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**U.S. Citizenship
and Immigration
Services**

Blo



File: [redacted] Office: VERMONT SERVICE CENTER

Date: **MAY 12 2004**

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:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 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 granting 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 the 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. Here, the Form ETA 750 was accepted for processing on December 22, 1997 and states that the petitioner's name is [REDACTED] d/b/a Madison Card and Gift. The proffered wage as stated on the Form ETA 750 is \$29.37 per hour, which equals \$61,089.60 per year. The petitioner submitted the 1999 Form W-3 transmittal statements of 330 Madison Card & Gift, Inc. showing that it paid a total of \$47,426.30 in wages to all of its employees during that year.

The petition in this matter states that the petitioner is "Lincoln Card & Gift, Inc. formerly 330 Madison Card & Gift." With the petition, the petitioner submitted copies of the 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Return of 330 Madison Card & Gift, Inc. and copies of December 1997 and January 1998 bank statements of 330 Madison Card & Gift, Inc. The petitioner submitted copies of 1998 and 1999 Form W-2 Wage and Tax Statements showing that 330 Madison Card and Gift, Inc. paid \$12,967.76 and \$6,483.88 in wages to the beneficiary during those years, respectively. Those returns show that 330 Madison Card & Gift, Inc. reports taxes based on a fiscal year beginning on October 1st of the nominal year and ending on September 30th of the following year.

The 1997 return shows that 330 Madison Card & Gift, Inc. declared taxable income before net operating loss deduction and special deductions of \$6,840 during the fiscal year that began on October 1, 1997 and ended on September 30, 1998. The corresponding Schedule L shows that at the end of that fiscal year its current liabilities exceeded its current assets.

The 1998 return shows that 330 Madison Card & Gift, Inc. declared taxable income before net operating loss deduction and special deductions of \$14,270 during the fiscal year that ran from October 1, 1998 through September 30, 1999. The corresponding Schedule L shows that at the end of that fiscal year its current liabilities exceeded its current assets.

The 1999 return shows that 330 Madison Card & Gift, Inc. declared a loss of \$8,660 as its taxable income before net operating loss deduction and special deductions during the fiscal year from October 1, 1999 through September 30, 2000. The corresponding Schedule L shows that at the end of that fiscal year its current liabilities exceeded its current assets.

The petitioner also submitted copies of 2000 and 2001 W-2 forms showing that Easy Street Publications, L.L.C. t/a Lincoln Card and Gift paid the beneficiary \$12,967.76 in wages during both of those years. The petitioner submitted the December 2001 and January 2002 bank statements of Easy Street Publications, L.L.C. d/b/a Lincoln Card & Gift.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 19, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested copies of the 1997 and 2001 W-2 forms showing wages the petitioner paid to the beneficiary.

In response, counsel submitted copies of 1997, 1998, and 1999 Form 1099, Miscellaneous Income statements showing that 330 Madison Card & Gift Inc. paid \$28,000, \$16,000, and \$23,000 in non-wage compensation to the beneficiary during those years, respectively. Counsel submitted copies of 2000 and 2001 Forms 1099 showing that Easy Street Publications L.L.C. paid the beneficiary \$18,000 during both of those years.

Counsel submitted a letter, dated September 4, 2002, in which he asserted that the amounts of the wage and non-wage compensation paid to the beneficiary during various years, and the petitioner's gross revenue, liquid assets, and bank balances demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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 December 2, 2002, denied the petition. The director noted that, as no evidence was submitted to demonstrate any relationship between Easy Street Publications, Inc. and the petitioner, evidence of wages Easy Street Publications, Inc. paid to the beneficiary cannot be included in the determination of the petitioner's ability to pay the proffered wage.

On appeal, counsel submits an additional copy of the previously submitted 1997 Form 1099 showing that during that year 330 Madison Card & Gift, Inc. paid the beneficiary \$28,000. Counsel refers to that additional copy as new evidence. Counsel also submits copies of other previously submitted documents. Counsel asserts that the documentation submitted shows that the petitioner has the ability to pay the proffered wage. Counsel emphasizes the amounts paid to the beneficiary, the petitioner's bank balances, and the amount of the petitioner's assets during various years.

Counsel also states that Easy Street Publications and Lincoln Card and Gift are the same company. The identification of Lincoln Card and Gift as a trade name of Easy Street Publications on the 2000 and 2001 W-2 forms and the December 2001 and January 2002 bank statements serves as evidence of that assertion. The

asserted relationship between Lincoln Card & Gift, Inc. and 330 Madison Card & Gift, however, is addressed below.

Counsel's reliance on gross receipts and total wage expense in his response to the director's request for evidence is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.¹ Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses² or otherwise increased its net income³, 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 it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

Similarly, counsel's reliance on the amount of the petitioner's total assets is misplaced. A petitioner's total assets are not available to pay a proffered wage, as some items included in total assets, its interest in real estate, for instance, are not expected, pursuant to the ordinary course of business, to be converted to cash. Other assets might be expected to be converted to cash, but by no set deadline. Only the petitioner's current assets, those expected to be converted into cash within the coming year, may be considered.

Further, the amount of the petitioner's current assets is not available to pay the proffered wage except as reduced by the amount of the petitioner's current liabilities. The petitioner's current liabilities are those that the petitioner is expected to pay within the coming year. The petitioner's current assets net of its current liabilities are its net current assets. The petitioner's net current assets for each of the salient years will be considered below.

Counsel's reliance on the petitioner's bank balances to show the petitioner's ability to pay the proffered wage is also misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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.

Counsel is correct that the amounts the petitioner paid to the beneficiary during each of the salient years is an appropriate consideration in the determination of the petitioner's ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage,

¹ Reliance upon total wages paid is especially ineffective where, as here, the total wages paid in a given year did not exceed the amount of the proffered wage. As was noted above, a 1999 Form W-3 in evidence indicates that 330 Madison Card & Gift paid a total of \$47,426.30 in wages to all of its employees during that year. That amount does not exceed the annual amount of the proffered wage to the beneficiary alone, which is \$61,089.60.

² The petitioner might demonstrate this, for instance, not by alleging, but by submitting evidence sufficient to demonstrate that beneficiary would replace a specific named employee, whose wages would then be available to pay the proffered wage.

³ The petitioner might be able to demonstrate that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 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. *Supra* at 1084. The court specifically rejected the argument that CIS, then the Immigration and Naturalization Service, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The priority date is December 22, 1997. The proffered wage is \$61,089.60 per year. The determination of the petitioner's ability to pay the proffered wage is complicated by the fact that 330 Madison Card & Gift, to whom the labor certification in this matter was issued, reports taxes based on a fiscal year from October through September, whereas 1099 and W-2 forms report payments made during calendar years.

The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during its 1997 fiscal year, but only that portion which would have been due if it had hired the beneficiary on the priority date. On the priority date, 82 days of 330 Madison Card & Gift's 365-day 1997 fiscal year had elapsed. The petitioner is obliged to show the ability to pay the proffered wage during the remaining 283 days of that fiscal year. The proffered wage multiplied by 283/365th equals \$47,365.36, which is the amount the petitioner must show the ability to pay during the salient portion of its 1997 fiscal year.

During its 1997 fiscal year, 330 Madison Card and Gift declared a taxable income before net operating loss deduction and special deductions of \$6,840. That amount is insufficient to pay the salient portion of the proffered wage. If 330 Madison Card & Gift's fiscal year 1997 taxable income before net operating loss deduction and special deductions were applied toward payment of the salient portion of the proffered wage, a difference of \$40,525.36 would remain. The petitioner must show the ability to pay that difference.⁴

A 1997 Form 1099 shows that during that calendar year, 330 Madison Card & Gift paid \$28,000 to the beneficiary. Approximately one-third of that amount, or \$9,333.33, is attributable to the petitioner's 1997

⁴ Portions of the discussion of the petitioner's ability to pay the proffered wage are based on the assumption, made *arguendo*, that the petitioner is the successor-in-interest of 330 Madison Card & Gift and that the taxable income before net operating loss deduction and special deductions of 330 Madison Card & Gift, and amounts it paid to the beneficiary, are appropriate considerations in the determination of the petitioner's ability to pay the proffered wage. In fact, this office does not make that assumption, but addresses it below.

fiscal year.⁵ A 1998 Form 1099 shows that during that calendar year, 330 Madison Card & Gift paid \$16,000 to the beneficiary. Approximately two-thirds of that amount, or \$10,667.67, is attributable to the 1997 fiscal year.⁶ The sum of \$9,333.33 and \$10,667.67 is \$20,001. That amount, applied to the remaining portion of the proffered wage from the paragraph above, yields a difference of \$20,524.36. The petitioner must show the ability to pay that remaining amount of the proffered wage.

The record contains no evidence, however, that the petitioner had any other funds with which to pay the proffered wage during its 1997 fiscal year. Further, at the end of its 1997 fiscal year, 330 Madison Card & Gift had negative net current assets. The record contains no indication that the petitioner could have paid any portion of the remaining amount of the proffered wage out of its net current assets. The petitioner has not demonstrated the ability to pay the proffered wage during 330 Madison Card & Gift's 1997 fiscal year.

During fiscal 1998 and ensuing fiscal years, the petitioner is obliged to demonstrate the ability to pay the entire proffered wage. The 1998 return shows that 330 Madison Card & Gift, Inc. declared taxable income before net operating loss deduction and special deductions of \$14,270 during the fiscal year. That amount is insufficient to pay the proffered wage. If that amount were applied to the proffered wage, a difference of \$46,819.60 would remain.

As was implied above, one-third of the amount paid to the beneficiary during the 1998 calendar year, or \$5,332.33, is attributable to the 1998 fiscal year.⁷ Two-thirds of the \$23,000 that the 1999 Form 1099 shows was paid to the beneficiary during that calendar year, or \$15,333.33, is also attributable to 330 Madison Card & Gift's fiscal year. The sum of those amounts is \$20,665.66. If that amount were applied to the balance of the proffered wage, a difference of \$26,153.94 would remain. The petitioner has not demonstrated that any other funds were available during 330 Madison Card & Gift's 1998 fiscal year to apply toward payment of that difference.

Further, 330 Madison Card & Gift's 1998 Schedule L shows that it ended the fiscal year with negative net current assets. 330 Madison Card & Gift was unable to pay the proffered wage out of its net current assets during fiscal year 1998. The petitioner has not demonstrated that it was able to pay the proffered wage during 330 Madison Card & Gift's 1998 fiscal year.

330 Madison Card & Gift, Inc. declared a loss of \$8,660 as its taxable income before net operating loss deduction and special deductions during its 1999 fiscal year. 330 Madison Card & Gift was unable to pay any portion of the proffered wage out of its taxable income before net operating loss deduction and special deductions during its 1999 fiscal year.

⁵ That is, because the petitioner's fiscal year runs from October through September, only the last three months of the 1997 calendar year were within the petitioner's 1997 fiscal year. Therefore, roughly one-third of the amount the petitioner paid to the beneficiary during the 1997 calendar year was likely paid during the 1997 calendar year, and the remaining two-thirds is attributable to its 1998 calendar year.

⁶ That is, because the first nine months of the 1998 calendar year were within the petitioner's 1997 fiscal year, two-thirds of the amount the petitioner paid to the beneficiary during 1998 were likely paid during the petitioner's 1997 fiscal year.

⁷ See the discussion, above, of amounts shown on 1099 forms, including footnotes five and six.

One-third of the amount shown on the 1999 Form 1099, or \$7,666.67, is attributable to 330 Madison Card & Gift's 1999 fiscal year. Two-thirds of the amount shown on the 2000 Form 1099 from Easy Street Publications L.L.C., or \$12,000, is attributable to 330 Madison Card & Gift's 1999 fiscal year.⁸ Two-thirds of the amount shown on the 2000 Form W-2, or \$8,465.17, is also attributable to 330 Madison Card & Gift's 1999 fiscal year.⁹ The sum of those three amounts, \$28,131.84, is insufficient to pay the proffered wage.

330 Madison Card and Gift ended its 1999 fiscal year with negative net current assets. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that fiscal year. The petitioner has not demonstrated the ability to pay the proffered wage during 330 Madison Card & Gift's 1999 fiscal year.

No tax returns were submitted covering periods after the 330 Madison Card & Gift's 1999 fiscal year. No annual reports or audited tax returns were submitted. Therefore, in demonstrating the ability to pay the proffered wage the petitioner must rely upon evidence of payments actually made to the beneficiary. Because W-2 forms and 1099 forms report income based on a calendar year, the balance of this decision will, for simplicity's sake, analyze the petitioner's ability to pay the proffered wage during calendar years, rather than continuing to consider 330 Madison Card & Gift's fiscal years.

The 2000 W-2 shows that during that year the petitioner paid the beneficiary \$12,967.76. The 2000 Form 1099 shows that during the same year the petitioner paid the beneficiary an additional \$18,000. The total of those two amounts is \$30,967.76, which is less than the proffered wage. The petitioner submitted no evidence of any other funds available to it to pay the proffered wage during 2000. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

The 2001 W-2 and 1099 forms show that during that year the petitioner again paid the beneficiary \$12,967.76 and an additional \$18,000. As was stated above, those amounts total \$30,967.76, which is less than the proffered wage. The petitioner submitted no evidence of any other funds available to it to pay the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate the ability to pay the proffered wage during 330 Madison Card & Gift's 1997, 1998, and 1999 fiscal years. The petitioner also failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the 2000 and 2001 calendar years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that counsel has asserts that 330 Madison Card & Gift, the company to whom the approved labor certification was granted by the Department of Labor, is identical to the petitioner, Easy Street Publications, L.L.C. t/a Lincoln Card and Gift, but provides no evidence of that assertion. The assertions of counsel are not evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence to

⁸ As was stated above, that 1099 states that Easy Street Publications paid \$18,000 to the beneficiary during the 2000 calendar year.

⁹ As was stated above that W-2 states that Easy Street Publications paid \$12,967.76 to the beneficiary during the 2000 calendar year.

[REDACTED]

show that 330 Madison Card & Gift is identical to the petitioner, is a successor-in-interest to the petitioner,¹⁰ or has any other relationship to the petitioner. As such, whether profits of 330 Madison Card & Gift and amounts it paid to the beneficiary should have been included in computations pertinent to the petitioner's ability to pay the proffered wage is unclear. Further, counsel has not demonstrated that the petitioner has an approved labor certification issued to it or otherwise available for its use.

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.

¹⁰ For factors which must be established to demonstrate a successor-in-interest relationship, see *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).