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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FEB 24 2004

FILE: EAC 01 078 52775 Office: VERMONT SERVICE CENTER Date:

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 Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decisions of the director and the AAO will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a specialty cook. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and the AAO affirmed that decision, dismissing the appeal.

In support of the motion, 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 continuing ability to pay the wage offered beginning on the priority date, 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 request for labor certification was filed on March 9, 2000. The proffered wage stated on the labor certification is $13 per hour which equals $27,040 annually.

With the petition, the petitioner's original counsel submitted a statement, dated December 9, 2000, from one of the petitioner's owners. That owner stated that the petitioner's business has recently improved as a result of employing the beneficiary and other factors. The petition states that the petitioner has four employees. No other evidence of the petitioner's ability to pay the proffered wage accompanied the petition.

Because the evidence submitted with the petition was insufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on August 9, 2001, requested that the petitioner provide additional evidence pertinent to that ability.

The Service Center explicitly directed the petitioner to show its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2). In addition, the Service Center requested that the petitioner submit a copy of its 2000 federal income tax return and a copy of the Form W-2 wage and tax statement showing the amount the petitioner paid to the beneficiary during 2000. The Service Center also asked whether the beneficiary would be filling a new position or replacing an existing employee. Finally, the Service Center requested that the petitioner provide a copy of its 2000 Form W-3 showing the wages it paid to all four of its employees during that year.

In response, petitioner's substituted counsel submitted copies of four 2000 W-2 wage and tax statements, none of which shows wages paid to the beneficiary. Counsel provided the petitioner's 2000 Form W-3 transmittal. Counsel also provided the petitioner's 2000 Form 1065 U.S. return of partnership income. The return shows that the petitioner declared a loss of $3,717 as its ordinary income from trade or business during that year.

Further, on a copy of the request for additional evidence returned by counsel someone, apparently either counsel or the petitioner's owner, indicated that the position to be filled by the beneficiary is a new position. Finally, counsel provided copies of statements of the petitioner's bank account. Although counsel did not state the proposition in support of which those bank statements were submitted, this office surmises that counsel intended that those statements should demonstrate the petitioner's ability to pay the proffered wage.

On December 27, 2001, the Director, Vermont Service Center, denied the petition, finding that the petitioner was unable to pay the proffered wage during 2000 out of a loss of $3,717 and had, therefore, failed to demonstrate the ability to pay the proffered wage during 2000.

On appeal, counsel submitted a copy of the petitioner's 1999 Form 1065 U.S. partnership return of income. The return shows that the petitioner declared a loss of $21,018 as its ordinary income from trade or business activities during that year. Counsel argued that those returns demonstrate that the petitioner's gross profits greatly improved from 1999 to 2000. Counsel cited *Masonry Masters v. Thornburgh*, 875 F2d 898, 903 (DC Cir. 1989) for the proposition that the Service should consider the amount by which hiring the beneficiary will boost the petitioner's income.

On August 2, 2002, the AAO dismissed the appeal. The AAO found that, consistent with 8 C.F.R. § 204.5(g)(2), the petitioner must show that it had the ability to pay the proffered wage during 2000. To show that the petitioner's business is improving is insufficient.

The AAO noted that counsel stated that hiring the beneficiary would increase the petitioner's profits, and urged that the amount of that increase should be included in the computation of the petitioner's ability to pay the proffered wage. The AAO observed that counsel had provided no evidence of any amount by which the petitioner's profits would be increased by hiring the beneficiary.

On motion, counsel provides additional bank statements. Counsel again urges that the case of *Masonry Masters v. Thornburgh*, Supra. should be considered more carefully. Counsel does not specify the proposition for which he cites *Masonry Masters*, other than implying that it supports the position that the petitioner is able to pay the proffered wage.

Counsel cites a portion of the decision in *Masonry Masters*. That portion of the decision makes two points. The first is that the Service impermissibly assumed, in that case, that hiring the employee would not add to the petitioner's profits. The second point made in the passage quoted by counsel is that the Service should have stated the formula it used to compute the petitioner's ability, or lack of ability, to pay the proffered wage. This office shall speculate, absent any other suggestion from counsel, that he believes those points to be applicable to the instant case.

This office makes no assumption at all pertinent to the amount by which hiring the beneficiary will increase the petitioner's profits. As the quote from *Masonry Masters* makes explicit, an employer seeks to hire workers whose contribution to production equals or exceeds their wages. This office believes that the petitioner wishes to hire the beneficiary based on that same assumption or expectation.

The passage from *Masonry Masters* makes clear, too, that the contribution of the employee may only be equal to his wages. In that event, hiring the employee would not raise profits. Further still, although *Masonry Masters* does not explicitly address it, the possibility also exists that an employer might incorrectly anticipate that the

contribution of a prospective employee will not equal or exceed his wages. In that event, hiring that employee would actually result in a decrease in profits.

Rather than make any assumption of the amount by which hiring the beneficiary is likely to increase, or decrease, the petitioner's profits, this office would require evidence of that amount. No such evidence has been submitted in this case. In fact, counsel's argument that the petitioner's profits will increase if it is permitted to hire the beneficiary is especially ineffective in view of the letter of December 9, 2000, in which one of the petitioner's owners implied that the petitioner already employed the beneficiary.

The other point made by the passage from *Masonry Masters*, is that the Service should make clear the calculation by which it determines whether the petitioner has demonstrated that it has the continuing ability to pay the proffered wage. That calculation, as applied to this case, shall be made explicit.

8 C.F.R. § 204.5(g)(2) requires that the petitioner choose between copies of annual reports, federal tax returns, and audited financial statements in demonstrating its continuing ability to pay the proffered wage beginning on the priority date. In this case, the petitioner has submitted no annual reports and no audited financial statements. The petitioner has opted, then, to demonstrate its ability to pay the proffered wage using its federal tax returns.

The proffered wage in this case is $27,040 per year. The priority date is March 9, 2000. The petitioner is obliged to demonstrate that it had the ability to pay the proffered wage during 2000, and that it has continued, since then, to have that ability.

If the petitioner had submitted any evidence that it paid any wages to the beneficiary during 2000 or any later year, then it would have demonstrated its ability to pay that amount during that year. If, for instance, the petitioner had demonstrated that it had paid the beneficiary $20,000 during 2000, it would be obliged to show, using its federal tax return, that it had the ability during that same year to pay an additional $7,040, the unpaid balance of the proffered wage.

The statement from the petitioner's owner, dated December 9, 2000, appears to state that the petitioner had already hired the beneficiary. The Service Center requested, on August 9, 2001, that the petitioner provide a copy of the Form W-2 wage and tax statement showing the amount the petitioner paid to the beneficiary during 2000. The petitioner did not submit that requested form, did not explain its failure to submit the requested form, and has submitted no evidence of any amount it paid to the beneficiary since the priority date. Therefore, that portion of the calculation is inapplicable to this case.

Using its federal tax returns, the petitioner must demonstrate that it was able, during 2000 and each ensuing year, to pay the beneficiary $27,040, the entire amount of the proffered wage. In determining the petitioner's ability to pay the proffered wage, CIS will first 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 INS, now 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 that the CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra*. 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*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054.

In the case of a partnership, or a company taxed as a partnership, the net income referred to above corresponds to Line 22 of Form 1065, Ordinary Income (Loss) from Trade or Business Activities. During 2000, the petitioner declared a loss of $3,717. The petitioner is unable to pay any additional salaries out of negative profit. Therefore, the petitioner has not demonstrated that it was able to pay the proffered wage out of its income during 2000. The remaining question is whether some additional funds may exist which are at the petitioner's disposal and which it may rely upon to pay the proffered wage.

Counsel has urged that the petitioner's bank account balances demonstrate that the petitioner was able to pay the proffered wage. Counsel submitted no evidence, however, to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return. Absent any such evidence, those account balances shall not be treated as additional funds at the petitioner's disposal with which it might have paid the proffered wage.

If the petitioner had demonstrated that the beneficiary would replace an existing employee, then the wages paid to that employee would be aptly included in the calculation of the petitioner's ability to pay the proffered wage. Upon hiring the beneficiary and replacing the incumbent employee, the petitioner would have the amount of that employee's wages available to it to pay the beneficiary. The replaced employee's wages might be sufficient in themselves to pay the proffered wage, or they might contribute to the ability to pay the proffered wage. In this case, counsel's submission in response to the request for evidence makes clear that the proffered position is a new position. The beneficiary would not, therefore, replace an existing employee. As such, no wages of an existing employee shall be considered in the calculation of the petitioner's ability to pay the proffered wage.

The evidence submitted does not show that the petitioner was able to pay the proffered wage out of its income during 2000 or that any other funds were available with which it might have paid the proffered wage during that year. Therefore, the decision of the AAO has not been overcome on the motion.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision is affirmed. The petition is denied.