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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 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: EAC 01 261 50478 Office: VERMONT SERVICE CENTER Date: FEB 10 2004

IN RE: Petitioner: [redacted]
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: [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, 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company which offers personal computer systems. It seeks to employ the beneficiary permanently in the United States as a technical sales engineer. 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 and continuing.

On appeal, counsel asserts that the decision is "based on misreading and erroneous analysis of the evidence submitted."

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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. The petitioner's priority date in this instance is October 1, 1997. The beneficiary's salary as stated on the labor certification is $68,710.46 per

year.

The record contains copies of the petitioner's 1997, 1998, and 1999 Internal Revenue Service (IRS) Form 1120. The tax return for 1997 reflected a taxable income of -$135,524. The tax return for 1998 reflected a taxable income of $9,836. The tax return for 1999 reflected a taxable income of $31,701.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the beneficiary's IRS Form W-2, Wage and Tax Statements which show a salary paid of $17,822.03 in 1997, $26,472.51 in 1998, and $26,694.96 in 1999, and argues that the Service failed to take the depreciation on the petitioner's income tax return into consideration.

In determining the petitioner's ability to pay the proffered wage, CIS will 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 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 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. 623 F. Supp. At 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. At 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

Counsel also provides unaudited, unreviewed financial statements which are of little evidentiary value as they are based solely on the representations of management. The regulation at 8 C.F.R. § 204.5(g)(2) gives audited financial statements as an acceptable form of evidence to establish the ability to pay the wage.

The petitioner's tax return for calendar year 1997 shows a taxable

income before deductions for net operating loss and special deductions of -$135,524 and negative net current assets. The beneficiary was paid $17,822.03 in 1997. The petitioner could not have made the difference between the wage paid and the proffered wage in 1997.

The petitioner's tax return for calendar year 1998 shows a taxable income of $9,836, and net current assets of $41,772. The beneficiary was paid $26,472.51 in wages. Adding the salary paid the beneficiary to the net current assets for a total of $68,244.51, the petitioner almost, but not quite, could have met the proffered wage in 1998. In 1999, the beneficiary was paid $26,694.96. The petitioner's net current assets that year were $20,917. The proffered wage could not have been met in 1999 by adding either the petitioner's taxable income or its net current assets to the wage actually paid the beneficiary.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of filing of the petition.

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 appeal is dismissed.