the beneficiary permanently in the United States as a dentist. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is May 1, 1997. The beneficiary's salary as stated on the labor certification is \$56.59 per hour or \$117,707.20 per annum.

Counsel submitted copies of the petitioner's 1998 through 2001 Internal Revenue Service (IRS) Forms 1040, U.S. Individual Income Tax Return and copies of the petitioner's Schedule C, Profit and Loss from Business statements. The Forms 1040 reflected adjusted gross incomes of \$62,081; \$67,748; \$82,943; \$101,306, respectively. Schedule C for 1998 reflected a net profit of \$14,409. For 1999, a net profit of \$28,628 was declared. In 2000, Schedule C showed a net profit of \$36,607. In 2001, a net profit of \$68,091 was declared.

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 both CIS and 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).

In cases where the petitioning business is organized as a sole proprietorship and its income is reflected on Schedule C of the owner's individual tax return, CIS will examine the owner's adjusted gross income in determining the petitioner's ability to pay. This is the basis for CIS review because a sole proprietorship is not legally separate from its owner. The sole proprietor's other sources of immediate income can be considered when determining whether the sole proprietorship can pay the beneficiary's proffered wage.

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

On appeal, counsel argues that "the decision of the Service was clearly in error in that it it (sic) relied on understated gross income figures, whereas the correct gross sales figures (such as the figure of \$260,706.00 for 2001) clearly evidenced the ability of the Petitioner to pay the proffered wage."

In *K.C.P. Food Co., Inc. v. Sava*, 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. In this case, counsel suggests that CIS should use the petitioner's gross receipts figure of \$260,706.00 to determine its ability to pay the offered wage. This figure is far more than the offered salary of \$117,707.20, but does not reflect any of the petitioner's expenses.

Counsel further argues that the beneficiary will replace a dentist who intends to leave his position with the petitioner.

Counsel's assertion is not persuasive. These funds were not retained by the petitioner for future use. Instead, these funds were expended on paying the dentist and therefore not readily available for payment of the beneficiary's salary in 1997. Funds spent elsewhere may not be used as proof of ability to pay the proffered wage.

The petitioner's Form 1040 for calendar year 1998 shows an ordinary income of \$62,081. The petitioner could not pay a proffered wage of \$117,707.20 a year out of this income. In addition, the tax returns for the years from 1999 through 2001 continue to show an inability to pay the wage offered.

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 filing 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.