

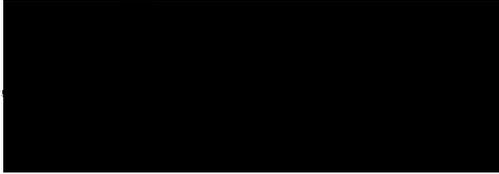
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U.S. Citizenship  
and Immigration  
Services

PUBLIC

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: NOV 09 2005  
SRC 02 208 53371

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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, Texas Service Center, denied the preference visa petition. The director subsequently reopened the matter pursuant to a motion by counsel, and then denied the petition again. 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook.

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 motion qualifies as a motion to reconsider because 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.

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 either 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. Here, the Form ETA 750 was accepted on November 2, 2001. The proffered wage as stated on the Form ETA 750 is \$10.49 per hour, which equals \$21,819.20 per year.

On the petition, the petitioner did not state the date it was established in the space provided for that purpose. The petitioner did not state its current number of employees, its gross annual income, or its net annual income in the spaces provided for those figures. The spaces provided for the missing information are in Part 5 of the Form I-140 petition.

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 Fort Lauderdale, Florida.

With the petition counsel submitted no evidence pertinent to the petitioner's ability to pay the proffered wage. Therefore the Texas Service Center, on February 7, 2003, requested evidence pertinent to that ability. The Service Center specifically requested (1) a copy of the petitioner's 2001 tax return, (2) a copy of the Form W-2 Wage and Tax Statement the petitioner issued to each of its employees during 2001 and 2002, and (3) of the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for each quarter of 2002. The Service Center also requested that the petitioner "submit any other documents which would establish the petitioner's ability to pay the proffered wage." Finally, the Service Center noted that the petitioner had not completed Part 5 of the petition and asked that the petitioner provide the information necessary to complete that portion of the form.

The petitioner did not respond to that Request for Evidence and the director denied the petition on June 18, 2003 as abandoned. Counsel responded with a letter motion dated July 7, 2003. Counsel stated that his office had not received the Request for Evidence and requested that the matter be reopened. On August 25, 2003 the Director, Texas Service Center reopened the matter and reissued the Request for Evidence.

Subsequently counsel submitted copies of the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, a copy of the petitioner's compiled balance sheet as of August 31, 2003, a copy of a compiled income statement of Horizon Diner II, Incorporated for the eight months ending August 31, 2003, and an accountant's analysis, dated September 30, 2003, of the evidence.

Counsel did not submit the requested copies of the Form W-2 Wage and Tax Statements the petitioner issued to each of its employees during 2001 and 2002 or the requested Form 941 Employer's Quarterly Federal Tax Returns for each quarter of 2002.

The tax returns submitted show that show that the petitioner is a corporation, that it incorporated on July 13, 1999, and that it reports taxes pursuant to the calendar year.

The 2001 return shows that the petitioner declared ordinary income of \$10,438 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$10,268 and current liabilities of \$2,089, which yields net current assets of \$8,179.

The 2002 return shows that the petitioner declared ordinary income of \$9,596 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of \$0. That return also states that it is the petitioner's final return.

The accountant's analysis urges that, in the determination of the petitioner's ability to pay the proffered wage, this office should consider the total of (1) the petitioner's ordinary income from its 2001 and 2002 returns, (2) some unspecified figure from the petitioner's financial statements for the first eight months of 2003, (3) the petitioner's cash on hand and cash in its bank accounts from its August 31, 2003 balance sheet, and (4) the amount of the petitioner's unearned profits. The sum of those amounts, the accountant asserts, would be

sufficient to pay the proffered wage during the two year and eight month period that includes 2001, 2002, and the first eight months of 2003.

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 December 9, 2003, denied the petition.

Counsel appealed on January 9, 2004. Counsel's appeal, in its entirety, reads, "The inability to pay the proffered wage is the only issue in question. The petitioner challenges and disputes this issue." Counsel submitted no additional evidence, analysis, or argument at that time but stated, on the Form I 290B appeal, that a brief or additional evidence would be submitted within 90 days. In a cover letter, dated January 8, 2004, counsel stated that he required "90 days to obtain financial documentation from the Petitioner in order to submit a brief and evidence." No additional evidence was submitted and the Director, AAO, dismissed the appeal on April 13, 2005.

With the instant motion, counsel submits copies of evidence previously submitted in response to the August 25, 2003 reissuance of the Request for Evidence. Counsel asserts that the evidence and the accountant's analysis demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Both the petitioner's tax returns and its unaudited financial statement were prepared pursuant to the accrual method, in which revenue is recognized when it is earned. This office would, in the alternative, have accepted tax returns prepared pursuant to cash convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on his behalf, seeks to rely on returns prepared pursuant to one method, and then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. The accountant states that the petitioner has entered into an agreement with Diner Discount Funding Program to provide meals and beverages to its members. Counsel states that the amount the petitioner will earn pursuant to that agreement is "deferred for income tax reasons." If those revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not pursuant to the accountant's adjustments.

Further, the reliance of counsel and the accountant on the compiled financial statements in this case 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Information from the petitioner's compiled financial reports will not be considered.

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 that 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 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 proffered wage is \$21,819.20 per year. The priority date is November 2, 2001.

During 2001 the petitioner declared ordinary income of \$10,438. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$8,179. That amount is insufficient to pay the proffered wage. The petitioner has submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$9,596. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had no net current assets. The petitioner cannot, therefore, 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 reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner submitted no reliable evidence pertinent to its ability to pay the proffered wage during 2003. The Request for Evidence in this matter was reissued, however, on August 25, 2003. On that date the petitioner's 2003 tax return, prepared pursuant to the calendar year, was unavailable. The petitioner is excused, therefore, from providing evidence pertinent to its ability to pay the proffered wage during 2003.

The petitioner failed to submit evidence sufficient 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 and the petition was correctly denied on that ground.

Additional issues exist in this case that were not raised in the decision of denial. The petitioner's 2002 tax return stated that it was the petitioner's final return. This could mean that the petitioner has ceased operations or it could mean that the petitioner has changed its mode of ownership.<sup>1</sup>

If the petitioner has ceased operations, it is no longer a U.S. employer within the meaning of 8 C.F.R. §204.5(l), and the petition may not be approved.

If, on the other hand, the petitioner has changed its mode of ownership, then the substituted petitioner, the new entity, must show that it is entitled to rely on the Form ETA 750 approved for use by the original petitioner. In order to rely on that approved Form ETA 750 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. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

Counsel's apparent intention is to substitute the corporation shown on the compiled financial statements, Horizon Diner II, Incorporated, for the original petitioner, Horizon Diner, Incorporated. Counsel provides no evidence, however, that the substituted petitioner is the original petitioner's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, *supra* and the petition should have been denied on this additional ground. Because this issue was not raised in the decision of denial, however, and the petitioner has not been accorded any opportunity to address it, today's decision does not rely, even in part, on this additional ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Further, although the Service Center requested, in the Request for Evidence issued on February 7, 2003 and reissued on August 25, 2003, that the petitioner provide copies of the Form W-2 Wage and Tax Statements it issued to each of its employees during 2001 and 2002 and its Form 941 Employer's Quarterly Federal Tax Returns for each quarter of 2002, those items have not 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 ground. Again, however, because this issue was not

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<sup>1</sup> Other facts might also cause a taxpayer to state that its corporate tax return is a final return. The statement indicates, however, that the taxpayer does not anticipate filing another return of the same type –Form 1120 U.S. Corporation Income Tax Return, Form 1120S, U.S. Income Tax Return for an S Corporation, or whatever form of return the statement is made on, during the ensuing year.

raised in the decision of denial and the petitioner has not been accorded any opportunity to address it, today's decision does not rely, even in part, on this additional ground.

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. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

**ORDER:** The motion is granted. The AAO's decision of April 13, 2005 is affirmed. The petition is denied.