

P30

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



File: WAC 02 101 53998 Office: California Service Center Date: JUN 05 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a manager. 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is November 14, 1997. The beneficiary's salary as stated on the labor certification is \$30.40 per hour or \$63,232.00 per annum.

Counsel submitted copies of the petitioner's 1997 through 2000 Form 1120 U.S. Corporation Income Tax Return. The tax return for 1997

reflected gross receipts of \$1,498,126; gross profit of \$103,465; compensation of officers of \$36,000; salaries and wages paid of \$20,384; and a taxable income before net operating loss deduction and special deductions of -\$75,358. The tax return for 1998 reflected gross receipts of \$1,361,361; gross profit of \$130,779; compensation of officers of \$36,000; salaries and wages paid of \$6,794; and a taxable income before net operating loss deduction and special deductions of -\$7,043.

The tax return for 1999 reflected gross receipts of \$1,795,181; gross profit of \$172,675; compensation of officers of \$36,000; salaries and wages paid of \$25,513; and a taxable income before net operating loss deduction and special deductions of \$1,008. The tax return for 2000 reflected gross receipts of \$3,124,684; gross profit of \$293,759; compensation of officers of \$36,000; salaries and wages paid of \$64,758; and a taxable income before net operating loss deduction and special deductions of \$68,950.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the Service failed to take into consideration the personal assets of the owner of the petitioning entity and that of his spouse.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel further cites *Matter of Masonry Masters, Inc. v. Thornburg* and argues that the "CSC failed to address Petitioner's argument raised in response to the RFE issued by CSC that the Beneficiary's ability to generate income should be taken into account in determining the issue of Petitioner's ability to pay the proffered wage in the future."

Counsel's argument that the beneficiary's employment will result in more income for the business is not persuasive. Counsel does not explain, however, the basis for such a conclusion. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the

strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

Matter of Masonry Masters, Inc. v. Thornburg, 875 F.2d 898. D.C. circ. 1989 is a decision that is not binding outside the District of Columbia. It does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The court held that the Service should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not provided evidence that there is a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia.

The petitioner's Form 1120 for calendar year 1997 shows a taxable income of -\$75,358. The petitioner could not pay a proffered salary of \$63,232.00 a year out of this income.

In addition, the petitioner's 1998 and 1999 federal tax returns continue to show an inability to pay the wage offered.

While the petitioner has demonstrated its ability to pay the wage offered in 2000, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the federal tax returns, 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 and continuing to 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.