2003 WL 22203713
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

SITAR RESTAURANT, Petitioner
v.
John ASHCROFT, Respondent

No. Civ.A.02–30197–MAP.
|
Sept. 18, 2003.

Attorneys and Law Firms

Michael G. Moore, Attorney at Law, Springfield, MA, for Petitioner.

Karen L. Goodwin, Springfield, MA, for Respondent.

MEMORANDUM AND ORDER REGARDING REPORT AND RECOMMENDATION RE: PETITIONER'S PETITION FOR REVIEW AND RESPONDENT'S MOTION FOR ORDER (Docket Nos. 1 & 3)

PONSOR, J.

***1** The Sitar Restaurant ("petitioner"), an Indian restaurant in Springfield, Massachusetts, seeks reversal of a decision of the Immigration and Naturalization Service ("INS") to deny an employment-based visa to Singh Avtar. On May 1, 2003, Magistrate Judge Kenneth P. Neiman recommended that the respondent's Motion to Affirm be allowed and the petitioner's Petition for Review be denied.

The Magistrate Judge's recommendation, upon *de novo* review, is hereby ADOPTED. The respondent clearly assessed the assets of the petitioner properly in determining to deny the preference visa.

For the foregoing reasons, the Petition for Review (Docket No. 1) is hereby DENIED and the Motion to Affirm (Docket No. 3) is hereby ALLOWED. The clerk is ordered to enter judgment for the respondent and close the file.

It is So Ordered.

REPORT AND RECOMMENDATION WITH REGARD TO PETITIONER'S PETITION FOR REVIEW and RESPONDENT'S MOTION FOR AN ORDER AFFIRMING THE DECISION OF THE IMMIGRATION AND NATURALIZATION SERVICE (Document Nos. 1 and 3)

NEIMAN, Magistrate J.

The Sitar Restaurant ("Petitioner"), an Indian restaurant in Springfield, Massachusetts, seeks to have the court review and reverse a decision of the Immigration and Naturalization Service ("INS") to deny an employment-based preference visa to Singh Avtar ("Avtar"), whom Petitioner wishes to employ as a chef specializing in vegetarian Indian cuisine. The visa application and a subsequent administrative appeal were denied after the INS found that Petitioner had insufficient income to pay Avtar the proffered wage.

Seeking review, Petitioner has filed suit—which it labels a "petition for review"—against the INS through Attorney General John Ashcroft ("Respondent"). In turn, Respondent has filed his own motion requesting that the court affirm the INS decision. The motions have been referred to this court for a report and recommendation. *See* 28 U.S.C. § 636(b)(1)(b). After hearing and for the following reasons, the court will recommend that Respondent's motion be allowed and that the petition be denied.

I. *STANDARD OF REVIEW*

As a review standard, the parties both point to the Administrative Procedure Act which states that a court must defer to the decision of an administrative agency except where it is proven to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). "An abuse of discretion may be found either when there is no substantial evidence to support the agency decision, or when the agency has made its determination based on an improper understanding of the law." *Augat, Inc. v. Tabor,* 719 F.Supp. 1158, 1160 (D.Mass.1989).

II. *BACKGROUND*

For purposes here, the following background is undisputed. Petitioner is a "tightly knit family business" organized as a corporation. (Document No. 5 (Administrative Record

(hereinafter "A .R.")) at 8.) Believing that having an Indian chef with vegetarian experience was necessary for corporate growth, Petitioner, in 1998, sought to hire Avtar, a citizen of India residing in Canada. (See A.R. at 19–20.) Petitioner proposed to pay Avtar $15 an hour which equates to $31,200 a year. (See A.R. at 15, 19.) In the 1998 tax year, however, Petitioner had only $4,583 in taxable income. (A.R. at 84.)

***2** On December 16, 1998, Petitioner applied for an alien employment certification for Avtar with the Department of Labor. (A.R. at 19.) The date of the application is considered the "priority date" pursuant to INS regulations. *See* 8 C.F.R. § 204.5(d). The certification—that there were insufficient workers within the United States and that employment of Avtar would not adversely affect similarly employed Americans—was granted by the Department of Labor on July 29, 2000. (A.R. at 19.)

Taking the next step, Petitioner, on September 14, 2000, petitioned the INS for an employment-based preference visa. (A.R. at 17.) On October 5, 2001, however, the INS denied the petition because Petitioner had insufficient income to pay Avtar the proffered salary on the priority date. (A.R. at 15.)

In an administrative appeal, Petitioner admitted that its income was insufficient as of the priority date, but offered an affidavit from a Baldev Singh ("Singh"), who Petitioner described as one of its directors, expressing support for Petitioner's business plan and offering to personally pay Avtar's $31,200 salary. (A.R. at 8, 11.) Petitioner also provided the 1998 joint tax return of Singh and his wife —who, together, have four dependents—which showed an adjusted yearly gross income of $67,073 and a taxable income of $31,361. (A.R. at 12.)

In a May 14, 2002 decision, the INS determined that it could not consider Singh's income in evaluating Petitioner's own ability to pay Avtar the proffered wage and, as a result, denied the appeal. (A .R. at 4.) Soon thereafter, Petitioner filed the present action—i.e., his "petition for review"—and Respondent filed his cross motion to affirm. [1]

III. *DISCUSSION*

Pursuant to the controlling regulation, which has remained unchanged during all times pertinent here, an employer pursuing a preference visa must be able to pay the proffered wage of a prospective employee at the time the priority date is established. *See* 8 C.F.R. § 204.5(g)(2) (2003). "Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* In appropriate cases, other evidence "may be submitted by the petitioner or requested by the [INS]." *Id.* The burden of proof is with the petitioner. *See* 8 U.S.C. § 1361.

The parties' cross motions raise essentially two questions. First, the court must determine whether the refusal of the INS to consider *Singh's* income in calculating the *Petitioner's* ability to pay the proffered wage was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a) Second, the court must determine whether, under the above standard, the INS should have considered as an asset Petitioner's "unappropriated retained earnings."

A.

With respect to the first question, Petitioner asks the court to find that the INS's decision to ignore Singh's personal assets "is unsupported by the cases its [sic] cites, ... illogical and *contra* actual business practice." (Petitioner's Memorandum (attached to Petition for Review) at 1.) Unfortunately, Petitioner fails to adequately counter Respondent's main argument on this issue: that nothing in the governing regulation, 8 C.F.R. § 204.5, permits the INS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

***3** Absent a legal obligation by Singh, the INS had no need to determine whether his income was sufficient to pay Avtar's salary. Interestingly enough, Petitioner makes no real attempt to address an agency decision directly on point, *In re: Petitioner,* 1998 WL 34030184 (INS Dec. 22, 1998), which holds that assets of "stockholders or of other[s] ... cannot be considered in determining the petitioning corporation's ability to pay the proffered wage." Petitioner also fails to affirmatively offer any case law in support of its position or provide any authority that requires the INS to credit a director's affidavit promising to pay the proffered wage. Instead, Petitioner merely attempts to distinguish certain cases cited by the INS. Unfortunately for its cause, Petitioner's efforts are unavailing.

The cases cited by the INS stand for two principles, first, that an employer must be able to pay the proffered wage to a prospective employee as of the priority date and, second,

that the INS may rely on tax returns and net taxable income to make that determination. For example, in *Matter of Great Wall,* 16 I. & N. Dec. 142 (Mar. 16, 1977), the Acting Regional Commissioner stressed the importance of a business being able to pay the proffered wage as of the priority date. *Id.* at 144–45. The petitioning business in that matter had hired a store manager on a student visa and wished to retain him on a permanent basis. *Id.* at 142. The business, however, was operating at a loss and was unable to pay his salary. *Id.* at 143. In fact, the business was surviving, in part, by borrowing $3,000 for operating expenses from the "employee" himself. *Id.*

Although Petitioner attempts to distinguish *Great Wall*—it points to the fact that the business was failing to pay the employee the prevailing wage of similarly situated United States workers—this is a distinction without a difference. Unfortunately for Petitioner, *Great Wall* stands for the principle that a business which cannot afford to pay an immigrant employee is not entitled to the requested visa.

Petitioner's attempt to distinguish a second decision cited by the INS, *Elatos Rest. Corp. v. Sava* 632 F.Supp. 1049 (S.D.N.Y.1986), is, in the court's opinion, similarly futile. *Elatos* makes clear that the INS can rely on an employer's tax returns to determine whether the employer can pay the proffered wage. *Id.* at 1054. Where such information is inadequate, however, the burden is on the employer to provide conclusive evidence of its ability to pay. *See id.* Neither of these principles assists Petitioner. Petitioner argues, however, that *Elatos* would have come out differently, i.e., the INS would have granted a preference visa, had the employer provided certified financial statements—which Petitioner claims to have done here through Singh's tax returns—to apprise the INS more definitively of its financial position. *See id.* ("[T]he onus was on the plaintiff to submit more conclusive evidence such as cash flow data or certified financial statements to clarify the income figures reflected on the return and thus apprise the INS more definitively of its financial position") (citation omitted)).

***4** In the court's opinion, Petitioner's argument with respect to *Elatos* falls short in several ways. For one thing, the individual tax return of a "director" is obviously not the "certified financial statement" of the petitioning corporation. Moreover, the court in *Elatos* was not necessarily promising a different result; it was simply reminding the petitioner there that it had to carry its burden of proof. *See id.* at 1054.

At bottom, Petitioner has not submitted evidence of its own ability to pay the proffered wage. Accordingly, the court cannot say that INS's decision to restrict itself to an examination of assets under Petitioner's legal control was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

B.

As for the second question—articulated for the first time in a reply memorandum Petitioner filed on March 4, 2003—Petitioner argues that Schedule L to its 1998 tax return reflects "unappropriated retained earnings of $23,428 and common stock valued at $12,000" which "could have been used to pay the salary offered." (Document No. 7 at 2.) Thus, Petitioner maintains, the INS improperly determined that it had insufficient assets to pay Avtar's wage.

Even assuming that the court, in reviewing the INS's administrative decision, could consider this belated argument, *see Cochran v. Quest Software, Inc.,* —— F.3d ——, No. 02–2326, slip op. at 18 (1st Cir. Apr. 29, 2003) ("Litigants normally must frame the issues in a case before the [lower tribunal] rules" and, "[a]fter that point, ... should not be allowed to switch from theory to theory like a bee in search of honey."), Petitioner has provided no guidance as to why the court should credit the proffered figures. To be sure, the stated amounts are found on Petitioner's 1998 Schedule L tax form in a section labeled "liabilities and shareholder equity." (A.R. at 87.) It is unclear to the court, however, how such "liabilities" and "shareholder" (as opposed to corporate) "equity" enhance Petitioner's financial picture. Indeed, it appears that the INS fully considered the "assets" section of Schedule L, that is, it concluded that Petitioner's available cash on hand and inventory were insufficient, even when combined with its taxable income, to meet the proffered wage. This approach was more than reasonable.

As with the first question, Petitioner fails to explain with respect to the second how the INS's approach amounts to an action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Accordingly, the court will recommend that Respondent's motion to affirm be allowed and that the petition itself be denied.

IV. *CONCLUSION*

For the reasons stated, the court recommends that Respondent's motion to affirm be ALLOWED and that Petitioner's petition for review be DENIED. [2]

All Citations

Not Reported in F.Supp.2d, 2003 WL 22203713

Footnotes

1 Because Respondent does not challenge the point, the court offers no opinion as to the propriety of the procedural mechanism (a "petition for review" targeting the Attorney General) that Petitioner has used to invoke this forum. *See* Fed.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court.") The court notes, however, that Petitioner first sought review directly in the First Circuit Court of Appeals which dismissed the action for lack of subject matter jurisdiction. In so doing, the First Circuit stated as follows: "[T]o the extent (if any) federal jurisdiction exists over Sitar's petition—a matter we do not now decide, *c.f., CDI Information Services v. Reno,* 278 F.3d 616, 619–20 (6th Cir.2002); *Shanti, Inc. v. Reno,* 36 F.Supp.2d 1151, 1158 (D.Minn.1999)—it lies in the district court in the first instance. *See* 28 U.S.C. § 1331." (Petition for Review, Exhibit 4.)

2 The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court within ten (10) days of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Services,* 848 F.2d 271, 275 (1st Cir.1988); *United States v. Valencia–Copete,* 792 F.2d 4, 6 (1st Cir.1986); *Scott v. Schweiker,* 702 F.2d 13, 14 (1st Cir.1983); *United States v. Vega,* 678 F.2d 376, 378–379 (1st Cir.1982); *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F.2d 603, 604 (1st Cir.1980). *See also Thomas v. Arn,* 474 U.S. 140, 154–55, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.