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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: EAC 98 185 53174 Office: VERMONT SERVICE CENTER Date: MAR 22 2001

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant 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)

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a construction company which seeks to employ the beneficiary permanently in the United States as a soft-tile setter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of December 29, 1997, the filing date of the visa petition.

On appeal, the petitioner provides a letter and additional evidence.

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 filing 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 filing date is December 29, 1997. The beneficiary's salary as stated on the labor certification is \$17.00 per hour (35 hour week) or \$30,940 annually.

The record shows that the petitioner had nine employees at the time the petition was filed. The director determined that the petitioner had filed at least thirty-six immigrant visa petitions. The petitioner initially submitted documentation that did not establish its ability to pay the offered wage as of the filing date of the petition.

On September 8, 1998, the director requested evidence to establish that the petitioner had the ability to pay the proffered wage of \$30,940 as of December 29, 1997, the filing date of the labor certification.

In response, the petitioner submitted copies of the 1996 and 1997 federal income taxes for [REDACTED] Inc. The director found that the record did not conclusively establish the relationship between the petitioner and [REDACTED]. In addition, a review of the income taxes of [REDACTED] Inc. does not clearly show that the petitioner has the ability to pay the offered wage of the beneficiary as well as the employees of [REDACTED].

The petitioner also submitted a copy of its 1996 and 1997 Form 1120S U.S. Income Tax Return for an S Corporation. A review of the 1997 federal tax return reflects gross receipts of \$204,933; gross profits of \$204,933; compensation of officers of \$107,000; salaries and wages of \$232,342; depreciation of \$2,950; and ordinary income of -\$63,229. Schedule L reflects total current assets of \$0 and total current liabilities of \$55,187. When adding the ordinary income, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the result is -\$60,279, \$91,219 less than the proffered wage.

The petitioner also submitted copies of Form 941 Employer's Quarterly Federal Tax Return which cover dates from 1996 until the present. According to the director, even though the forms indicate the amount of taxes required to be paid by the petitioner, there is nothing in the record to show that the petitioner had sufficient assets with which to pay the beneficiary.

The petitioner indicated that it had intended to replace contractors employed at the time the petition was filed with the thirty-six beneficiaries of the previously mentioned petitions. The director determined that the petitioner failed to establish that it was presently employing a contractor in the same position as the beneficiary; the petitioner has a detailed description of its plan for replacing the contractors, or that the petitioner had sufficient work to employ the beneficiary in a permanent position.

On appeal, the petitioner provides a letter. The letter contains a statement from [REDACTED] former Secretary-Treasurer of the petitioner in which he states that the petitioner consolidated with [REDACTED] Inc. and [REDACTED] Limited Partnership on August 1, 1999 into Residential Construction Management services, Inc.

The petitioner states that:

The petitioner challenges the finding of the Vermont Service Center to wit:

In addition you have submitted copies of internally generated payment records which do not bear the name of [REDACTED] Construction Consulting, Inc., or describe the payments being distributed. These documents do not clearly establish that the petitioner has the ability to part (sic) the proffered wage.

We absolutely disagree with the finding and argue as follows:

We concede that the majority of payments were made by Megan Homes, Inc. and only in part by us. However the records were co-mingled and we found it time consuming and difficult to separate them. We ask permission to include them and the incorporation document of Residential Construction Management Services, Inc. within the 30 days extension period to the Administrative Appeals Unit.

Although the petitioner states that the sponsoring company and Residential Construction Management Services, Inc. have the same owners and that with the consolidation of the companies, Megan Homes, Inc. and Gene Fox Limited Partnership ceased to exist, the petitioner has provided no evidence of its claims. 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). In addition, the list of contracts submitted by the petitioner does not establish that Great Eastern Construction Consultants, Inc. had the ability to pay the proffered wage at the time of filing the petition. Since the petitioner has chosen to petition for the beneficiary utilizing the labor certification issued to Great Eastern Construction Consultants, Inc., approval of the petition must be based on the ability of Great Eastern Construction Consultants, Inc. to pay the proffered wage as of December 29, 1997. See Matter of Dial Auto Repair Shop, Inc., 19

I&N Dec. 481 (Comm. 1986).

Furthermore, the petitioner has not documented the positions, duties and termination of the workers who performed the duties of the proffered position. If they performed other kinds of work, then the beneficiary could not have replaced them as suggested by the petitioner.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

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.