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FILE: LIN-03-058-51905 Office: NEBRASKA SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [Redacted]
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.

Robert P. Wiemann
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 an information technology company. It seeks to employ the beneficiary permanently in the United States as a software engineer at an annual salary of \$82,430. 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 continued to have the financial ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the petitioner suffered uncharacteristic losses in 2002.

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*.

(Final emphasis added.) In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the time the priority date is established until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is November 20, 2001. The beneficiary's salary as stated on the labor certification is \$82,430 annually.

With the original petition, the petitioner submitted Forms 1120S U.S. Income Tax Return for an S Corporation for the tax years ending 2000 and 2001. In response to the director's request for additional documentation, the petitioner submitted its corporate income tax return for 2002. These forms contain the following information:

	2000	2001	2002
Net income (loss)	\$47,881	(\$37,068)	(\$27,887)
Current assets	\$17,957	\$5,454	(\$1,144) ¹
Current liabilities	\$0	\$0	\$0

¹ This number includes (\$2,659) in cash and \$1,515 in other current assets. The record contains no explanation for the negative cash value. We note that any money owed is usually listed as a liability, not as a negative asset.

On his Form ETA-750B, the beneficiary indicates that he has worked for the beneficiary since July 2000. The record also contains Forms W-2 issued by the petitioner to the beneficiary in 2001 and 2002. These forms reflect that the petitioner paid the beneficiary \$29,334 in 2001 and \$15,959 in 2002.

As the priority date is November 20, 2001, the director stated that the petitioner need only demonstrate that it had the ability to pay the beneficiary one-month's salary at the proffered wage in 2001. Thus, the director concluded that the petitioner did have the ability to pay the proffered wage in 2001. The director then concluded that the petitioner did not have the ability to pay the proffered wage in 2002.

Counsel argues on appeal that the petitioner suffered an uncharacteristic loss in 2002. The petitioner submits a letter from [REDACTED] CPA, asserting that the petitioner spent \$130,045.17 in product development in 2002, \$83,973 of which was wages paid to the petitioner's own employees. The petitioner also submits invoices and Forms W-2 to substantiate these costs. Finally, the petitioner submits licensing agreements with its customers and unaudited financial statements prepared by an unknown entity. The profit and loss statement for January through June 2003 reflects net income of \$75,546.64, a 117 percent increase from the same period in 2002. The balance sheet as of June 30, 2003 reflects \$1,515 in current assets and negative \$3,500 in current liabilities (accounts payable). As with the negative cash value on the 2002 tax return, the record contains no explanation for a negative accounts payable value. According to [REDACTED] Dictionary of Accounting Terms 11 (3rd ed. 2000), accounts payable is a current liability representing money owed by the entity. Alternatively, accounts receivable represent money owed to the entity and should be listed as a current asset. *Id.* at 11-12. Logic dictates that neither of these numbers should be negative.

Counsel's arguments and the evidence submitted on appeal are not persuasive. Citizenship and Immigration Services (CIS) will consider uncharacteristic financial losses on a case-by-case basis. *See Matter of Sonogawa*, 12 I&N 612 (Reg. Comm. 1967). In that case, however, the petitioner had demonstrated 11 years without financial difficulties. In 1966, the petitioner in that case incurred moving costs and was unable to do regular business for a period of time. The instant case is not comparable. The petitioner incorporated in June 1999. While the petitioner demonstrated a small net income in 2000, it suffered a loss in both 2001 and 2002. In fact, we cannot concur with the director that the petitioner had the ability to pay the beneficiary in 2001. While the petitioner did pay the beneficiary more than one-month's salary at the proffered wage, that salary extended over the full year. Unlike a situation where the beneficiary only began employment at the end of the year in question, it is clear that in 2001, the petitioner was paying the beneficiary only 36 percent of the proffered wage. The petitioner's net loss and net current assets of only \$5,454 in 2001 cannot account for the difference between what the petitioner paid the beneficiary and the proffered wage, \$53,096.²

The petitioner does not contest the director's conclusion that its net loss and net current assets cannot demonstrate an ability to pay the difference between the proffered wage and the wage paid in 2002, \$66,471. Moreover, the record does not reflect that the petitioner suffered an uncharacteristic loss in 2002. We note that the petitioner suffered an even larger loss in 2001, with far more expenses, and has not demonstrated a pattern of earlier success. While the petitioner may have been involved in product development in 2002, that activity appears to be

² Even if we only looked at the six weeks in 2001 after the priority date, six weeks at the proffered wage amounts to \$9,511. Whereas, dividing the beneficiary's actual salary by 52 weeks in the year to obtain the weekly salary and multiplying that number by six weeks of employment equals \$3,385. The difference between the proffered wage and the beneficiary's actual wage for those six weeks in 2001 is \$6,126. Thus, the petitioner's net current assets of \$5,454 in 2001 cannot account for the difference even during the six weeks in 2001 after the priority date.

the type of business the petitioner is in. Further, the petitioner cannot include wages paid to three of its employees as uncharacteristic or "extraordinary" as claimed by counsel.

Finally, the evidence of an increase of income in 2003 is not persuasive. The financial statements are not audited as required by 8 C.F.R. § 204.5(g)(2) and contained unexplained negative values. Even if the financial statements were credible, they merely suggest that the petition was filed prematurely, not that the petitioner suffered an uncharacteristic loss in 2002.

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.