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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: WAC 02 119 54847 Office: CALIFORNIA SERVICE CENTER Date: JAN 14 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 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 a financial and insurance services company. It seeks to employ the beneficiary permanently in the United States as a life insurance sales agent. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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 denied the petition accordingly.

On appeal, counsel submits a statement.

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 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 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 proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $4,609.81 per month, which equals $55,317.72 per year.

With the petition counsel submitted the 1998, 1999, and 2000 Form 1040 joint personal returns of the petitioner's owner and the owner's spouse, including Schedule C, Profit or Loss from

Business (Sole Proprietorship).

The 1998 Schedule C shows that the petitioner returned a net profit of $29,008 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income, including all of the petitioner's net profit, of $62,911 during that year.

The 1999 Schedule C shows that the petitioner returned a net profit of $35,526 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income, including all of the petitioner's net profit, of $38,568 during that year.

The 2000 Schedule C shows that the petitioner returned a net profit of $34,760 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income, including all of the petitioner's net profit, of $70,990 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on April 15, 2002, issued a Request for Evidence requesting additional evidence pertinent to that ability. The Service Center stipulated that, pursuant to 8 C.F.R. § 204.5(g)(2), the evidence must consist of copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a copy of the 2001 Form 1040 of the petitioner's owner and the owner's spouse, including the corresponding Schedule C. The 2001 Schedule C shows that the petitioner returned a net profit of $22,343 during that year. The Form 1040 shows that the petitioner's owner and owner's spouse declared an adjusted gross income of $53,747 during that year, including all of the petitioner's net profit.

In that response, counsel asserted that, pursuant to *Masonry Masters, Inc. v. Thornburgh*, 875 F2d 898 (D.C. Cir. 1989), CIS is obliged to consider the ability of the beneficiary to generate income in determining the petitioner's ability to pay the proffered wage. Counsel, however, provided no evidence of the beneficiary's ability to produce income.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 22, 2002, denied the petition.

On appeal, counsel asserts the following: (1) that the director's analysis of tax documents was flawed, (2) that the director erred in not permitting the petitioner to address any

doubt pertinent to its ability to pay the proffered wage, (3) that the director erred in not adhering to unspecified guidelines and unspecified precedent, and (4) that the director erred in failing to consider the argument petitioner raised in response to the Request for Evidence.

Counsel also stated that a brief would be submitted. Although a year has transpired, that brief is not in the file. CIS is neither obliged nor inclined to wait any longer.

Counsel's assertions are so abstract that they barely escape a summary dismissal pursuant to 8 C.F.R. 103.3(a)(1)(v) for failure to identify *specifically* any erroneous conclusion of law or statement of fact for the appeal. [Emphasis added.] Counsel is correct, however, that the decision of denial should have addressed counsel's argument pertinent to *Masonry Masters, Inc. v. Thornburgh, Supra*. This office shall address that argument.

Masonry Masters held that examining a company's financial records alone is unrealistic because it fails to account for income a new employee may generate.[1] Counsel, however, provides no evidence of the beneficiary's ability to generate income in the proffered position. CIS is not obliged to assume that the beneficiary possesses that ability or to guess at its extent. Absent any evidence of the beneficiary's ability to generate income, that hypothetical ability cannot be included in the determination of the petitioner's ability of the petitioner to pay the proffered wage.

Counsel's assertion that the director should have allowed the petitioner an additional opportunity to address the question of its ability to pay the proffered wage is unconvincing. 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The petitioner was obliged to submit evidence of that ability with the petition.

On April 15, 2002, the Service Center issued a request for evidence asking the petitioner to sustain its obligations under the regulations. The Service Center was not obliged to issue that request again if it found that the petitioner had failed to comply.

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

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[1] The AAO may consider the reasoning of this decision; however, the AAO is not bound to follow the published decision of a United States District Court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

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 the INS, now 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 the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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.

Because the petitioner is a sole proprietorship, however, the petitioner's owner is obliged to pay the petitioner's debts and obligations. The income and assets of the petitioner's owner are, therefore, correctly considered in determining the petitioner's ability to pay the proffered wage.

During 1998, the petitioner's owner and owner's spouse declared an adjusted gross income of $62,911. That amount exceeds the proffered wage.

During 1999, the petitioner's owner and owner's spouse declared an adjusted gross income of $38,568. That amount is less than the proffered wage. The petitioner submitted no evidence that it had any other income or assets available to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner and owner's spouse declared an adjusted gross income of $70,990, which exceeds the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

If the petitioner's owner and owner's spouse had paid the proffered wage out of their adjusted gross income during 1998 and 2000, their adjusted gross income would have been greatly reduced. The petitioner's owner and owner's spouse had a household of five during 1998 and a household of four during

2000. Whether the remaining amount would have been sufficient to support the petitioner's household is unclear. Given the failure of the petitioner to demonstrate its ability to pay the proffered wage during 1999, however, this office need not determine whether the petitioner has demonstrated its ability to pay the proffered wage during 1998 and 2000.

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.