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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER

Date: APR 15 2004

IN RE: Petitioner:
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner provides consulting services. It seeks to employ the beneficiary permanently in the United States as a Director – Product Development at an annual salary of \$120,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary’s proffered wage as of the filing date of the visa petition.

On appeal, counsel asserts that the director erred in not considering the depreciation expenses claimed by the petitioner on its tax return and that the director should have considered factors other than the petitioner’s net income.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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.

The priority date 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). Here, the petition’s filing date is June 8, 2001. The beneficiary’s salary as stated on the labor certification is \$120,000 annually.

With the original petition, the petitioner submitted no evidence relating to its ability to pay the beneficiary the proffered wage. Subsequently, the petitioner submitted Forms 1120 U.S. Corporation Income Tax Return for the tax years ending 2000, 2001 and 2002 that contained the following information:

	2000	2001	2002
Officers compensation	\$0	\$0	\$0
Salaries	\$0	\$0	\$0
Cost of Labor	\$0	\$0	\$0
Employee Leasing	\$386,070	\$391,296	\$15,852
Consulting	\$140,000	\$90,000	\$0
Employee Expenses	\$0	\$0	\$109,865
Depreciation	\$23,930	\$35,192	\$19,627
Net income (loss)	\$22,889	(\$225,639)	(\$44,319)
Current assets	\$12,839	\$99,408	\$11,337
Current liabilities	\$49,128	\$49,128	\$41,700

The director denied the petition, noting that the petitioner did not incur salary or cost of labor expenses in any year and that the petitioner suffered a net loss in 2001 and 2002.

On appeal, counsel references the employee leasing and consulting expenses listed on attached schedules to the petitioner's 2000 and 2001 tax returns. The petitioner submitted a letter from its accountant asserting that the petitioner outsourced its payroll duties to Paychex Business Solutions. In addition, counsel argues that the director should not have considered any depreciation expenses in determining the petitioner's net income, characterizing this expense as a "paper loss only." Relying on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *O'Connor v. Attorney General*, 1987 WL 18243 (D. Mass. 1987), counsel further asserts that the director should have considered the petitioner's 2002 income tax returns as evidence of its "acuity and viability in a weak economic market." Finally, counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), for the proposition that the director should have considered that the beneficiary's services to the petitioner will generate the necessary income to cover his salary. The petitioner submits a letter from its President asserting that the beneficiary "would substantially affect our company's ability to generate income."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that the legacy Immigration and Naturalization Service (legacy INS, 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. *Id.* at 1084. The court specifically rejected the argument that the Service 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. 532, 537 (N.D. Texas 1989); see also *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)).

Even if we did add back the depreciation, the petitioner would still not be able to demonstrate a net profit in 2001 or 2002 and its net profit in 2000 would remain well below the proffered wage. While the director did not specifically consider the petitioner's net current assets for any year, we note that its net current assets in all three years (negative \$36,289 in 2000, \$50,280 in 2001, and negative \$30,363 in 2002) are far short of the proffered wage.

While the petitioner has now provided an explanation for the lack of wages and cost of labor expenses in 2000, 2001, and 2002, it is not clear that the employee leasing and consulting expenses covered the proffered wage in 2001 and 2002. The record contains no evidence these funds were used to pay the beneficiary the full proffered wage. In support of the beneficiary's Application to Register Permanent Residence or Adjust Status, part of the record before us, the beneficiary submitted a September 20, 2001 approval notice for a nonimmigrant visa petition filed in his behalf by the petitioner. The beneficiary's Form W-2 for 2001, however, issued by Paychex Business Services of North Florida, reflects wages of only \$10,500. The petitioner must demonstrate its ability to pay the difference between the proffered wage and the wages actually paid, \$109,500. Neither the petitioner's net income (a negative number in 2001) nor its net current assets (\$50,280 in 2001) can demonstrate an ability to pay an additional \$109,500. Moreover, while counsel does not discuss or highlight the petitioner's employment expenses in 2002, we note that they are

significantly less than in the previous two years, suggesting that the petitioner has not been able to maintain previous levels of employment.

Counsel's reliance on *Matter of Sonogawa* is not persuasive. That case involved a business that had demonstrated 11 years of financial success and had a single costly year due to closing temporarily for a move. In the instant case, the petitioner only came into existence in 1998, three years prior to the priority date of the instant petition. Nor does the record reflect that the petitioner has enjoyed financial success during the entire three-year period prior to the priority date or subsequently in 2002.

Regarding counsel's reliance on *O'Connor v. Attorney General*, in a more recent decision, that same court has relied on the reasoning in *Elatos Restaurant Corp. v. Sava, supra*. See *Sitar Restaurant v. Ashcroft*, Civ. A. 02-30197-MAP (D. Mass Sept. 18, 2003). In the recent decision, that court upheld the agency's reliance on a petitioner's tax return, concluding that the agency decision in that matter, which fully considered the net income and "assets" section of Schedule L, was more than reasonable.

Finally, *Masonry Masters, Inc. v. Thornburgh, supra*, is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The petitioning organization is not located in the District of Columbia.

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 decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.