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**U.S. Department of Homeland Security
Citizenship and Immigration Services**

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

File: EAC 02 071 50081 Office: VERMONT SERVICE CENTER

Date: **DEC 11 2003**

IN RE: Petitioner:
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:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a graphic design studio. It seeks to employ the beneficiary permanently in the United States as a graphics/programming trainer. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a statement and additional evidence.

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 nature, for which qualified workers are not available 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$50,500 per year.

With the petition counsel submitted what purports to be the petitioner's unaudited profit and loss statement for the period from January to October 2001.

8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel may not be considered.

Because no competent evidence was submitted to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on February 19, 2002, requested additional evidence pertinent to that ability. The Service Center also specifically requested the petitioner's 2000 federal income tax return.

In response, counsel submitted a letter, dated May 1, 2002. In that letter, counsel noted that he was providing a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return, rather than the requested 2000 tax return. This office notes that, because the priority date of the petition is April 4, 2001, information from the petitioner's income tax return for the 2000 calendar year would have no direct relevance to the petitioner's ability to pay the proffered wage after the priority date.

Line 28 of the 2001 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$56,276 during that year. Line 30 indicates that the petitioner declared taxable income of \$36,564.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on September 5, 2002, denied the petition. The director noted that the proffered wage is \$50,500 and stated that the petitioner's tax return "indicates available funds of (only) \$41,454." Although the director did not state how he arrived at that figure, it is apparently the sum of the petitioner's taxable income of \$36,564 and its Line 21b depreciation deduction.

On appeal, counsel implies that the appropriate measure of the petitioner's ability to pay the proffered wage should include the petitioner's taxable income before net operating loss deduction and special deductions, plus the amount of the petitioner's depreciation deduction.

Counsel also provides a Form 1099 Miscellaneous Income statement, showing that the petitioner paid the beneficiary \$36,000 during 2001 in non-wage compensation. Counsel states, but does not provide evidence to support, that the beneficiary was paid that amount for work performed from the end of April 2001 until the end of December 2001 and that the beneficiary's work was paid at a rate equal to the proffered wage.

Counsel's arithmetic appears to be incorrect. If the beneficiary worked for the petitioner for more than nine full months and was paid \$36,000, then the petitioner was paid somewhat less than \$4,000 per month, which equals somewhat less than \$48,000 per year, and somewhat less than the proffered wage. Notwithstanding that error in calculation, however, the Form 1099 does indicate that the petitioner paid the beneficiary \$36,000 during 2001.

Counsel's implied assertion that the petitioner's depreciation deduction should be added to the petitioner's taxable income before net operating loss deduction and special deductions to show the amount available to pay the proffered wage is unconvincing, notwithstanding that the director apparently agreed.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. The value lost as equipment and buildings 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, it is not 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*, Supra at 537. See also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054. 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 his present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel is correct, however, that the petitioner's Line 28 taxable income before net operating loss deduction and special deductions is the correct measure of the petitioner's income during a given year, rather than Line 30 Taxable Income. In this instance, the difference between Line 28 and Line 30 was the petitioner's Line 29a Net Operating Loss Deduction. A Net Operating Loss Deduction is a carry-over of losses from previous years, and not indicative of performance during the year taken. To the extent that a measure of a given year's disposable income is to be found on a Form 1120 tax return, that measure is the taxable income before net operating loss deduction and special deductions.

In calculating the petitioner's ability to pay the proffered wage, CIS will first examine the net income 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 both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The proffered wage is \$50,500. The priority date is April 4, 2001. During 2001, the petitioner's taxable income before net operating loss deduction and special deductions was \$56,276, which is greater than the proffered wage.

In addition, the Form 1099 submitted on appeal shows that the petitioner paid the beneficiary \$36,000 during 2001, ostensibly for performing in the proffered position. Counsel alleged that the \$36,000 was all paid for work done after the priority date, but did not provide any evidence to support that assertion. If a portion of the work was performed prior to the priority date, then the money paid for that work could not correctly be included in the calculation of funds available to pay the proffered wage. Because the petitioner was able to pay the proffered wage out of its income, however, this office need not further consider that document and the calculations appropriate to it.

The petitioner has demonstrated the ability to pay the proffered wage out of its income. 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 met that burden.

ORDER: The appeal is dismissed.