

(b)(6)

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



U.S. Citizenship
and Immigration
Services

[Redacted]

Date: **MAY 02 2013**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

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:

[Redacted]

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 in accordance with the instructions on 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 employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO summarily dismissed the appeal on April 13, 2009. A subsequent motion to reopen and reconsider was dismissed by the AAO. The AAO is reopening this matter *sua sponte*. The appeal will be dismissed.

The immigrant petition, Form I-140, Immigrant for Alien Worker, filed by [REDACTED] on behalf of [REDACTED] was denied on June 1, 2007 by the director because the petitioner did not establish that it has the ability to pay the proffered wage as of the priority date of July 3, 2006. An appeal, filed July 2, 2007, was summarily dismissed by the AAO on April 13, 2009. In the dismissal, the AAO noted that counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days, however, as of the date of dismissal the record did not reflect receipt of additional evidence.

On June 30, 2009, the petitioner filed a motion to reopen/reconsider which was denied by AAO on March 2, 2010. We delineated that U.S. Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i); that similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* We noted that the motions were filed on Wednesday, June 24, 2009, 72 days after the AAO's April 13, 2009 decision, and, that the record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. Therefore, as the record did not establish that the failure to file the motions within 30 days of the decision was reasonable and beyond the affected party's control, we determined that the motions were untimely and must be dismissed for that reason.

Furthermore, we dismissed the motion for failing to meet an applicable requirement. We noted that the regulation at 8 C.F.R. §§ 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider; that Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding;" that, the motions did not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C); and, that the regulation at 8 C.F.R. § 103.5(a)(4) states that motions which do not meet applicable requirements must be dismissed. Because the motions did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), they will also be dismissed for this reason.

In addition, we noted that counsel contended in the motion that the AAO erred in failing to consider additional evidence purportedly submitted in support of the appeal before the AAO summarily dismissed the appeal. Counsel submitted this evidence along with certified mailing receipts indicating that these documents were sent to the Texas Service Center. We pointed out that the instructions on the Form I-290B clearly state that supporting evidence should be sent to the AAO,

not to the Service Centers. *See also* 8 C.F.R. § 103.3(a)(1)(v) (“If the AAO grants additional time, the affected party shall submit the brief directly to the AAO”). Accordingly, we noted that even if the motions were not being dismissed for untimeliness and for failing to meet applicable requirements, they would be dismissed for this substantive reason.

The AAO is reopening the matter *sua sponte* to consider additional evidence included in the record that was submitted in support of the appeal.

The evidence submitted with the motions that is being considered now is a June 27, 2007 letter from [REDACTED] CPA, stating that the petitioner’s 2006 income tax return shows depreciation in the amount of \$106,797, which he states “represents monetary funds available to the petitioner,” to pay the offered wage of \$18.26 per hour (\$38,022). Counsel infers that per [REDACTED]’s letter, by adding back the depreciation expense deducted on the 2006 income tax return the petitioner would have sufficient funds to pay the proffered wage. We disagree.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. Where, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure 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. 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 sales and profits and wage expense is misplaced. Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient. Also, 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

Depreciation expenses deducted on the 2006 income tax return may not be added back to the petitioner's net income. Therefore, after considering [REDACTED] June 27, 2007 letter, we find no basis to withdraw the director's decision to deny the instant Form I-140 petition. We have reiterated above the reasons for our dismissals of the appeal and the prior motion to reopen/reconsider. We find no reason to withdraw those decisions.

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 sustained that burden. Accordingly, the motions will be denied, the prior proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions are dismissed. The petition remains denied.