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U.S. Citizenship
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Services

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APR 18 2007

FILE: EAC 02 276 53104

Office: VERMONT SERVICE CENTER

Date:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa. 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 reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) provides that the affected party must file a motion within 30 days of the issuance of the decision that the motion seeks to have reopened or reconsidered, except that the failure to timely file may be excused where it is demonstrated that the delay was reasonable and beyond the control of the petitioner.

The record indicates that the AAO issued its decision on April 29, 2005. The director properly gave notice to the petitioner that it had 30 days to file the appeal. Citizenship and Immigration Services (CIS) received the instant motion on June 27, 2005, 59 days after the decision was issued. Accordingly, the motion was untimely filed.

In the instant case, however, counsel submitted, with the motion, evidence showing that an appeal brief was previously submitted within the allotted time, which brief this office failed to consider on appeal. The AAO will exercise its discretion to consider the late motion and the brief.

The petitioner is a restaurant. 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.

The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The 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 April 5, 2001. The proffered wage as stated on the Form ETA 750 is \$14.96 per hour, which equals \$31,116.80 per year.

On the petition, which was submitted on September 12, 2002, the petitioner stated that it was established on February 17, 1995. The petitioner did not state the number of workers it employs, its gross annual income, or its net annual income in the spaces provided for those statistics. On the Form ETA 750, Part B, signed by the beneficiary on March 30, 2001, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Jackson Heights, New York.

In the instant case the record contains (1) copies of the petitioner's 2000, 2001, and 2002 Form 1120, U.S. Corporation Income Tax Returns, (2) copies of what purport to be the petitioner's amended 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns, and (3) a copy of the petitioner's 2002 W-3 transmittal. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on February 17, 1995, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from June 1 of the nominal year to May 31 of the following year.

During its 2000 fiscal year, which began on June 1, 2000 and ended on May 31, 2001, the petitioner declared taxable income before net operating loss deductions and special deductions of \$3,947. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2001 fiscal year, which began on June 1, 2001 and ended on May 31, 2002, the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,650. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

During its 2002 fiscal year, which began on June 1, 2002 and ended on May 31, 2003, the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,026. At the end of that fiscal year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 W-3 transmittal shows that it paid total wages of \$54,870 during that year.

The director denied the petition on December 6, 2003. The petitioner's appeal from that decision was dismissed on April 29, 2005.

On the motion, counsel submitted the amended returns mentioned above.¹ Counsel noted that those amended returns show that the petitioner paid Schedule A, Line 3, Cost of Labor of \$30,000 during both 2001 and 2002 that was not shown on its original tax returns. Counsel stated that the \$30,000 was paid for the services of non-employee contract cooks and could have been used to pay the wage proffered in the instant case. Counsel provided no evidence that the petitioner paid that amount for contract cooks during those years.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

In a previous letter dated August 26, 2003 counsel indicated that the petitioner's depreciation deductions and its assets, including depreciable assets and cash on hand, should be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

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.

This office is aware 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 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

¹ Actually, counsel submitted evidence showing that he submitted those amended returns prior to the adjudication of the appeal. Those returns were not then in the record, however, and were not considered on appeal.

value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *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.² 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 to pay additional wages. Such a scenario is unacceptable.

The amended returns are different from the original returns in two ways. They indicate that the petitioner paid \$30,000 in Cost of Labor during both its 2001 and 2002 fiscal years, which the original returns did not. They also show an additional \$30,000 in gross receipts each year. The remainder of the returns, including the taxable income before net operating loss deductions and special deductions shown, is unchanged. Counsel offered no explanation of how the petitioner neglected to include its labor costs on its original returns, nor of how it came to understate its gross receipts by the exact same amount.

Counsel submitted no Form 1120X amended return forms or any other indication that the amended returns were submitted to IRS. Absent any indication that they were submitted to IRS, those forms have little evidentiary value.

Even if the returns were shown to have been submitted to IRS, the circumstances of this amendment, showing payment of labor costs just sufficient, when added to the petitioner's slight profits during the salient years, are sufficiently suspicious that this office would not consider the petitioner's newly reported labor costs without additional evidence that the amount shown was actually paid for non-employee cooks during the salient years.

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.

² Counsel did 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, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

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 business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. The petitioner's depreciable assets would typically be among the assets the petitioner needs to continue in business.

Only the petitioner's current assets -- the petitioner's year-end cash 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, including its year-end cash on hand, 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 typically³ 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 \$31,116.80 per year. The priority date is April 5, 2001, which fell within the petitioner's 2000 fiscal year.

³ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

During its 2000 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$3,947. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that any other funds were available to it during its 2000 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during its 2000 fiscal year.

During its 2001 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$2,650. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that any other funds were available to it during its 2001 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during its 2001 fiscal year.

During its 2002 fiscal year the petitioner declared taxable income before net operating loss deductions and special deductions of \$4,026. That amount is insufficient to pay the annual amount of the proffered wage. At the end of that fiscal year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not shown that any other funds were available to it during its 2002 fiscal year with which it could have paid the proffered wage. The petitioner has not demonstrated that it was able to pay the proffered wage during its 2002 fiscal year.

The petition in this matter was submitted on September 12, 2002. On that date the petitioner's fiscal year 2003 tax return was unavailable. The service center issued a request for evidence in this matter on June 3, 2003, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's fiscal year 2003 tax return was still unavailable.⁴ The petitioner is excused from demonstrating its ability to pay the proffered wage during its 2003 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during its 2000, 2001, and 2002 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis, which has not been overcome on appeal or on motion.

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 April 29, 2005 is affirmed. The petition is denied.

⁴ The petitioner's 2003 fiscal year ended May 31, 2004.