U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 018 52984 Office: NEBRASKA SERVICE CENTER Date: JUN 2 4 2004

[redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

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, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The petitioner is a real estate broker.[1] It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a statement. Counsel subsequently submitted 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 granting 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 nature, for which qualified workers are not available in the United States.

The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $26.03 per hour, which equals $54,142.40 per year.

The petition states that the petitioner has five employees. With the petition, counsel submitted a form letter, dated October 10, 2002, signed by the petitioner's president, which states that the petitioner is able to pay the proffered wage. Counsel also submitted the 2001 compiled financial statements of XEZ, Inc. In a letter dated October 11, 2002, counsel represented that XEZ, Inc. is a business name of the petitioner, but submitted no evidence of that assertion.

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[1] The Form ETA 750 submitted in this matter states that the petitioner's business is "Real Estate." The petition states that the type of business is "Real State [sic]." This office concludes that the petitioner is a real estate broker. If the petitioner engages in some other business in the field of real estate, such as appraisal or property management, for instance, that would have no substantive effect on the decision in the instant matter.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director, on December 2, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2), the director instructed the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements. The petitioner was also informed that if it employed 100 or more workers, a statement from a financial officer of the company would suffice to demonstrate the ability to pay the proffered wage.

In response, counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. Counsel also submitted the 2001 Form 1120S of XEZ, Incorporated. The petitioner's 2001 return shows that it declared ordinary income of $368 during that year. The corresponding Schedule L shows that at the end of that year, the petitioner had current assets of $1,969 and no current liabilities, which yields net current assets of $1,969.

In a letter, dated December 13, 2002, counsel observed that the petitioner and XEZ, Inc. are owned by the same person, that together they paid commissions and subcontractors' wages of over $1 million, and that the two companies' gross earnings exceed the proffered wage and the wages of the other employees. Counsel offered no other argument in support of considering the income and assets of XEZ, Inc. in the determination of the ability of URB to pay the proffered wage. Counsel did not indicate which line items indicate the amount the petitioner and XEC allegedly paid in commissions and to subcontractors.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on February 7, 2003, denied the petition.

On appeal, counsel stated: "Petitioner, URB, Inc., is a large real estate company that exists in the form of multiple sub S corporations owned by the same individual. Two of the sub corporations are URB, Inc. and XEZ, inc., and they are the specific sub companies that the proffered position involves."

Counsel states, then, that URB, Inc. is one of several sub corporations of "the petitioner." As the petitioner is URB, Inc., counsel appears to be stating that the petitioner is a wholly owned subsidiary of the petitioner. Assuming that only one corporation named URB, Inc. exists, counsel has misstated the facts. In the same sentence, counsel implies, at least, that the petitioner owns XEZ, Inc. We note that initially. Cpimse; asserted that the petitioner does business as XEZ, Inc. This assertion is clearly false, as the two are separate corporations. Counsel's inconsistent assertions diminish his overall credibility. Further, the assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel statement does not clarify the relationship between the petitioner and XEZ, Inc., whether or not that was what he intended.

Later in the brief, counsel elaborates:

> The petitioner exists in the form of multiple sub corporations, two of which are URB, Inc. and XEZ, Inc. Said sub corporations are the entities which [the beneficiary] will be rendering her services to. Her salary will be paid by the sub corporations jointly, or by either of the two

on different occasions. Since the two entities are owned by the same individual, their funds are ultimately drawn out of the same pot.

Counsel submits a letter, dated April 2, 2003, from the petitioner's owner, Brian Urbanowski. In that letter, the owner states that he is "the owner of the company which is petitioning for an immigrant visa on behalf of [the beneficiary]. The company exists in the form of multiple sub S corporations [that he owns], and which together form a larger entity. I am the sole owner of said sub corporations, including XEZ, Inc. and URB, Inc."

Counsel also provided bank statements for the petitioner and XEZ, Inc. Counsel argues that those bank statements also demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel further argues that the petitioner reasonably expects that hiring the beneficiary will increase the petitioner's profits. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the petition should be approved on the basis of that expectation.

Finally, counsel provides a 2002 Schedule K-1 showing that Brian Urbanowski owns 100% of URB, Inc., and a 2002 Supplemental Schedule K, stating that Brian Urbanowski owns 100% of XEZ, Inc. The information on those schedules, if believed, clarifies the relationship between those corporations. Neither is a subsidiary of the other. They both belong to the same owner. No other relationship has been demonstrated.

This office reminds counsel and the petitioner's owner that the petitioner in this matter is URB, Inc.,[2] not the unnamed larger entity that the petitioner's owner states owns it.[3] The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or any other entity.[4] As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others, including other corporations they may own, and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner, URB, Inc., must show the ability to pay the proffered wage out of its own funds.

Counsel's citation of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both

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[2] This was stated in Part 1 of the Form I-140 petition. Further, the labor certification submitted was approved for URB, Inc.

[3] This office further notes that the petitioner is a subchapter S corporation, and that other corporations may not generally own subchapter S corporations.

[4] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. Assuming that the petitioner's business will flourish is speculative.

Counsel argued that the ability of the beneficiary to generate additional income for the petitioner should also have been considered. Counsel provided no evidence of the proposition that the beneficiary's management of the petitioner would increase the petitioner's profits. Counsel did not state who had been managing the petitioner, did not state how the beneficiary's management would be superior, did not state how this superior management would increase the petitioner's profits, and provided no basis for estimating this forecast increase in profits.

This office shall not assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate additional income, and absent such evidence Citizenship and Immigration Services (CIS) will make no such assumption.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Counsel's reliance on the commissions and the subcontrators' wages that the petitioner paid is inapposite, as is its reliance on the petitioner's gross profits. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income[5], the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

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[5] The petitioner might, for instance, be able to demonstrate, rather than merely assert, that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted no evidence to establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists 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. at 537. *See also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

If the petitioner's net income during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $54,142.40 per year. During 2001, the petitioner declared ordinary income of $368 during that year. That amount is insufficient to pay the proffered wage. The petitioner ended the year with net current assets of $1,969. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that it had any other funds available with which to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.