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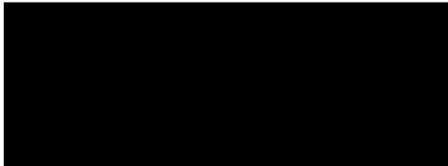
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



JAN 17 2008

File: EAC 01 018 50413

Office: VERMONT SERVICE CENTER

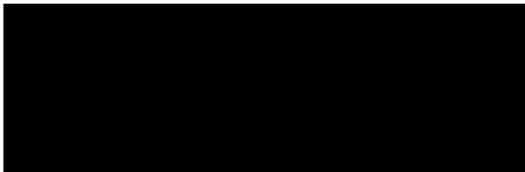
Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



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 CFR 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 the Service 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a medical practice. It seeks to employ the beneficiary permanently in the United States as an internist at an annual salary of \$124,092.80. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel argues that sufficient funds have been available since the priority date, and that the beneficiary now receives a salary greater than the proffered wage.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), provides for the granting of immigrant classification to aliens who are members of the professions holding an advanced degree. The beneficiary's eligibility for this immigrant classification is not at issue in this proceeding.

8 CFR 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 filing 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 application for labor certification was accepted on April 25, 2000. The beneficiary's salary as stated on the labor certification is \$124,092.80 per year.

With the original petition, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for 1999, which contained the following information:

Gross receipts	\$451,885.00
Assets	4,423.00
Officers compensation	199,500.00
Salaries	150,558.00
Taxable income	184.00

The above documentation does not cover the April 25, 2000 priority date, nor does it establish the salary actually paid to the beneficiary. On May 31, 2001, the Service requested evidence of the petitioner's ability to pay the proffered wage. In response, the petitioner submitted a 2000 tax return showing the following information:

Gross receipts	\$555,051.00
Assets	14,757.00
Officers compensation	245,640.00
Salaries	163,747.00
Taxable income	4,475.00

The petitioner also submitted a copy of a Form W-2 Wage and Tax Statement indicating that the petitioner paid the beneficiary \$105,210.11 in 2000. Dr. Erhan Kucuk, owner of the petitioning company, states "[a]s with other professional associations, I take virtually all of the company's income after payment of expenses as my compensation." Dr. Kucuk adds that the beneficiary's compensation has since increased to \$130,000 per year, which exceeds the proffered wage. Kenneth P. Stier, C.P.A., the petitioner's accountant, states that he "advised Dr. Kucuk to take as compensation . . . the approximate income of [the petitioning company] after the deduction of all expenses, including employee expenses. . . . I can confirm that [the petitioner] had the ability to pay [the beneficiary] \$130,000 in the year 2000."

The director denied the petition, stating that the beneficiary's "W-2 indicates he was paid only \$97,710.11 rather than the amount that the statements indicate," and rejecting the assertion that "the petitioner could have taken out less money as compensation" because that assertion represents "speculation over possible funds." With regard to the \$97,710.11 figure, that amount derives from line 1 of the Form W-2. Line 5 of the same form lists the higher amount, \$105,210.11. The discrepancy of \$7,500 reflects an allocation to the beneficiary's 401(k) retirement plan. Because such funds are allocated before taxation, they are not reflected in the beneficiary's taxable earnings for the year.

Counsel argues on appeal that the director "failed to consider evidence which established Petitioner's income as well as evidence of normal accounting, taxation and business standards relating to sole shareholder professional associations." Counsel asserts "[t]he standard practice in medical professional service corporations is for the owner to withdraw as compensation almost all income remaining after payment of expenses in order to avoid double taxation." Noting the figures on the tax returns in the record, counsel observes that, from 1999 to 2000, the petitioner's income increased by over \$100,000, and Dr. Kucuk's compensation increased by over \$45,000.

Richard Puzo, C.P.A., partner-in-charge of the Physician Practice Group at J.H. Cohn LLP, "the largest independent accounting firm located in New Jersey," states that the tax structure for professional medical service corporations differs from that of "other C-corporations." He explains that the sole stakeholders of such corporations routinely minimize the taxable incomes of their corporations by withdrawing the profits as compensation, because otherwise those profits would be subject, in effect, to "double taxation":

When the sole owner of a professional service corporation withdraws compensation, he is taxed as his own individual rate. Any amounts left as income in the corporation after he withdraws his compensation are taxed at 35%. In addition, when the sole owner of the corporation eventually withdraws the remaining income, he is taxed at his individual rate. The effect of this is taxation of his profits both at the rate of 35% at the corporate level and at the individual's rate for any amounts not taken out as compensation.

As a result, I and other accountants advise owners of medical service corporations to withdraw as compensation before the end of the tax year as much as is necessary to reduce taxable income to a nominal amount. In my experience, almost all medical practices [follow this procedure]. . . . Consequently, the better measure of the profitability of a medical practice is to look at the total revenues minus expenses (but not including compensation of the owner), not at the taxable income (which will usually be a nominal amount).

The petitioner submits a copy of the petitioner's articles of incorporation, confirming Dr. Kucuk to be the corporation's sole officer. The petitioner also submits copies of pay stubs showing that the beneficiary received, in the months leading up to the filing of the appeal, biweekly payments of \$5,000, which annualize to \$130,000, exceeding the proffered wage.

Ordinarily, a petitioner cannot establish its ability to pay based on compensation already paid to officers of the company. The petitioner, however, has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for sole owner medical service corporations. The sole owner of the corporation is clearly not earning a subsistence wage, a reduction of which would impair the owner's own ability to earn a living. The petitioner's income is ample and growing, and the petitioner's ability to pay the proffered wage is evident in its current ability to exceed that 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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained.