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U.S. Citizenship  
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**FEB 12 2004**



FILE: LIN-03-033-51259 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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:



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.

*for Mari Jensen*

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a recruiter for temporary medical staffing. It seeks to employ the beneficiary permanently in the United States as a coordinator of rehabilitation services at an annual salary of \$65,650. 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 argues that Citizenship and Immigration Services (CIS) should not consider the petitioner's taxable income, but its gross income. Counsel notes that the regulations do not indicate how tax returns should be analyzed. In addition, counsel asserts that the addition of the beneficiary's services will increase the petitioner's revenues sufficiently to pay the proffered wage. Finally, counsel argues that CIS should consider the benefit the beneficiary's services would provide to the community.

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.

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the petition's filing 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is April 26, 2001. The beneficiary's salary as stated on the labor certification is \$65,650 annually. With the original petition, the petitioner submitted a Form 1120S U.S. Corporation Income Tax Return for the tax year ending 2000 that contained the following information:

Net income (loss)	\$1,144
Current assets	\$52,780
Current liabilities	\$12,500

In response to the director's request for additional documentation, the petitioner submitted its corporate income tax return for 2001. This form contained the following information:

Net income (loss)	(\$8,753)
Current assets	\$35,256
Current liabilities	\$0

The petitioner also submitted its 2002 Form 990-EZ, Return of Organization Exempt from Income Tax. This form indicates the petitioner had \$301,123 in revenue and \$286,689 in expenses, leaving \$14,434.

Consequently, the director denied the petition.

On appeal, counsel requests that CIS consider the petitioner's gross income in 2002, asserting that "accounting credits and deductions re-categorize the income and do not change the actual cash position of the business." Counsel further asserts that the addition of the beneficiary's services will generate sufficient income to cover his wage. Counsel also discusses the importance of the petitioner's services to the community. The petitioner submits its 2002 Forms W-2 issue to other employees and an affidavit from Clement Olobatuyi of the petitioning company. Mr. Olobatuyi asserts that the addition of the beneficiary's services would generate sufficient additional income

The priority date for the petition is April 26, 2001. Thus, the petitioner must demonstrate an ability to pay the proffered wage in 2001. In 2001, the petitioner suffered a net loss and its net current assets (current assets minus current liabilities) were only \$35,256, far less than the proffered wage.

Examining the net income reflected on the tax return is well established by judicial precedent. *Elates Restaurant Corp. v. Sava* F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F. 2d 1305 (9<sup>th</sup> Cir. 1984)). CIS is not required to consider gross income without also considering the expenses that were incurred to generate that income. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *see also Chi-Feng Chang and Chi-Shing Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989).

CIS does not add back in the type of "deductions" referenced by counsel, presumed to be expenses such as depreciation. Moreover, we note that the expenses deducted in 2001 and 2002 include only actual expenses incurred by the business (salaries, other employee benefits, professional fees, payments to independent contractors, occupancy, rent, utilities, maintenance, printing, publications, postage shipping, advertising, taxes, licenses, and interest). The petitioner did not list any depreciation in either year. Thus, counsel's argument that the deducted expenses did not change the actual cash position of the business is clearly false. Finally, whatever benefit the beneficiary's services might bring to the community, that consideration cannot waive the requirement that the petitioner demonstrate its ability to pay the proffered wage at the time of filing.

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.