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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

Room 2015, AA Office 2015, 3/F

425 L Street, N.W.

Washington, D.C. 20536



FEB 02 2004

File: SRC 02 042 56202

Office: Vermont Service Center

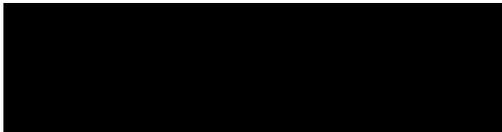
Date:

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:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 is an auto repair shop. It seeks to employ the beneficiary permanently in the United States as an auto technician. 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 documentation.

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, and continuing. Here, the petition's priority date is February 1, 2001. The beneficiary's salary as stated on the labor certification is \$600.00 per week which equates to \$31,200.00 per annum.

The petitioner initially submitted a copy of the first page of its Internal Revenue Service (IRS) Form 1120 for 2000. On March 19, 2002, the director requested additional evidence of the petitioner's ability to pay the wage offered, specifically "federal tax returns, audited or reviewed financial statements, published annual reports, or annual reports accompanied by audited financial statements." In response, counsel submitted copies of the petitioner's bank statements for the period from January 31, 2001 through February 28, 2002.

In determining the petitioner's ability to pay the proffered wage, CIS will 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 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).

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

On appeal, counsel resubmits the petitioner's bank statements and asserts that *Matter of Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989) applies in this case in that the beneficiary's work will produce revenue in excess of the prevailing wage.

The holding in *Matter of Masonry Masters, Inc. v. Thornburgh* 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 CIS, formerly the Service or INS, 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.

Counsel further argues that the petitioner has other assets, in the form of titles to automobiles, which it has repossessed from

customers, with which to pay the proposed salary. Counsel, however, also states that the "evidence of assets in the form of automobiles, which Petitioner can sell right now was not available at the time the petition was filed because Petitioner had not yet repossessed them."

Counsel's argument is not persuasive. If the petitioner did not have the assets as of the priority date, then the petitioner did not have sufficient assets with which to pay the proffered wage.

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). As noted above, the priority date in this case is February 1, 2001. The only tax form submitted is an unsigned, undated copy of the petitioner's Form 1120 for 2000 which shows a taxable income of \$5,358, an amount insufficient to pay the proffered wage. Furthermore, the petitioner has not submitted documentation which conforms to the director's request of March 19, 2002, nor does it conform to the regulation at 8 C.F.R. § 204.5(g)(2) which states that evidence of ability to pay the wage "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

In addition, even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. 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).

Accordingly, after a review of the record, 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.

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.