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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

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Washington, DC, 20536



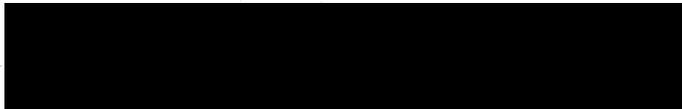
File: EAC 01 090 50832

Office: VERMONT SERVICE CENTER

Date:

**DEC 17 2003**

IN RE: Petitioner:  
Beneficiary:



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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

**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 Citizenship and Immigration Services (CIS) 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 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 an insurance firm. It seeks to employ the beneficiary permanently in the United States as a Vice-President, Far East marketing. As required by statute, the petition is accompanied by an individual labor certification, a duplicate original of 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.

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 turns, in part, 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). The petition's priority date in this instance is August 9, 1999. The beneficiary's salary as stated on the labor certification is \$56,000 per year.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage at the priority date and continuing to the present. In a Notice of Action dated January 9, 2002 (I-797), the director required the petitioner's 1998 and 1999

federal income tax returns, or, in the alternative, annual reports with audited or reviewed financial statements, and bank statements for six months prior to the priority date.

The petitioner submitted none of the financial documentation as requested in Form I-797. 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 continuing to the present and denied the petition.

On appeal, the petitioner offers a letter dated May 10, 2002 from a CPA firm (CPA summary). It reviews the petitioner's statement of earnings, retained earnings, and cash flows, for the years 1995 to present. It claims more than \$10,000,000 in policy reserves and a cash flow of over \$2,000,000 per year. The CPA summary concludes that the petitioner can provide a \$56,000 annual salary.

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 director, in Form I-797, requested the federal tax returns, annual reports or audited financial statements for the petitioner in accord with 8 C.F.R. § 204.5(g)(2). The I-140 states that the petitioner is a firm with two (2) employees and net income of \$122,638 annually. 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 the Bureau (formerly the Service). *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The petitioner's CPA summary on appeal does not satisfy the request of the I-797 for evidence of ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

After a review of the CPA summary and response to the I-797, 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.

Since the petition cannot be approved on the evidence of the ability to pay the proffered wage, further proceedings are moot to examine whether the petitioner established that the beneficiary meets the qualifications for the position. The petitioner's appeal argues only that the beneficiary will benefit the

petitioner and the Virgin Islands in the international market place.

The Form ETA 750, rather, set a tripartite requirement, namely:  
-a bachelor of science degree with a major field of study in "chartered secretary";  
-on the job training, for two (2) years; and  
-ten (10) years of work experience in a related occupation as a corporate secretary.

On appeal, the petitioner does not relate the evidence of the beneficiary's education, training, and experience to the three (3) terms of the Form ETA 750. In fact, data is largely expressed in different job titles and functions and not comprehensibly related to the tripartite qualifications. See letters dated February, 2002 of Routledge from ICSA, on October 21, 2001 of Braithwaite from Ansbacher (BVI), and on June 2, 2000 of Spilg from Ansbacher (Guernsey). The petitioner must resolve uncertainties in applying evidence to justify each requirement of the Form ETA 750.

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

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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.