U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 220 50585 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:

[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

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 roofing contractor. It seeks to employ the beneficiary permanently in the United States as a roofer. 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, in extenso:

> *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.
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> In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS), formerly the Service or the INS].

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from 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. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 24, 2001. The beneficiary's salary as stated on the labor certification is $16.43 per hour or $34,174.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated November 26, 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 2000 federal income tax return, with all schedules and attachment, for the business, whether a corporation or a sole proprietorship. The petitioner responded with the beneficiary's 2001 Wage and Tax Statement (Form W-2), reflecting wages paid, as of the priority date, of $29,026.11, less than the proffered wage. The Immigrant Petition for Alien Worker (I-140), in Part 5, omitted the petitioner's date established, current number of employees, gross annual income, and net annual income.

The petitioner's Secretary-Treasurer, in a letter dated January 7, 2003 (financial viability letter), which counsel forwarded to CIS, stated that:

> . . . We are unable to forward tax returns or financial statements as requested. I can relate to you that [the petitioner] has been in business since 1959 with annual sales of approximately 8 million dollars. We have been in the same location since 1967 at 800 So. Pickett St. in Alexandria. Our firm is one of the largest roofing companies in the metropolitan area. We have completed projects at the White House, the Federal Reserve, the Mormon Temple, all of the local military installations, including one in Frankfurt Germany and all of the local school systems. [The petitioner] has had projects in excess of 1 million dollars and has unlimited bonding capacity. Our federal I.D. number is 54-0061474 if you wish to investigate our performance further.

The director noted the request to provide 2000 federal income tax returns, determined that 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 obtains lawful permanent residence, and denied the petition.

On appeal, counsel summarizes the financial viability letter with the preface:

> (A) The Director's decision to deny the I-140 petition on the basis that petitioner does not possess the financial ability to pay the proffered wage is both ludicrous and incredulous. It is neither based on the facts nor on established legal principles.

Counsel does not identify the legal principle that the director neglected or violated to a ludicrous and incredulous effect. The regulation requires the director to exact evidence of the ability to pay either in the form of copies of annual reports, federal tax returns, or audited financial statements. One exception allows the statement of a financial officer if a prospective employer employs 100 or more workers. The petitioner and counsel, however, chose to omit even the allegation of the number of employees from the I-140, as well as proof of the number. Counsel only says that the petitioner employs a "substantial number of employees." The other exception regards the showing of an appropriate case to weigh certain alternative types of evidence. The record reflected no unusual feature of the case, and, in any event, the petitioner and counsel offered no suggested document. *See* 8 C.F.R. § 204.5(g)(2). This regulation prescribes several modes of proof, but the AAO cannot find any of them in this record, as presently constituted.

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).

Counsel, in fact, denies the need to offer alternative types of evidence. Many larger companies, it is said, do not, and need not, disclose financial statements, especially if logic and common sense dictate that the petitioner and beneficiary have, unquestionably, given enough information to demonstrate the ability to pay the proffered wage. Counsel cites no authority for this non-disclosure. The petitioner's self-serving determination of the amount and type of evidence it will offer does not satisfy this regulation. *See* 8 C.F.R. § 204.5(g)(2).

Counsel specifies a well-established policy of CIS that "some companies are large enough (million of dollars in sales) that no tax returns are required." The AAO is unaware of this policy or of any authority for it. Counsel asserts that it is "unquestionable (without any doubt whatsoever)" that the petitioner has the ability to pay the proffered wage, reciting only the favorable financial factors already asserted in the financial viability letter.

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).

Counsel's reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. Evidently, that petitioner offered the director probative initial evidence, documents in response to the RFE, and proof, as prescribed in 8 C.F.R. § 204.5(g)(2). *Matter of Sonegawa* cannot apply to the instant I-140. This petitioner interposes its self-serving declarations expressly to negate any offer of evidence, responsive documents, or application of the pertinent regulation.

After a review of the financial viability letter, the response to the RFE, and counsel's 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 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.