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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] LIN 02 071 53013 Office: NEBRASKA SERVICE CENTER

Date: **APR 16 2003**

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]

**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant 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 seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(2) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(2) as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner is an information technology firm. It seeks to employ the beneficiary permanently in the United States as a senior software engineer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and requests reversal of the director's decision.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is July 5, 2001. The beneficiary's salary as stated on the labor certification is \$72,000 per year.

The petitioner initially submitted a copy of its federal Form 1120S U.S. Income Tax Return for an S Corporation for the tax year ending 2000. It contained the following information:

|                        |              |
|------------------------|--------------|
| Gross receipts         | \$ 1,093,711 |
| Officers' compensation | 60,000       |
| Salaries               | 215,056      |
| Depreciation           | 1,501        |
| Ordinary Income        | 5,360        |

In response to the director's request for additional evidence establishing the petitioner's ability to pay the proffered wage, the petitioner submitted a copy of its federal Form 1120S U.S. Income Tax Return

for an S Corporation for the tax year ending 2001. It showed the following:

|                        |              |
|------------------------|--------------|
| Gross Receipts         | \$ 1,153,759 |
| Officers' compensation | 67,651       |
| Salaries               | 452,902      |
| Depreciation           | 901          |
| Ordinary Income        | 17,321       |

The director concluded that the evidence failed to establish that the petitioner had sufficient income to pay the beneficiary the proffered wage of \$72,000.

On appeal, counsel submits copies of the petitioner's 2000, 2001 and 2002 financial statements, consulting contracts, 2001 and 2002 accounts receivable statements, and re-submits copies of the 2000 and 2001 federal tax returns. Counsel contends that the petitioner's ability to pay is shown by its accounts receivable balance of nearly \$355,000 as of December 31, 2001. Counsel states that the corporate tax return does not include this sum because it reflects only cash basis accounting. He also asserts that the company's profitability is shown by the ability of its owners to take almost \$68,000 after payment of expenses.

The regulation at 8 C.F.R. § 204.5(g) requires copies of annual reports, federal tax returns, or audited financial statements. While additional material may be considered, such documentation generally cannot substitute for the evidentiary requirements. The tax return must reflect that the employer generates sufficient net income to cover the offered salary. *See, e.g., K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In this case, both the 2000 and 2001 tax returns fail to show that the petitioner's ordinary income of \$5,360 and \$17,321, respectively, covers the beneficiary's \$72,000 salary. Even adding the depreciation to the net income does not sufficiently raise the total to cover the beneficiary's salary in either tax year. Counsel's argument that the owners' ability to take \$67,651 as officers' compensation during the 2001 tax year is not persuasive. This sum was reflected as an expense paid by the company similar to the salaries and wages paid to its employees. We also note that a corporation is a separate and distinct legal entity and any assets of its stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The petitioner's accounts receivable balance may show that it is a viable company, but only reflects a portion of its financial status. All of the financial statements submitted for 2000 and 2001 fail to show that they were audited as required by the regulation, and as such, cannot be accorded significant evidentiary value. Although the petitioner's financial statement showing its profit and loss and related balance sheet for January through March 2002 was submitted with an accountant's review, this information does not establish the petitioner's ability to pay as of the filing date of the petition. *Matter of Wing's Tea House, supra*.



Based on the evidence contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.