

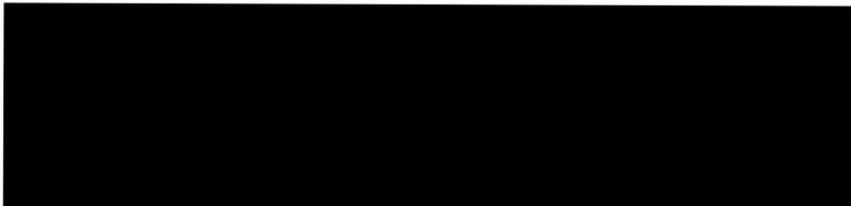
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FILE: WAC 02 174 51094 Office: CALIFORNIA SERVICE CENTER Date: SEP 12 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a residential care facility for the elderly. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that it has had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel submits a brief.

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 incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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 unavailable 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 30, 1996. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which equals \$24,024 per year.

On the petition, the petitioner stated that it was established on July 1, 1997. The space reserved for the petitioner to report the number of workers it employs was left blank. The petition states that the petitioner's gross annual income is \$301,900. The space reserved for the petitioner to report its net annual income was left blank.

The approved Form ETA 750 in this matter was not issued to [REDACTED] the petitioner, but to [REDACTED] and [REDACTED]. On the Form ETA 750, Part B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner or for Mr. And [REDACTED]. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Diamond Bar, California.

In support of the petition, counsel submitted the 1997, 1998, and 1999 Form 1120-A U.S. Corporation Short-Form Tax Returns of the petitioner, [REDACTED]. Those returns show that the petitioner is a corporation, that it incorporated on July 1, 1997, and that it reports taxes pursuant to accrual accounting and a calendar year that runs from July 1 of the nominal year until June 30 of the following year.

The 1997 tax return, which covers the fiscal year from July 1, 1997 to June 30, 1998, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$0 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had total assets of \$3,698 and no current liabilities, which yields net current assets of \$3,698.

The 1998 tax return, which covers the fiscal year from July 1, 1998 to June 30, 1999, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,265 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had total assets of \$14,130 and no current liabilities, which yields net current assets of \$14,130.

The 1999 tax return, which covers the fiscal year from July 1, 1997 to June 30, 1998, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$6,507 during that fiscal year. The corresponding Schedule L shows that at the end of that fiscal year the petitioner had total assets of \$26,450 and no current liabilities, which yields net current assets of \$26,450.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 13, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The service center also specifically requested the petitioner's 1996, 2000, and 2001 tax returns and, if it employed the beneficiary between 1996 and 2001, copies of Form W-2 Wage and Tax Statements showing the amounts it paid to the beneficiary during those years.

In response, the counsel submitted (1) the joint 1996 Form 1040 U.S. Individual Income Tax Return of the petitioner's owners, [REDACTED] (2) the 2000 Form 1120, U.S. Corporation Income Tax Return of [REDACTED] the petitioner, (3) an illegible 1999 W-2 form, (4) 1996 and 1997 W-2 forms issued by [REDACTED] and (4) 1998, 2000 and 2001 W-2 forms issued by the petitioner, [REDACTED]

The 1996 and 1997 W-2 forms show that Diamond Crest paid the beneficiary \$8,525 and \$5,400 during those years respectively. The 1998, 2000, and 2001 W-2 forms show that the petitioner paid the beneficiary \$10,800, \$13,200, and \$13,200 during each of those years, respectively.

The petitioner's owners' 1996 tax return covers the 1996 calendar year. A Schedule C attached to that return shows that during that year they operated [REDACTED] as sole proprietorships, and that during that year those entities returned net profits of \$377 and \$680, respectively. The return shows that during 1996 the petitioner's owners declared adjusted gross income of \$61,895, including the profit of those sole proprietorships.

The petitioner's 2000 tax return, which covers the fiscal year from July 1, 2000 to June 30, 2001, shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$8,337 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$44,590 and no current liabilities, which yields net current assets of \$44,590.

Counsel did not submit the requested 2001 tax return or an explanation of that omission. Counsel's cover letter, which accompanied his submissions in response to the request for evidence, is dated November 1, 2002. On that date the petitioner's fiscal year 2001 return should have been available.

On April 19, 2003 the service center issued another request for evidence. The subject matter of that request, however, is not directly related to the issues based upon which the petition was subsequently denied. With the submissions in response to that request, however, is a list, apparently exhaustive, of the petitioner's employees. The beneficiary's name appears on that list and the list indicates that she is paid \$11 per hour. That list is signed by [REDACTED] Ms. [REDACTED] relationship to the petitioner is unknown.¹

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 October 7, 2003, denied the petition.² In the decision the director misstated the annual amount of the proffered wage as \$22,176.

On appeal submitted a brief. In the brief counsel states that the petitioner's 1996 tax return was inadvertently omitted from the petitioner's submissions and provides a copy of that return. This office notes that the petitioner's owners' 1996 tax return had already been provided, but that the petitioner's 2001 return had not.

Counsel cited a nonprecedent decision of this office for the proposition that a petitioner's depreciation deduction during a given year, its cash-on-hand, its assets and liabilities, and other unspecified statistics should be included in the determination of the funds available to pay additional wages during that year. Counsel cited another nonprecedent decision of this office, though the proposition for which it was cited is unclear.

¹ This office notes that Ms. [REDACTED] is not included on the list of employees.

² That decision misstated the date upon which the request for evidence in this matter was issued.

Counsel further asserts, citing the previously submitted employee list, that the petitioner is paying the beneficiary \$11 per hour, which counsel states is greater than the hourly amount of the proffered wage. Counsel argues that this, too, demonstrates the petitioner's ability to pay the proffered wage. Initially, this office notes that the hourly wage offered to the beneficiary is \$11.55 per hour, an amount greater than \$11.

Finally, counsel reiterated his argument pertinent to the petitioner's depreciation deduction.

On March 16, 2005 this office considered the evidence submitted, found that it did not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and dismissed the appeal.

On the motion counsel again asserts that funds represented by a depreciation deduction are available to pay wages.

Counsel urged various calculations pertinent to the proffered wage. In some cases the calculus urged by counsel is unclear. As to 2000, for instance, counsel stated,

For the year 2000, the petitioner's gross receipts amounted to \$249,752, salaries and wages paid amounted to \$31,360; depreciation in the amount of \$9,804; taxable income was \$8,337 and current assets of \$66,379.

Counsel does not make clear the calculation pursuant to which those figures demonstrate the proffered wage.

Counsel again cited nonprecedent decisions. Counsel asserts that in those cases this office considered taxable income, depreciation, and net assets in determining those petitioners' ability to pay the proffered wage. Counsel urges that if consistency is to be attained those cases should be considered.

Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, as was noted in the decision on appeal the facts of the nonprecedent decisions are not before this office. If counsel believed that the reasoning behind those decisions was compelling he was free to present it in argument. This office will address counsel's reasoning, including the propositions for which those nonprecedent cases are cited.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. Counsel is correct that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also*

Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.³ Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable. The amount of the petitioner's depreciation deduction will not be added back to its income in determining its ability to pay the proffered wage.

Counsel is correct that the wages actually paid to the beneficiary are correctly considered in assessing 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case the evidence demonstrates that the petitioner paid the beneficiary W-2 forms showing that [REDACTED] paid the beneficiary \$8,525 during 1996 and \$5,400 during 1997; and that the petitioner [REDACTED] paid the beneficiary \$10,800 during 1998, \$13,200 during 2000, and \$13,200 during 2001.

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). See also 8 C.F.R. § 204.5(g)(2).

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.

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 that 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

³ Counsel does not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages.

business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash⁴ and those assets expected to be consumed or 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.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$24,024 per year. The priority date is July 30, 1996.

An issue exists pertinent to the right of the instant petitioner [REDACTED] to rely on the approved Form ETA 750 labor certification in this case. That issue will be addressed below. For the purpose of analysis of the petitioner's ability to pay the proffered wage this office will assume, *arguendo*, that the petitioner and one or both of the sole proprietorships shown on the 1996 tax return of the petitioner's owners are the same entity.

Analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is complicated by the fact that it reports taxes based on a fiscal year, whereas W-2 forms report wages paid based on the calendar year.

During 1996 the beneficiary was paid \$8,525. The petitioner is obliged to show the ability to pay the remaining \$15,499 balance of the proffered wage. During 1996 the petitioner's owners declared adjusted gross income of \$61,895. This office finds that the petitioner's owners could have paid the proffered wage out of that years adjusted gross income and still supported themselves and their family.⁶

During 1997 the petitioner paid the beneficiary \$5,400. Approximately half of that amount, or \$2,700, is attributable to the first half of the 1997 calendar year. The balance is attributable to the petitioner's 1997 fiscal year, which began on July 1, 1997.

The petitioner's owners' 1996 tax return covers the 1996 calendar year. The petitioner's 1997 return covers the fiscal year beginning on July 1, 1997. No tax return was submitted to cover the period from January 1,

⁴ Counsel urged many arguments pertinent to end-of-year cash. End-of-year cash will only be considered in the contest of current assets and current liabilities. To consider it separately would be to ignore the counterbalancing current liabilities.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁶ The owner of a sole proprietorship is obliged to satisfy the petitioner's debts and obligations out of his own income and assets. Therefore a sole proprietor's adjusted gross income is correctly considered if the petitioner is a sole proprietorship. The sole proprietorship petitioner's owner is obliged to demonstrate that he could have paid the proffered wage out of his adjusted gross income and supported himself on the amount remaining. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

1997 to June 30, 1997. As was noted above, \$2,700 of the amount paid to the beneficiary during 1997 is attributable to the first six months of 1997. The petitioner submitted no reliable evidence of any other funds paid to the beneficiary or available to the petitioner during the first six months of 1997 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during the first half of 1997.

The remaining \$2,700 shown on the 1997 W-2 form is attributable to the petitioner's 1997 fiscal year. In addition, \$5,400, half of the \$10,800 shown on the 1998 W-2 form, is attributable to the petitioner's 1997 fiscal year, for a sum of \$8,100 during that fiscal year. The petitioner must show the ability to pay the remaining \$15,924 balance of the proffered wage.

During its 1997 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its income during that fiscal year. At the end of that fiscal year the petitioner had net current assets of \$3,698. That amount is insufficient to pay the balance of the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 1997 with which it could have paid additional wages. The petitioner has not demonstrated the ability to pay the balance of the proffered wage during its 1997 fiscal year.

The remaining \$5,400 shown on the 1998 W-2 form is attributable to the petitioner's 1998 fiscal year. Because the petitioner did not submit a 1999 W-2 form it has not shown that it paid any additional amount to the beneficiary. The petitioner is obliged to show the ability to pay the remaining \$18,624 balance of the proffered wage during its 1998 fiscal year.

During its 1998 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,265. That amount is insufficient to pay the balance of the proffered wage. At the end of that year the petitioner had net current assets of \$14,130. That amount is insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during its 1998 fiscal year.

As was noted above the petitioner did not demonstrate that it paid any wages to the beneficiary during 1999. However, half of the wages it paid to the beneficiary during 2000, or \$6,600, is attributable to its 1999 fiscal year. The petitioner is obliged to show the ability to pay the remaining \$17,424 balance of the proffered wage.

During its 1999 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$6,507. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year the petitioner had net current assets of \$26,450. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during its 1999 fiscal year.

The remaining \$6,600 the petitioner paid the beneficiary during 2000 is attributable to the petitioner's 2000 fiscal year. In addition, half of the amount shown on the 2001 W-2, or \$6,600, is also attributable to the petitioner's 2000 fiscal year, for a total of \$13,200. The petitioner must show the ability to pay the remaining \$10,824 balance of the proffered wage during that fiscal year.

During its 2000 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$8,337. That amount is insufficient to pay the balance of the proffered wage. At the end of that fiscal year, however, the petitioner had net current assets of \$44,590. That amount is sufficient to pay the entire proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during its 2000 fiscal year.

The remaining \$6,600 paid to the beneficiary during 2001 is attributable to the petitioner's 2001 fiscal year. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no evidence of any other funds it paid to the beneficiary during that fiscal year. The petitioner is obliged to show the ability to pay the remaining \$17,424 balance of the proffered wage during that fiscal year. However, the petitioner did not submit its fiscal year 2001 tax return or any other reliable evidence of its ability to pay additional wages during its 2001 fiscal year. The petitioner has not demonstrated its ability to pay the proffered wage during its 2001 fiscal year.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during the first half of 1997. Further, the petitioner failed to demonstrate its ability to pay the proffered wage during its 1997, 1998, 2000, or 2001 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on this basis.

The record suggests additional issues not addressed in the previous decisions in this matter.

As was noted above, the Form ETA 750 in this matter was issued to [REDACTED] and [REDACTED]. At that time [REDACTED] consisted of either one or two sole proprietorships. [REDACTED], a corporation, filed the petition in this matter.

Clearly, a new company, a corporation, was formed with the name of the previous sole proprietorships, notwithstanding that they have owners in common. When an existing, approved Form ETA 750 is to be used by a company other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation assumed all of the rights, duties, obligations, and assets of the sole proprietorship.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

Further, on August 13, 2002 the service center requested a copy of the petitioner's 2001 tax return. That return has never been submitted. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in

part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

Further still where a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal or motion. *Matter of Soriano*, 19 I&N Dec. 764(BIA 1988). If, in attempting to overcome today's decision on a motion, the petitioner submits a copy of its 2001 tax return, it should address this proposition from *Matter of Soriano* and why that tax return should be considered.

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 motion is granted. The AAO's decision of March 16, 2005 is affirmed. The petition is denied.