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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: EAC 01 279 52394 Office: VERMONT SERVICE CENTER Date: MAR 04 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 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 immigrant visa petition was denied by the Director, Vermont 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 an ophthalmologist. He seeks to employ the beneficiary permanently in the United States as an ophthalmic assistant. 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated that he has the ability to pay the 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.

The sole issue on appeal is whether the petitioner has established his continuing financial ability to pay the beneficiary's offered wage. 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 January 23, 2001. The beneficiary's salary as stated on the labor certification is $26.10 per hour or $54,288 annually.

In this case, the petitioner, a private physician doing business as a sole proprietorship, submitted evidence of his ability to pay the proffered wage in the form of copies of Form 1040, U.S. Individual Income Tax Return for the years 2000 and 2001, including Schedule C, Profit or Loss From Business.

The information provided reflects the following:

Year	Business Income	Adjusted Gross Income
2000	$73,132	$ 66,429
2001	$75,707	$ 78,078

In a request for evidence dated November 13, 2001, the director instructed the petitioner to provide a summary of his reasonable monthly living expenses. In response, the petitioner submitted a breakdown of his monthly expenses, which indicates that he spends approximately $4,200 monthly ($50,400 annually) to support himself and his family.

In denying the petition, the director concluded that a deduction of living expenses does not leave a sufficient sum to meet the beneficiary's proffered wage. The director concluded that the petitioner requires approximately $104,688 per year to support himself and his family at a rate of $50,400 annually, as well as pay the beneficiary's proffered wage of $54,288. The director determined that the petitioner's adjusted gross income in 2000 and 2001 was far less than the amount required to cover these expenses.

On appeal, counsel submits a copy of an accountant's analysis of the petitioner's income and asserts that the petitioner's available funds establish that the petitioner can meet the beneficiary's proffered wage. The accountant's letter indicates that if a depreciation expense and a car and truck expense taken on Schedule C of the petitioner's individual income tax return were added back, then the petitioner would have sufficient funds to cover the beneficiary's wage offer.

The AAO does not agree. A sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal expenses and liabilities are relevant to the petitioner's ability to pay the proffered wage. A sole proprietor's business-related income and expenses are reported on Schedule C of the individual tax return and carried forward to the first page to be included in the calculation of the sole proprietor's adjusted 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. There is no precedent that would allow a petitioner to add back to net cash the depreciation expense charged. *See 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).

In view of the foregoing, the AAO concludes that the petitioner's evidence fails to establish that his income is sufficient to cover the proffered wage as well as provide for his annual living expenses. Accordingly the AAO cannot conclude that the petitioner has established his continuing financial ability to pay the proffered wage as of the visa 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 not met that burden.

ORDER: The appeal is dismissed.