



U.S. Citizenship
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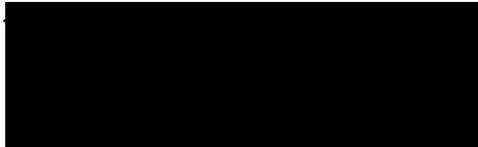
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FILE: LIN 03 194 51144 Office: NEBRASKA SERVICE CENTER Date: **NOV 22 2005**

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 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, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook/baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$12 per hour, which equals \$24,960 per year.

On the petition, the petitioner stated that it was established during 1978 and that it employs six workers. The petition states that the petitioner's gross annual income is \$1,200,000 but does not state its net annual income in the space provided for that figure. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Traverse City, Michigan.

In support of the petition, counsel submitted no evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Therefore, on January 22, 2004, the Director, Nebraska Service Center, issued a Request for Evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a copy of the petitioner's 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns, a copy of the petitioner's trial balance¹ on December 31, 2003, a copy of a side-by-side comparison of the petitioner's 2002 and 2003 multi-step profit and loss statements.

The petitioner's tax returns show that the petitioner is a corporation, that incorporated on December 30, 1985,² and that it reports taxes based on the calendar year and accrual accounting.

The 2001 return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,055 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$135,907 and current liabilities of \$119,512, which yields net current assets of \$16,395

The 2002 return shows that the petitioner declared a loss of \$97,858 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

In a cover letter, dated April 14, 2004, counsel emphasized the petitioner's gross receipts in urging that the evidence provided demonstrated 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 May 14, 2004, denied the petition.

On appeal, counsel argues that the petitioner's profits will increase in an amount greater than the proffered wage, but submits no evidence in support of that assertion. Counsel submits a copy of the decision in *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), apparently as support for his proposition that the ability of the beneficiary to generate additional income for the petitioner should be considered.

Counsel alleges that an employee embezzled over \$250,000 from the petitioner from 2001 to 2003. Although counsel submits evidence pertinent to the embezzlement, described below, it does not appear to support the estimate of the amount taken, nor even demonstrate convincingly that embezzlement occurred. Counsel stated that because of the influence of that embezzlement on the petitioner's income, the petitioner's financial statements for the years 2001 through 2003 are not indicative of the petitioner's ability to pay the proffered wage.

Counsel alleges that, in order to continue operating the petitioning corporation, the petitioner's owner has personally guaranteed commercial loans to the petitioner. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) in relation to those guaranteed loans. The proposition counsel wished to support with that citation, however, is unclear.

¹ A trial balance is a list of all of a company's financial accounts, but not an audited financial statement.

² The assertion on the petitioner's tax returns that it incorporated during 1985 appears to conflict with the petitioner's assertion, on the Form I-140, that it was established during 1978.

Finally, counsel asks that the petition be approved on the basis of the evidence submitted but, if it is not approved, that it be withdrawn, preserving the approved labor certification.

Counsel submits a letter, dated June 10, 2004, from the petitioner's owner to the Internal Revenue Service, discussing details of the alleged embezzlement.

Counsel submits a computer-compiled list of various debits and credits to the petitioner's accounts, apparently in support of the assertion that some of the petitioner's funds were embezzled. Those printouts, however, contain no evidence that any of the transactions involved embezzlement.

Finally, counsel provides a photocopy of a newspaper article pertinent to the death of the petitioner's previous owner, father of the current owner. The proposition that article was intended to support is unclear.

Counsel's reliance on the amount of the petitioner's gross receipts is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ 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. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, 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. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In the instant case, counsel has not even alleged that hiring the beneficiary will decrease the petitioner's expenses. Counsel has alleged that the beneficiary will generate revenue in excess of his wages, but offered no evidence in support of that assertion. Counsel 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 have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

Counsel's citation of *Masonry Masters* is unconvincing. Although a portion of that decision urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

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Counsel submits unaudited financial statements and then avers that, because of the influence of an alleged embezzlement on the petitioner's financial performance, those financial statements are not good indices of the petitioner's ability to produce profits. Counsel alleges that the embezzlement involved an amount an amount greater than \$250,000. However, counsel neither demonstrated that the embezzlement occurred nor, if it did, the extent of that embezzlement. The unaudited financial statements will be disregarded, though not for the reason urged by counsel.

Reliance on the unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel's assertion that the tax returns submitted are poor indices of the petitioner's ability to pay the proffered wage is insufficient. That assertion neither demonstrates the petitioner's obligation, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date nor relieves the petitioner of that obligation.

This office is unaware of any regulation permitting conditional withdrawal of a visa petition. Counsel has not, therefore, withdrawn the visa petition in the instant case and it will be adjudicated. This office notes, however, that dismissal of the appeal does not invalidate the approved Form ETA 750 labor certification.

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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, 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. The court specifically rejected the argument that 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, 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 assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$24,960. The priority date is April 20, 2001.

During 2001 the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,055. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$16,395. That amount is also insufficient to pay the proffered wage. The petitioner has submitted no other reliable evidence of funds available to the petitioner during 2001 with which

it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared a loss as its taxable income before net operating loss deduction and special deductions. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable to show the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has submitted no other reliable evidence of funds available to the petitioner during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. 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 upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.