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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC-02-283-50229 Office: CALIFORNIA SERVICE CENTER Date: JUL 21 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 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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is cross-cultural market research, consulting and training organization. It seeks to employ the beneficiary permanently in the United States as a research analyst. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director denied the petition having determined that the petitioner had failed to establish its ability to pay the proffered wage or the beneficiary's qualifications for the position.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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 petition'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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is May 24, 1999. The beneficiary's salary as stated on the labor certification is $35,588.80 per year.

With the initial petition, counsel submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated January 7, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE also requested evidence of the beneficiary's education, training and experience and clarification of experience stated on the Form ETA 750, Part B.

In response to the RFE, counsel submitted the petitioner's fiscal year 1999 and 2000 Form 1120, U.S. Corporation Income Tax Return with Schedule L. The federal tax return for the fiscal year from October 1, 1999 to September 30, 2000 reflected a taxable income of $1,352. Schedule L reflected net current assets of -$53,590. The federal tax return for the fiscal year from October 1, 2000 to September 30, 2001 reflected taxable income of $ Schedule $1,893. Schedule L reflected net current assets of -$86,099. In addition, counsel submitted a letter from the petitioner's tax attorney [redacted] who asserts that the petitioner has the ability to pay the proffered wage. [redacted] indicates that the petitioner has paid $163,353 and $182,280 in payroll during the periods ending in September 2000 and September 2001, respectively and still had significant funds left over to pay the petitioner's president [redacted] indicates that those funds paid to the petitioner's president reflect the ability to pay the proffered wage.

Counsel also submitted translations of the beneficiary's academic achievements, documentation reflecting the awarding of a Bachelor's Degree in Psychology, a Masters Degree in Psychology and a Ph.D. in Psychology; a copy of a letter from the University of Iberoamericana thanking the beneficiary for teaching a class in

interviewing techniques in 1984; a letter from the Encharge of the counseling center of the University of Iberoamericana indicating that the beneficiary collaborated for 11 years in the counseling center in the fields of Clinical Psychology and working with adolescents; a letter from the Executive Director of the Children's Museum/Mueso De Los Ninos, reflecting that the beneficiary had completed an internship at the museum; and. a letter from [redacted] coordinator for the Mexican Association of Group Psychotherapy, reflecting that the beneficiary stated working as a psychotherapist in 1982 and joined the Mexican Association for Group Analytic Psychotherapy in 1992.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage or that the beneficiary had the work experience required and denied the petition.

The second issue in this proceeding is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, the Form ETA 750 indicated that the position of research analyst required a bachelor's degree and one year of experience.

On appeal, counsel argues that the petitioner has submitted sufficient evidence of the beneficiary's qualifications. Counsel submits a second letter from [redacted] who states that he has used the beneficiary's consulting services from 1982 to the present. [redacted] indicates that the beneficiary has been a group analyst/facilitator for nearly 20 years and is an ideal candidate for the position proffered. Counsel also submits a letterf rom Moises Cohen, M.A Psychology, who states that he hired the beneficiary in 1994 for an unspecified period of time and that he also worked with him in 1996 conducting numerous leadership training programs for private industry. Counsel also submits a personal statement from the beneficiary, who states that he commenced employment for the University of Iberoamericana in June of 1982 and was employed as a full-time teacher until 1988. He states that he worked for the university part-time from 1988 to 1993. He further states that he began private practice in 1983 on a part-time basis with his hours gradually increasing to more than 20 per week in 1998. He states that from 1993 to 1997 most of his time was devoted to private practice with 5 to 10 hours a week devoted to instructional teaching at various institutions in Mexico. He concludes stating that in 1997 he has been practicing in Tijuana.B.C., Mexico.

The Form ETA 750 requires one year of experience in the facilitation of small groups and the dynamics of group behavior. The evidence of record indicates that the beneficiary has been a psychotherapist for 20 years teaching, consulting and in private practice. Based on the fact that the beneficiary has established that he taught on a part-time and full-time basis for 11 years and that there are other specific references made to the beneficiary having taught, counseled, or facilitated group activities over a twenty year period, it is logical to conclude that the beneficiary has one year's experience as required.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has established that the beneficiary has one year's experience. Therefore, the petitioner has overcome this portion of the director's decision.

On appeal, counsel states that the petitioner has the ability to pay the proffered wage and references a new letter from the petitioner's tax attorney as evidence of the petitioner's financial status. In the new letter [redacted] states that the petitioner has paid over $422,000 in per year in payroll and independent contractor expenses and making a profit doing so [redacted] further states that the beneficiary's salary would only "be a drop in the bucket and would most likely replace wages fro employees who are no longer with the firm."

Counsel also submits the petitioner's Form 1120 U.S. Corporation Income Tax Return for the fiscal year October 1, 2001 to September 30, 2002. The federal tax return for the fiscal year ending September 30, 2002 reflected taxable income of -$1,199. Schedule L reflected net current assets of -$58,642.

Counsel's conclusion that the petitioner has the ability to pay the proffered wage because it has paid its president a significant salary each year is not persuasive. The salary taken by the petitioner's president represents funds that have already been disbursed and are therefore, not available to pay the proffered wage to the beneficiary. The assertion that the beneficiary's salary will somehow replace those employees who have left the firm, is not corroborated by any documentary evidence. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. The record contains no list of employees, their salaries, or any evidence of the hiring and/or terminations of employees by name, salary and job title. Therefore, counsel's conclusion must be viewed as conjecture.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had previously employed the beneficiary.

As an alternative means of determining the petitioner's ability to pay the proffered wage, the AAO will next examine the petitioner's net income figure as 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. Tex. 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.*, 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." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Counsel has submitted three separate tax filings from the petitioner. The tax return for the fiscal year ending September 30, 2000, which begins a few months after the priority date, reflects taxable income of $1,352. Schedule L reflected net current assets of -$53,590. The federal tax return for the fiscal year ending September 30, 2001 reflects taxable income of $1,893. Schedule L reflected net current assets of -$86,099. Finally, the tax return for the fiscal year ending September 30, 2002 reflects taxable income of -$1,199. Schedule L reflected net current assets of -$58,642. The petitioner could not pay the proffered wage of $35,588.80 per year out of these figures.

After a review of the evidence 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 the petition and continuing until the beneficiary obtains lawful permanent residence. Therefore, the petitioner has not overcome this portion of the director's objections.

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.