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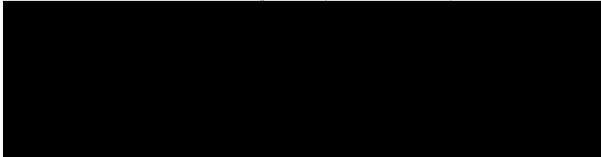
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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



File: WAC 01 244 60654 Office: CALIFORNIA SERVICE CENTER

Date: APR 21 2004

IN RE: 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: SELF-REPRESENTED

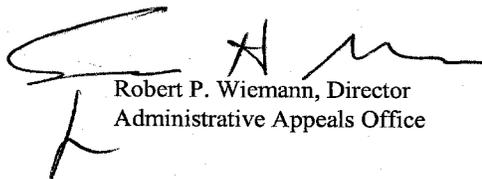
**INSTRUCTIONS:**

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 employment-based preference visa petition was initially approved by the Director, California Service Center. The case underwent a secondary review, and the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR). The director ultimately revoked approval of the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a chiropractic clinic. It seeks to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by 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.

On appeal, the petitioner 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's 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. Here, the Form ETA 750 was accepted on November 28, 1995. The proffered wage as stated on the Form ETA 750 is \$10.70 per hour, which equals \$22,256 per year.

With the petition the petitioner submitted portions of the 1999 and 2000 Form 1040 individual tax returns of the petitioner's owner, including Schedule C, Profit or Loss from Business (Sole Proprietorship).

The petition was approved in error. A subsequent review revealed that the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, the California Service Center, on November 12, 2002, issued the NOIR. The NOIR requested evidence pertinent to that ability. The Service Center requested that the petitioner demonstrate its ability to pay the proffered wage during 1995, 1996, 1997, 1998, 1999, and 2000. The Service Center requested that, if income tax returns were used to demonstrate the ability to pay the proffered wage, they be complete and include all attachments.

In response, the petitioner submitted its owner's complete Form 1040 income tax returns, including Schedules C, for all of the years requested.

The 1995 Schedule C shows that the petitioner returned a net profit of \$84,123 during that year. The 1995 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$85,478 during that year.

The 1996 Schedule C shows that the petitioner returned a net profit of \$205,540 during that year. The 1996 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$86,423 during that year.

The 1997 Schedule C shows that the petitioner returned a net profit of \$221,603 during that year. The 1997 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$88,464 during that year.

The 1998 Schedule C shows that the petitioner returned a net profit of \$123,174 during that year. The 1998 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$92,612 during that year.

The 1999 Schedule C shows that the petitioner returned a net profit of \$121,867 during that year. The 1999 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$128,228 during that year.

The 2000 Schedule C shows that the petitioner returned a net profit of \$137,192 during that year. The 2000 Form 1040 shows that the petitioner's owner and the owner's spouse declared an adjusted gross income of \$188,320 during that year.

With those tax returns, the petitioner's owner submitted a letter, dated November 22, 2002. In that letter, the petitioner's owner stated that the petitioner's net income plus its depreciation deductions show the ability to pay the proffered wage.

On November 12, 2002, the director revoked approval of the petition. The director stated that, although the petitioner's owner's adjusted gross income during each year exceeded the proffered wage, the difference between the proffered wage and the petitioner's owner's adjusted gross income appeared insufficient to support the petitioner's owner's family.

On appeal, the petitioner asserts (1) that the petitioner's net income alone demonstrates the ability to pay the proffered wage, (2) that the petitioner's owner's adjusted gross income indicates the ability to pay the proffered wage, and (3) that the petitioner's owner's taxable income shows the ability to pay the proffered wage.

The petitioner also cited a non-precedent decision for the proposition that its depreciation deduction should be included in the calculation of its ability to pay the proffered wage. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily first 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 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 *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.

The petitioner, however, is a sole proprietorship. The petitioner's owner, therefore, is obliged to pay the petitioner's debts and obligations with his own income and assets. The petitioner's owner's income and assets are, therefore, an appropriate consideration in determining the petitioner's ability to pay the proffered wage. The petitioner's owner, however, must be able to support himself and his family with the funds that would have remained after paying the proffered wage out of his income and assets.

The priority date is November 28, 1995. The proffered wage is \$22,256 per year. The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1995, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, 331 days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 34 days. The proffered wage multiplied by  $34/365^{\text{th}}$  equals \$2,073.16, which is the amount the petitioner must show the ability to pay during 1995.

During 1995, the petitioner's owner and owner's spouse declared an adjusted gross income of \$85,478 during that year. That adjusted gross income minus the salient portion of the proffered wage equals \$83,404.84. The Service Center mistakenly did not request any evidence of the petitioner's owner's monthly expenses and the petitioner's owner provided none. In the absence of any such evidence, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 1995.

During 1996 and ensuing years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. During

1996, the petitioner's owner and owner's spouse declared an adjusted gross income of \$86,423. That adjusted gross income minus the proffered wage equals \$64,167. The Service Center mistakenly did not request any evidence of the petitioner's owner's monthly expenses and the petitioner's owner provided none. In the absence of any evidence to the contrary, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 1996.

During 1997, the petitioner's owner and owner's spouse declared an adjusted gross income of \$88,464. That adjusted gross income minus the proffered wage equals \$66,208. In the absence of any evidence to the contrary, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 1997.

During 1998, the petitioner's owner and owner's spouse declared an adjusted gross income of \$92,612. That adjusted gross income minus the proffered wage equals \$70,356. In the absence of any evidence to the contrary, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 1998.

During 1999, the petitioner's owner and owner's spouse declared an adjusted gross income of \$128,228. That adjusted gross income minus the proffered wage equals \$105,972. In the absence of any evidence to the contrary, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner and owner's spouse declared an adjusted gross income of \$188,320. That adjusted gross income minus the proffered wage equals \$166,064. In the absence of any evidence to the contrary, the balance which would have remained after paying the proffered wage appears sufficient to support the petitioner's owner and the petitioner's owner's family. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. 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. The director's decision is revoke the petition is withdrawn. The petition is approved.