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U.S. Citizenship
and Immigration
Services

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MAR 17 2004

FILE: WAC 02 098 52173 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for a 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, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a picture framing business. It seeks to employ the beneficiary permanently in the United States as a fabrication supervisor. 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 asserts that the petitioner's gross income should be considered when determining its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

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

(2) 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$24.02 per hour or \$49,961.60 annually.

The petitioner is organized as a sole proprietorship. A sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's sources of income and personal liabilities are also considered in determining the petitioner's ability to pay. As evidence of its ability to pay the beneficiary's offered wage, the petitioner submitted copies of its Form 1040 U.S. Individual Income Tax Return for the years 2000 and 2001. The 2001 tax return indicates that the petitioner's owner claimed an adjusted gross income of \$44,347 including a business income of \$59,506 as set forth on Schedule C. The petitioner also submitted bank statements for May, June and July of 2002. They reflect that the petitioner maintained an average monthly balance of approximately \$24,000.

In denying the petition, the director mentioned the owner's 2001 adjusted gross income figure, but stated that the petitioner's net income was less than the proffered wage. As noted by counsel on appeal, the director misstated the owner's adjusted gross income for the year 2001. It remains that the 2001 adjusted gross income of \$44,347,

which includes the owner's financial data contained on Schedule C, does not cover the beneficiary's offered wage of \$49,961.60. Although the petitioner's bank statements, representing a three-month period in 2002, suggest that it had available cash assets, the visa priority date is April 30, 2001. Pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2), the petitioner must show its ability to pay the offered wage as of that date and continuing until the beneficiary obtains lawful permanent residence status.

On appeal, counsel asserts that the petitioner's gross income of \$296,304 in 2001, as set forth on the Form 1040 Schedule C, should not be ignored. This is only part of the determination. Expenses incurred in order to generate revenue also must be considered. The business' net income is the product of this equation and is carried forward to the calculation of the sole proprietor's adjusted gross income on page 1 of the Form 1040.

As noted above, the petitioning owner's adjusted gross income as set forth on the 2001 tax return could not cover the offered wage. Accordingly, based on a review of the evidence submitted, we cannot conclude that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the present.

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.