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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 100 52474 Office: CALIFORNIA SERVICE CENTER Date: MAR 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:

[redacted]

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 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 an ophthalmologist. It seeks to employ the beneficiary permanently in the United States as a dispensing optician. 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. Here, the petition's priority date is September 13, 1996. The beneficiary's salary as stated on the labor certification is $2,800.00 per month or $33,600.00 per annum.

Counsel submitted copies of the 1996 through 2001 Form 1120 U.S. Corporation Income Tax Return for Hosein Mohamedi, M.D., Inc. The tax returns reflected a taxable income before net operating loss deduction and special deductions of -$28,952, -$15,002, -$43,621, -$42,937, $42,274, and $9,242 respectively.

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. The director noted that no evidence of the relationship between Central Valley Eye Care and Hosein Mohammadi, M.D. had been established.

On appeal, counsel submits evidence that Hosein Mohammadi, M.D., Inc. has been doing business as Central Valley Eye Care since 1990.

Counsel argues that "[d]epreciation can generally be added to the taxable income on the face of a company's tax return, and the sum of those two figures can be used in evaluating an employer's ability to pay."

In determining the petitioner's ability to pay the proffered wage, CIS, formerly INS, 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 *K.C.P. Food Co., Inc. v. Sava,* the court held 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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh,* 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava,* 632 F.Supp. at 1054.

The petitioner's Form 1120 for calendar year 1996 shows a taxable income of -$28,952 and net current assets of -$87. The petitioner could not pay a proffered wage of $33,600.00 a year out of this income.

While it is noted that the proffered wage could have been paid from net current assets for the years 1997 through 1999 and from taxable income in 2000, the tax return for 2001 lacks the ability to pay the wage offered either through taxable income or net current assets.

Accordingly, after a review of the federal tax returns 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 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.