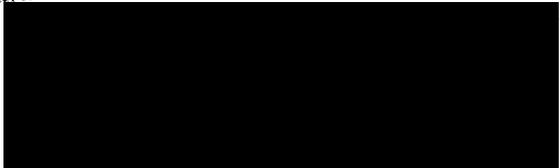


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U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass., 3/F  
425 I Street, N.W.  
Washington, D.C. 20536



File: WAC 02 087 54841 Office: CALIFORNIA SERVICE CENTER Date: **OCT 29 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:

**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 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a textile manufacturer. It seeks to employ the beneficiary permanently in the United States as a link-and-link machine operator. As required by statute, the Immigrant Petition for Alien Worker (I-140) 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.

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). The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$9.00 per hour and equals \$18,720 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of Action dated March 26, 2002 (RFE), the director requested annual

reports, audited financial statements, or federal tax returns and Forms W-2 and W-3 for 1998-2001 to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel cited, in response to the RFE, the regulation, which permits CIS (formerly the Service or INS) to accept the statement of the financial officer of a United States organization employing 100 or more persons to establish the ability to pay. See 8 C.F.R. § 204.5(g)(2). The record contains no statement of any financial officer of the petitioner either to verify 100 or more employees or the ability to pay the proffered wage.

The petitioner had initially tendered unaudited statements of income (profit and loss, or P&L herein) from a certified public accountant, for the years ending October 31, 1998, 1999, and 2000, (CPA P&L). They reflected net income equal to, or greater than the proffered wage.

The director rejected the CPA P&L as unaudited and observed that the record contained no statement of the petitioner's financial officer, such as the regulation exacts for their acceptance. The director reasoned that, lacking the verification from the petitioner's financial officer, the petitioner must produce the evidence, as specified in the RFE and the regulation. The director determined that, without the petitioner's federal tax returns, audited financial statements, or annual report, the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtained lawful permanent residence. Therefore, the director denied the petition.

On appeal, counsel submits a brief. Again, he recites regulations that permit the financial officer of a United States organization employing 100 or more workers to provide a statement to establish that the petitioner could pay the proffered.

Counsel insists, despite the director's finding, that a letter stated that:

[The petitioner] had been in business for 18 years, employed over 100 employees, and had more than adequate cash reserves to pay the proffered wage. Such letter was signed by the Chief Executive Officer, a financial officer of [the petitioner], [PH]. [CIS] gave no weight to the petitioner's letter...

Counsel's insistence is misplaced. No letter of PH is in the

record. Moreover, the CEO is not a financial officer. Counsel, in response to the RFE, cited, in the abstract, the regulation allowing the financial officer's letter.

Counsel's claims of knowledge have no probative value, be they of the existence of a financial letter, of its contents, or of the status of the CEO, PH, as a financial officer of the petitioner. 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 petitioner sought to avoid the exaction, by the RFE, of the federal tax return, annual report or audited financial statement in accord with 8 C.F.R. § 204.5(g)(2). The petitioner provided no letter of a financial officer or federal tax returns in response to the RFE, and none will be considered on appeal.

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).

*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.

The reevaluation of the petitioner's evidence discloses several inconsistencies. First, each CPA P&L had a transmittal that claimed the review of the accompanying balance sheet. None was attached. Second, counsel alleged a company policy that prohibited the petitioner from submitting copies of employer quarterly reports (Form DE-6) of wage and tax statements of the beneficiary (Form W-2) to prove the payment of the proffered wage to the beneficiary. The record contained no such policy. Third, counsel averred that the petitioner had attached its "audited statements from 2001." They were, in fact, neither audited nor reviewed. The petitioner has not resolved any inconsistency.

*Matter of Ho* at 591-592 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 petitioner withheld the primary evidence under the regulation, both of the ability to pay the proffered wage and for the exemption from the means of proof. The unavailability of such proof creates a presumption of ineligibility.

8 C.F.R. § 103.2 (b) states in part:

*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.

After a review of the statements, letters, and brief, 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.