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

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



JUL 03 2003

File: EAC 00 282 52920 Office: VERMONT SERVICE CENTER Date:

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]

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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 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*  
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 income tax preparation firm. It seeks to employ the beneficiary permanently in the United States as a system control operator. As required by statute, the petition is accompanied by an individual labor certification 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 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 October 11, 1996. The beneficiary's salary as stated on the labor certification is \$26.20 per hour or \$54,496 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On May 19, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing to the present or had paid it to the

beneficiary. On November 8, 2001, the director deemed the petition abandoned, failing timely receipt of the requested evidence in the record. 8 C.F.R. § 103.2(b)(13). On February 21, 2002, the director, however, acknowledged the timely submission of responsive evidence and reopened the decision of November 8, 2001 on February 21, 2002.

Counsel submitted a copy of the beneficiary's "1996 1099 form" for wages paid of \$34,737.90, less than the proffered wage. Counsel attached copies of the petitioner's money management account and insured money market account, which showed a balance over \$100,000 in June and July of 1996. The director determined that the bank accounts did not show the complete financial record of the petitioner and did not establish its ability to pay the proffered wage as of the priority date of the petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and statements for a bank account for August 17, 1996 to August 18, 1997. The petitioner has not provided primary evidence of its ability to pay the proffered wage, namely, annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2). The Service must rely on the primary evidence. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985).

Counsel justifies the omission of primary evidence:

... The AAU [Administrative Appeals Office] has consistently found that an employer can show it has the ability to pay the proffered wage by showing that it has sufficient cash on hand in a bank account to supplement funds it paid the beneficiary in the applicable year when the beneficiary's compensation did not meet the prevailing wage. Specifically, we have attached copies of 4 [AAO] decisions in which the exact issue was addressed. A decision favorable to the petitioner was rendered in each case.

The four (4) records on which these decisions were based are not precedent decisions, published and made available to the public under 8 C.F.R. § 103.9(a). Unpublished decisions are not precedent decisions and are not binding. 8 C.F.R. § 103.3(c).

Counsel further insists on these bank statements covering a year up to August 28, 1997, rather than primary evidence:

... The purpose in presenting the bank accounts was to show that the company had sufficient cash available in

every month in 1996 to substantiate the company's belief that it had the financial ability to make up the difference between the beneficiary's actual earnings in 1996 and the proffered wage.

The applicable regulation, 8 C.F.R. § 103.2(b), demands, however, primary evidence:

*Evidence and processing - (1) General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

*(2) Submitting secondary evidence and affidavits - (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, ... pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Counsel argues against the need for primary evidence that:

[The petitioner] is a public accounting firm which has 75 to 100 accounting clients, prepares over 2,500 income tax returns annually, as well represents individuals with regard to audits and sales tax filings. They have 6 full-time employees, and during the tax season (January-April) their staff size expands to @ [sic] 15 employees who man 5 or six offices throughout the NYC metropolitan area. The company has been in business since 1957. It is a privately owned family business that is not incorporated. Therefore, the family is extremely reluctant to release their personal income tax returns, which is where the

company's income is reported. However, they have been willing to produce their business bank account statements.

The bank account and money market statements offered initially and on appeal do not constitute primary evidence under 8 C.F.R. § 204.5(g)(2). There is no basis to absolve a party either of the obligation to present primary evidence or of the presumption of ineligibility.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The address to which the bank statements went has no support from any other in the proceedings. 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).

Moreover, the suggested secondary evidence relates only to cash and assets. It is not reasonable to consider assets and gross income without reference to the liabilities and expenses incurred to generate that income. *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985). Bank statements submitted on appeal, even if they were primary evidence, cover the period only to August 18, 1997. The petitioner did not offer evidence of its ability to pay beyond 1997 even with the brief and appeal of March 26, 2002.

The record did not establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, though requested.

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.