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U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC 00 011 52927 Office: CALIFORNIA SERVICE CENTER

AUG 03 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: SELF-REPRESENTED

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 initially approved by the Director, California Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a notice of intent to revoke the approval of the preference visa petition, together with his reasons therefore. The director subsequently revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner sought 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 physician. He sought to employ the beneficiary permanently in the United States as a bilingual secretary. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on October 14, 1999. It was initially approved on August 27, 2000. The alien beneficiary appeared at the U.S. embassy in the United Arab Emirates to obtain the immigrant visa pursuant to the approval of the I-140. Upon further inquiry and investigation into the petitioner's financial ability to pay the beneficiary's proffered wage, the consular associate referred the petition back to the Citizenship and Immigration Services (CIS) (formerly known as the Immigration and Naturalization Service). The director concluded that the I-140 was approved in error and issued an intent to revoke the petition on December 9, 2002. The director determined that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the visa priority date. The petitioner's response and subsequent submission of additional evidence failed to convince the director to revise his decision and the petition's approval was revoked on April 8, 2003 pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, the petitioner submits additional financial documentation and asserts that the petitioner has always had the ability to pay the proffered wage.

Section 205 of the Act, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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)(2) provides 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. . . . 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 [CIS].

Eligibility in this case is based upon 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. 8 C.F.R. § 204.5(d). Here, the petition's priority date is January 17, 1996. The beneficiary's salary as stated on the labor certification is $13.06 per hour based on a 40-hour week, or $27,164.80 per annum.

At the outset, it is important to note that although the record suggests that the beneficiary will be employed at a medical office operated as a corporation, the petitioner named on the approved labor certification is "Ayoub [redacted] The petitioner named on the I-140 is also [redacted] [Sic] There is no indication on either document that this petitioner is appearing in anything other than an individual capacity. As an individual petitioner, it is appropriate to take a broader view of his available individual financial resources reflected in the record because all of his cash or cash equivalent readily available assets may be considered in evaluating his ability to pay the beneficiary's proposed wage offer. Although the director failed to solicit specific information relevant to the petitioner's available assets, the record contains sufficient evidence to indicate that the individual petitioner has had sufficient means to pay the proffered wage.

The record reveals that the 1997, 1998, and 1999 corporate federal tax returns filed in the name of "Advanced [redacted] were initially submitted as representing the individual petitioner's financial ability to pay the beneficiary's proffered wage of $27,164.80. These returns show that this company was operated as a personal services corporation, which is currently subject to the highest marginal tax rate of 35%. 26 U.S.C. § 11(b)(2). As reflected in the corporate tax returns, this encourages the employee-shareholders to distribute profits as a way to avoid the high tax rate on income. These kinds of corporations provide services in health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. §448(d)(2). In this case, Advanced [redacted] Inc. reported over one million dollars in gross revenue in each of the three years, although the net income of the company showed that it declared only -$6,993 in 1997, $15,552 in 1998, and -$3,504 in 1999. The tax returns, however, show that $450,000, $340,000, and $320,000 were distributed as officer compensation to the two shareholders. The record indicates that the petitioner is a 50% shareholder in this company and received one-half of this compensation in each year.

The director issued a notice of intent to revoke on December 9, 2002. The director focused his analysis on the corporation's negligible net income as shown on its 1997, 1998, and 1999 corporate tax returns. The director accurately noted that the company declared a net taxable loss in 1997 and 1999.[1]

In response to the notice of intent to revoke, the petitioner submitted a letter, dated January 3, from Alan Chabok, a certified public accountant. [redacted] attaches his analysis of three different corporations, in which the petitioning doctor has an interest, including Advanced [redacted] The analysis shows that Advanced [redacted]. has continued to report over one million dollars in gross revenue in 2000 and 2001. [redacted] states that by combining the resources of these companies, as well as adding back such non-cash items as depreciation, the result is sufficient to pay the beneficiary's proffered wage. [redacted] analysis does not represent an audited financial statement. Nevertheless, [redacted] states that

[1] The company's corporate tax returns also showed that its current liabilities exceeded its current assets in each of the three years. CIS considers net current assets as well as net income, because it represents a petitioner's cash or cash equivalents that would reasonably be available to pay the proffered wage in the year of filing. Thus, the difference between the current assets and current liabilities is a petitioner's net current assets figure, which if equal to or greater than the proffered wage, evidences a petitioner's ability to pay.

there were sufficient monies available to absorb an additional salary of over $94,000 per year.

It is additionally noted that [redacted] suggestion of adding back depreciation and other expenses is without support. 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. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 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. Tex. 1989); *Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

On appeal, the petitioner submits partial copies of the 1998, 1999, 2000, and 2001 corporate federal tax returns of [redacted] and complete copies of the corporate tax returns of "All Family [redacted] for 1997 through 2001. These companies appear to represent part of this individual petitioner's holdings, and as such, can be considered in determining the individual petitioner's ability to pay the proffered salary of $27,164.80. For example, the tax returns of [redacted] show that the petitioner was a 34% shareholder in 1998 and a 50% shareholder in 1999 through 2001. He received a $26,600 income distribution in 1998, $34,819 in 1999, $41,536 in 2000, and $70,615 in 2001. It is worth noting that this company's net income has risen from a low of –$96,669 in 1997 to $141,231 in 2001. Its gross receipts or sales have likewise increased from $66,810 in 1997 to $554,358 in 2001. [redacted] has also tripled its net income from $47,660 in 1999 to $168,653 in 2001. It can be concluded that these companies have collectively maintained a steady stream of growth and represent a viable source of current and future income to the individual petitioner. It is appropriate to reasonably expect this income to continue to increase. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

Although the record could have been better developed in this case, the AAO concludes that the evidence sufficiently indicates that the individual petitioner has had sufficient available financial resources to pay the proffered wage.

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 petition is approved.