U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship
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[redacted]

MAR 22 2004

FILE: EAC 02 080 52117 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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: SELF-REPRESENTED

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

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

The petitioner is a decorating firm. It seeks to employ the beneficiary permanently in the United States as a plasterer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 21, 2001. The beneficiary's salary as stated on the labor certification is $670.40 per week or $34,860.80 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 21, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted the petitioner's 2000 federal tax return with all schedules and attachments, annual report or audited financial statement, as well as wage and tax statements to evidence payments to the beneficiary in 2000.

The petitioner, without explanation, submitted page 1 only of its 1998-2001 Forms 1120-A, U.S. Corporation Short Form-Income Tax Returns. The federal tax returns for 2000 and 2001 reflected taxable income before net operating loss deduction and special deductions of $4,380 and $1,056, respectively, less than the proffered wage.

The director, further, considered the petitioner's statement that:

> An analysis of the past several years indicates that the cost of using a subcontracted individual has exceeded $45,000 per year. The cost of using a subcontractor during the year 2001 exceeded $57,000.
>
> It is therefore evident that an individual can be employed at a rate of less than $40,000 which will be more cost effective.

The director considered that the evidence did not show that the subcontractor had resigned, that taxable income was sufficient, or that the petitioner had otherwise allocated funds to pay the beneficiary as of the priority date. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

On appeal on August 13, 2002, for the first time, the petitioner asserts that:

> I currently use [the beneficiary] as the only subcontracted individual for [the petitioner]. . . . Therefor [sic], I feel that I have demostrated [sic] that [the petitioner] is providing the necessary income for [the beneficiary].

On appeal, also for the first time, the petitioner produces additional pages of its 1998-2001 Forms 1120-A. In 2001, the petitioner paid "subcontractors" $57,059, but Form 1120-A names none of them. The RFE exacted wage and tax statements to show payments to the beneficiary, but the petitioner has withheld those.

The AAO uses a multiple pronged analysis to ascertain the ability to pay the proffered wage. First, the petitioner's net income for 2001, as shown in Form 1120-A, was only $1,056, less than the proffered wage. Therefore, the AAO turned to the difference of current assets minus current liabilities, viz., net current assets, as reported in the balance sheet of Form 1120-A. Net current assets in 2001 were $10,935 at the beginning and $8,361 at the end, each less than the proffered wage.

Finally, AAO will consider the payment of the proffered wage to the beneficiary as evidence of the ability to pay the proffered wage for the priority date. Only on appeal in 2002 did the petitioner claim that the beneficiary was the only subcontracted individual being paid "currently." Inexplicably, the petitioner offered no prescribed evidence of the payment of wages to the beneficiary in 2001 or 2002.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner, next, claimed that an analysis over several years supported the premise that using a subcontractor was not cost effective. The petitioner withheld the analysis, disregarded the documentary requirements of the RFE for wages paid, and offered no explanation for their avoidance.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If Citizenship and Immigration Services (CIS), formerly the Service or the INS, fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.,* 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

The petitioner's avoidance of the requested evidence is puzzling. It deprives the record of credible evidence for the ability to pay the proffered wage at the priority date.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The petitioner has not exhibited any of the requested evidence of the payment of wages to the beneficiary. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

After a review of the federal tax return and the lack of evidence of wages paid to the beneficiary, 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 until the beneficiary obtains lawful permanent residence.

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.