**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 0 1 2013 Office: TEXAS SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely. In response to the petitioner's motion to reopen and reconsider, the AAO determined that the appeal should remain rejected as untimely filed. The petitioner has filed a second motion to reopen and reconsider. The petitioner's motion will be dismissed.

The petitioner is a motel in the hospitality business. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward and failed to establish that the beneficiary had the experience required for the position offered. The director denied the petition on December 11, 2008.

On September 8, 2011, the AAO rejected the appeal as untimely filed. In this decision, the AAO noted that the petitioner's appeal was untimely because it was not received by the Texas Service Center until January 15, 2009, or 35 days after the director's decision was issued. *See* 8 C.F.R. § 103.3(2). The AAO additionally noted that the regulation at 8 C.F.R. § 103.3(a)(2(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Texas Service Center. *See* 8 C.F.R. § 103.5(a)(1)(ii). The AAO then stated:

> In this matter, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider. The appeal does not contain any new evidence and is not supported by any pertinent precedent decisions establishing that the decision was incorrect based on an incorrect application of law or policy. Furthermore, the record contains a memorandum from the Texas Service Center indicating that the appeal was reviewed prior to its being forwarded to the AAO and that the Service Center was not inclined to grant favorable relief.

Counsel's first motion to reopen and reconsider the AAO's rejection of the appeal as untimely filed was based on the argument that the weather conditions affected the delivery of the appeal by DHL courier service to the Texas Service Center. On April 23, 2012, the AAO granted counsel's motion to reopen and reconsider the timeliness of the appeal but found that its prior decision of September 8, 2011 rejecting the untimely appeal should be affirmed.

Counsel has submitted a second motion to reopen and motion to reconsider asserting that somehow the original untimely appeal should now be considered on its merits within the context of a motion to reopen and reconsider. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).[1] In this case, counsel is seeking to reverse the AAO's decision of April 23, 2012. Counsel attaches a copy of the brief that was submitted in support of the original untimely appeal. Counsel does not submit evidence that the appeal was timely received. No evidence was submitted that demonstrates that the AAO's decision of April 23, 2012 finding that the appeal was untimely and was based on an incorrect application of law or policy or a presentation of new facts such that the current motion would qualify as a motion to reconsider or a motion to reopen.[2]

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[1]The director also denied the petition based on the failure to establish the beneficiary's required 2 years of work experience in the job offered as a cook or 2 years of experience in a related occupation, also described as a cook. It is noted that counsel submitted for the first time on appeal (not with the original petition as asserted in this motion) an undated letter from , general manager of the asserting that the beneficiary worked there as a cook from 1997 to 1999. This letter does not constitute the basis for a motion to reopen as it could have been submitted with the original petition. Additionally, the letter does not contain an address for this business and is inconsistent with the beneficiary's own claims of past employment as set forth on Part B of the Form ETA 750 signed by him on April 18, 2001. This employment has been omitted on Part B of the Form ETA 750. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) No explanation of this omission was submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Additionally, this claimed employment was also omitted from a Biographic Information form (G-325A), signed by the beneficiary on June 14, 2003, where he states that he was working for in , New Jersey from 1998 until the present (date of signing) and was unemployed from June 1996 until 1998.

[2]The director's December 11, 2008 decision correctly set forth USCIS analysis of a petitioner's ability to pay the proffered wage by examining wages paid to a beneficiary, the petitioner's net income and the petitioner's net current assets. The methodology of this review is discussed in that decision. Current assets represent readily available cash or cash equivalent assets such as would be listed on lines 1 through 6 of Schedule L of the petitioner's tax returns. Current liabilities are listed on line(s) 16 through 18. The difference represents a petitioner's net current assets. 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.

USCIS will also review a petitioner's net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, as advocated here by counsel on appeal, or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid 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 USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

The AAO does not accept counsel's second motion as a motion to reopen or a motion to reconsider, and does not find a sufficient basis to overturn its decision of April 23, 2012 or September 8, 2011, finding that the appeal was correctly rejected as untimely.

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 motion to reopen and motion to reconsider is dismissed.

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*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Counsel's attached brief attempts to use a total asset figure pulled from the front page of the respective tax returns somehow combined with the petitioner's current liabilities (rather than total liabilities) to arrive at an asserted sufficient sum to cover the proffered wage. As explained by the director in his decision deny the petition, USCIS uses a petitioner's net current assets as an alternative method to review a petitioner's ability to pay, rather than a petitioner's total assets. Total assets include depreciable long-term assets that a petitioner uses in the ordinary course of business. Such depreciable assets would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage. Further, as noted above, depreciation will not be added back to a petitioner's net income. For the same reasons, it will not be added back to a petitioner's net current asset figure.