

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

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

File: WAC 02 157 52828 Office: CALIFORNIA SERVICE CENTER

Date: **APR 28 2004**

IN RE: Petitioner:
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:

PUBLIC COPY

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

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.

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 messenger service and trucking company. It seeks to employ the beneficiary permanently in the United States as a technical support specialist. 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.

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 nature, for which qualified workers are not available in the United States.

The regulation at 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.

The petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$23.61 per hour, which equals \$49,108.80 per year.

The petition states that the petitioner employs 34 workers. With the petition counsel submitted the petitioner's 1998, 1999, and

2000 Form 1120S U.S. Income Tax Returns for an S Corporation. Counsel also provided copies of the petitioner's California Form DE-6 Quarterly Wage Reports for all four quarters of 2000 and the first, second, and third quarters of 2001. The wage reports show the amounts the petitioner paid to its employees in wages during those quarters. The reports also show that the petitioner did not employ the beneficiary during any of those quarters.

The 1998 income tax return shows that the petitioner declared a loss of \$52,585 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$6,085 and current liabilities of \$629, which equals net current assets of \$5,456.

The 1999 return shows that the petitioner declared a loss of \$66,196 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$3,487 and current liabilities of \$28, which equals net current assets of \$3,459.

The 2000 return shows that the petitioner declared a loss of \$78,102 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

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 June 21, 2002, requested additional evidence pertinent to that ability. The Service Center requested that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested evidence of the petitioner's ability to pay the proffered wage during 2001. The Service Center stipulated that the evidence should be copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel provided copies of its Form 941 Employers Quarterly Tax Returns and California Form DE-6 Wage Reports for the last quarter of 2001 and the first and second quarters of 2002. Those documents show the amounts the petitioner paid in wages during those quarters. They also show that the petitioner did not employ the beneficiary during any of those quarters.

Counsel also provided copies of the petitioner's monthly checking account statements for January 2000 through July 2002. Counsel cited *Masonry Masters v. Thornburgh*, 875 F2d 898 (D.C.Cir. 1989), for the proposition that CIS should consider the ability of the beneficiary to produce income in its determination of the petitioner's ability to pay the proffered wage.

On September 26, 2002, the California Service Center issued

another request for evidence in this matter. The Service Center again requested evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response, counsel submitted copies of his previous submissions.

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 November 29, 2002, denied the petition. In that decision, the director noted that the petitioner's ordinary income added to its year-end "cash assets" was insufficient to pay the proffered wage during 1999, 2000, and 2001.

On appeal, counsel argues (1) that the petitioner's year-end cash is an inappropriate consideration in the determination of the petitioner's ability to pay the proffered wage, (2) that how the petitioner's year-end "cash assets" were computed is unclear, (3) that the petitioner's depreciation deduction should be added back to its ordinary income to show its "True Ordinary Income or True Profit," (4) that the amounts of the petitioner's monthly bank balances should be included in the determination of the petitioner's ability to pay the proffered wage, and (5) that the amounts the petitioner paid in wages during various quarters shows its ability to pay the proffered wage.

Counsel provides the petitioner's unaudited fiscal year 2002 profit/loss statement. Unaudited financial statements are the representations of management compiled into standard form. The unsupported representations of management are insufficient to demonstrate the ability to pay the proffered wage.

Further, 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the preferred evidence of a petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

Finally, counsel states, but provides no evidence to support, that the petitioner's owners have \$800,000 equity in their home, which they could utilize to pay the proffered wage.

Even had counsel submitted sufficient evidence of the petitioner's owners' equity, that amount would have no place in the determination of the petitioner's ability to pay the proffered wage. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the corporation's debts and obligations,

are irrelevant to this matter and shall not be further considered.

This office agrees with counsel that the computation of "year-end cash" in the decision of denial is unclear. This office will not use it. Counsel's suggestion that the petitioner's depreciation deduction should be added to its ordinary income to yield "True Ordinary Income or True Profit," however, is misguided.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532, 537 (N.D. Tex. 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1989). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Third, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the preferred evidence of a petitioner's ability to pay a proffered wage.

Counsel's reliance on the amount of the petitioner's wage expense is similarly inapposite. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses¹ or otherwise increased its net

¹ The petitioner might demonstrate this, for instance, by showing that the petitioner would replace a specific named employee, whose wages

income², the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's ordinary income.

Counsel previously cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. The AAO may consider the reasoning of *Masonry Masters*, but is not bound to follow the 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).

A portion of *Masonry Masters* urges that the ability of the beneficiary in that case to generate income for the petitioner should be considered. That portion is clearly dictum, however, as the decision was based on other grounds. Further, it appears in the context of a criticism of the failure of the Immigration and Naturalization Service to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Finally, while that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary would generate income and to speculate at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence CIS will make no such assumption.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 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 Immigration and Naturalization Service, now CIS, had properly relied upon the

would then be available to pay the proffered wage.

² The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

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.

The priority date is January 13, 1998. The proffered wage is \$49,108.80 per year. During 1998, the petitioner declared a loss as its ordinary income. The petitioner has not demonstrated that it was able to pay the proffered wage out of its income. The petitioner ended the year with net current assets of \$5,456, an amount insufficient to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 1998.

During 1999, the petitioner declared a loss as its ordinary income. The petitioner has not demonstrated that it was able to pay the proffered wage out of its income. The petitioner ended the year with net current assets of \$3,459, an amount insufficient to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 1999.

During 2000, the petitioner declared a loss as its ordinary income. The petitioner has not demonstrated that it was able to pay the proffered wage out of its income. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay the proffered wage out of its assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during 2000.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, or 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the 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.