U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B-6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 22 2004
SRC-01-237-50111

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, Nebraska Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a news organization. The petitioner seeks to employ the beneficiary permanently in the United States as a management analyst (media consultant). 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 because he determined that (1) the petitioner failed to establish its ability to pay the proffered wage and (2) the petitioner failed to prove that the beneficiary meets the qualification of the proffered position.

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.

The first issue to be discussed in this case is whether the petitioner has the ability to pay the proffered wage.

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 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. The petition's priority date in this instance is February 9, 2000. The beneficiary's salary as stated on the labor certification is $32,400 per year.

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 initially establish that it had previously employed the beneficiary.

On appeal, counsel submitted the beneficiary's 2000 and 2001 Form W-2 Wage and Tax Statements indicating that the petitioner paid the beneficiary $32,400 during 2001 and $24,700 during 2000.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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 the full proffered wage in 2000. Rather, it paid the beneficiary only $24,700, $7,700 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, 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 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, now CIS, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year 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 federal tax return for 2000 reflected taxable income before net operating loss deduction and special deductions of $ 2,092.55. Schedule L reflects current assets of $3,029.54; current liabilities of $160 and net current assets of $2,869.54. Both taxable income and net current assets were less than $7,700, the difference between the proffered wage and wages paid. As such, it is concluded that the petitioner did not have the ability to pay the proffered wage during 2000. The petitioner has, therefore, not overcome this portion of the director's objection.

The second issue to be discussed in this case is whether the beneficiary meets the qualifications of the proffered position.

Regulations in 8 C.F.R. § 204.5(l)(3)(ii) specify for the classification of a professional that:

> (C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

> degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

In evaluating the beneficiary's qualifications, CIS must first look at the must look tot the job offer portion of the alien labor certification to determine the required qualifications of the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Restaurant,* 19 I&N Dec. 401,406 (Comm.1986). *See Matter of Mandany v. Smith* 696 F. 2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F. 2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F. 2d 1 (1st Cir. 1981).*

In this case, the petitioner requires a bachelor of science degree in communications or the equivalent with a major field of study in journalism.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth a requirement that the beneficiary must produce one degree that is determined to be a foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category.

On appeal, counsel submits evidence of the beneficiary's Bachelor of Science in Communications degree with a major in journalism. At counsel's Exhibit #17 is a credential evaluation by Josef Silny & Associates, Inc. which determines that the beneficiary has a foreign equivalent of a U.S. bachelor degree based on his completion of a program at the University of San Paulo where he was awarded a bachelor's degree in social communication with a major in journalism.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc., 19* I&N Dec. 817 (Comm. 1988).

The petitioner's counsel submits copies of the beneficiary's diploma and transcripts for the University of San Paulo as Exhibit #25 that corroborate the credential evaluation. Therefore, the petitioner has overcome that portion of the director's objections pertaining to the beneficiary having the required education for the position.

Therefore, the petitioner has overcome that portion of the director's objections pertaining to the beneficiary's having the required education for the position.

As stated above, however, a review of the federal tax returns reflects that the petitioner has not established that it has sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to the present even though the beneficiary is qualified for the position.

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.