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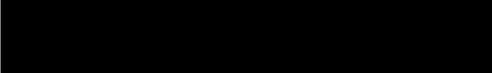
**U.S. Citizenship
and Immigration
Services**

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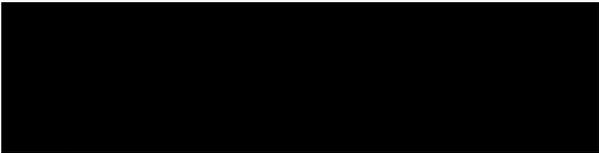


FILE: WAC 02 173 52941 Office: CALIFORNIA SERVICE CENTER Date: **MAR 04 2005**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 employment based immigrant visa petition was denied by the Director, California Service Center on October 18, 2002. A subsequent appeal, dated November 24, 2002, and received by CIS on December 9, 2002 was rejected as late filed. A second appeal is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a professional or skilled worker. The petitioner is a steel construction business. It seeks to employ the beneficiary as a layout worker I. As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because he determined that the petitioner had not established its ability to pay the proffered wage from the priority date and continuing to the present.

On appeal, counsel states:

This is a timely motion to reconsider. A fee is being attached to the instant motion. A motion to reconsider seeks to point out an error made by a decision by BCIS (formerly INS)—The Service hereafter. This appeal is being made in reference to WAC 02 173 52941.

The Service erred in noting that the filing of the appeal was not in its proper form, and the timing of the appeal was incorrect. A review of the file shows that Form I-290 was properly used to file the motion to reopen. Thus, the Service should find that there is no question that the form used for filing the appeal was the correct one. It appears that the Service did not bother to review the attached statement to Form I-290.

A review of the entire file would show that the filing of the appeal was made sometime during the Thanksgiving Holiday during the week of November 21st. The mailing was done via Express Mail for next day delivery. For some unexplained reason, the Postal Service delivered the motion to reopen on or about December 9, 2002. The timing of sending the underlying I-290 was proper because three extra days are added per regulation to the deadline for filing an administrative appeal upon receipt of such notice. The underlying motion to reopen noted that the decision by the Service denying Form I-140 was received on October 23, 2004. Therefore, the deadline for submitting the administrative appeal was November 26, 2002. The appeal was timely sent overnight on November 24, 2002. Therefore, the Service should consider that the appeal was timely filed.

Counsel is mistaken. Even if CIS accepted that November 26, 2002 was the proper date for a timely appeal, the appeal was still received two weeks (14 days) late. In addition, while counsel may have signed the appeal form on November 24, 2002, the appeal was not actually mailed until December 6, 2002 as evidenced by the Express Mail envelope that is in the record of proceeding. Furthermore, the AAO cannot find any fault with the director in not treating the untimely-filed appeal as a motion to reopen or reconsider.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrectly based on the evidence of record at the time of the initial decision.

Counsel failed to provide any new facts supported by affidavits or other documentary evidence, and counsel failed to submit any precedent decisions that establish that the decision was based on an incorrect application of law or Service policy. Counsel also failed to establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Beyond the director's decision on rejecting the first appeal, the AAO is in agreement with the director that the petitioner has not established that it could pay the proffered wage from the priority date of October 1, 1996 and continuing to the present.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary in 1996 through 2001 at a salary equal to or greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets from 1996 through 2001 were \$28,349, \$38,987, \$15,002, -\$3,546, -\$38,543 and -\$3,566, respectively. The petitioner could not have paid the proffered wage in 1996, 1998, 1999, 2000, or 2001 from its net current assets. The only year the petitioner could have paid the proffered wage from its net current assets was in 1997.

It is noted that if the petitioner employed the beneficiary from 1996 through 2001, the petitioner has not provided any evidence of that employment, such as Forms W-2, Wage and Tax Statements, or Forms 1099, Miscellaneous Income.

The 1996 tax return reflects a taxable income before net operating loss deduction and special deductions of \$33,738 and net current assets of \$28,349. The petitioner could not have paid the proffered wage of \$38,750.40 in 1996 from either its taxable income or its net current assets.

The 1997 tax return reflects a taxable income before net operating loss deduction and special deductions of \$29,805 and net current assets of \$38,987. The petitioner could have paid the proffered wage of \$38,750.40 from its net current assets in 1997.

The 1998 tax return reflects an ordinary income of -\$9,385 and net current assets of \$15,002. The petitioner could not have paid the proffered wage of \$38,750.40 from either its ordinary income or its net current assets in 1998.

The 1999 tax return reflects an ordinary income of -\$7,617 and net current assets of -\$3,546. The petitioner could not have paid the proffered wage of \$38,750.40 wage from either its ordinary income or its net current assets in 1999.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The 2000 tax return reflects an ordinary income of \$10,490 and net current assets of -\$38,543. The petitioner could not have paid the proffered wage of \$38,750.40 from either its ordinary income or its net current assets in 2000.

The 2001 tax return reflects an ordinary income of -\$36,384 and net current assets of -\$3,566. The petitioner could not have paid the proffered wage of \$38,750.40 from either its ordinary income or its net current assets in 2001.

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.