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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: [Redacted] Office: Nebraska Service Center

Date: SEP 11 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN 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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an auto and truck engine and transmission repair shop. It seeks to employ the beneficiary permanently in the United States as a diesel mechanic. 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 a brief and additional evidence.

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.

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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$849.60 per week or \$44,179.20 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On August 31, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted copies of the petitioner's 1998, 1999, and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The 1998 federal tax return reflected gross receipts of \$258,439; gross profit of \$98,240; compensation of officers of \$14,200; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$26,567. The 1999 federal tax return reflected gross receipts of \$167,665; gross profit of \$82,631; compensation of officers of \$14,100; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$20,267. The 2000 federal tax return reflected gross receipts of \$175,116; gross profit of \$88,361; compensation of officers of \$14,400; salaries and wages paid of \$0; and an ordinary income (loss) from trade or business activities of \$18,377.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a letter from the petitioner's accountant and argues that:

The employment of the beneficiary will enable the petitioner to leverage current operations by making it possible for the petitioner to accept the substantial business opportunities which previously had to be declined because the petitioner had only one mechanic. Except for the cost of automobile parts, the additional revenue from work done by each additional employee will translate entirely into increased income from business activities before the payment of salaries and wages, as rent, advertising, and other expenses will remain constant. The decision was made by the petitioner to offer [the beneficiary] employment as a mechanic due to the realization that an additional mechanic would allow the petitioner to significantly increase revenues and earnings due to the extensive amount of work that was unavailable in this highly specialized area of auto repairs and maintenance.

Counsel's argument that the beneficiary's employment will result in more income for the business is not persuasive. Counsel does not explain the basis for such a conclusion. For example, the petitioner has not demonstrated that the beneficiary will replace

less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Absent evidence of these savings, this statement can only be taken as counsel's personal opinion. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

Counsel further argues that the president of the petitioning entity would personally guarantee the payment of any additional funds needed to pay the offered wage.

Counsel's argument is not persuasive. The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations 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; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The petitioner's Form 1120S for the calendar year 1998 shows an ordinary income of \$26,567. The petitioner could not pay a proffered salary of \$44,179.20 a year out of this income.

In addition, the petitioner's 1999 and 2000 federal tax returns continue to show an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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.