

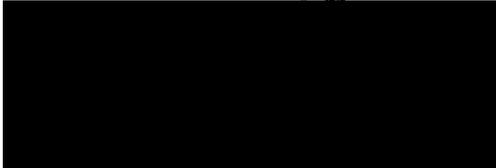
U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

D2



Identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

DEC 18 2003

FILE: EAC 02 076 50491 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



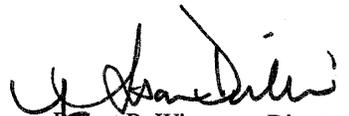
INSTRUCTIONS:

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner designs and sells air pollution control equipment. The petitioner employs five people and has a gross annual income of \$1,600,000. It seeks to temporarily employ the beneficiary as a mechanical engineer for a period of three years. The director determined that the petitioner had not established that it has sufficient work and resources to support a specialty occupation.

On appeal, counsel asserts that the director erred in making this determination, and that the petitioner submitted sufficient documentation to indicate that the corporation had significant contracts in the coming years to support the position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The proffered position is as a mechanical engineer. The beneficiary has a bachelor's degree in engineering. It appears both that the position is a specialty occupation and that the beneficiary is qualified to perform the specialty occupation.

The issue in the instant proceeding is whether the petitioner has sufficient work and resources available to ensure that the beneficiary would be performing in the specialty occupation for the duration of his employment.

On appeal, counsel states, "Although sufficient documentation was previously submitted to indicate that the corporation had contracts for several million dollars for [sic] over the next few years, this was not acceptable to the District Director." It is not clear which documentation counsel is discussing. The only evidence regarding the petitioner's finances submitted with the initial petition was the first page of its 1999 tax return indicating gross receipts of \$1,655,605 and a copy of its bank statement for July 2001, showing a balance of \$137,200.24. On February 19, 2002, the director requested that the petitioner "submit evidence that your company has sufficient work and resources available to satisfy this [S]ervice that the beneficiary will be performing services in a specialty occupation for the requested period of employment." In response, counsel submitted a letter from the petitioner stating:

We have received verbal commitments from the Municipal Authorities in Iceland (Sudurnes Incinerator Authority) on a commitment for the first of four (4) duplicate Municipal Waste Incinerator Systems. We are part of an overall team providing this equipment. Our portion of each of the four (4) duplicate projects represents approximately \$1.1 million dollars in engineering to be completed in the next year. Additionally, we have commitments to be completed this year for two (2) large scrubber systems at Interquisa (Madrid, Spain).

The total of these projects represents a two year back log [sic] of work for our engineering staff at present levels. We must add additional engineering personnel.

Recent projects completed in South America totaling approximately \$1.2 million dollars will require service assistance within the next twelve months as well. We have lost our previous Spanish speaking engineer and we are hoping that the future addition of [the beneficiary] will allow us to full fill [sic] this gap.

Our on going [sic] sales have been stable and in the range of \$2 million dollars/year of engineering billing for the past several years. With the commitments received, we anticipate our billings to increase to

\$3-3.5 million dollars/year over the next several years. Therefore we can assure that [the beneficiary's] services would be required for sometime to come.

No evidence was submitted to support the petitioner's statements. This information, had it been documented, should have been enough to allay the director's concerns. However, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). On appeal, counsel submits copious documentation of these facts, but it was not submitted at the time it was requested. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO notes that the director erred in several of his statements in the decision. In particular, the director stated that the petitioner's "company is relatively new, has few employees, and reports modest or projected gross income." While it is true that the petitioner only has five employees, it is not a new company, since it was established in 1988. It is not clear what information the director is relying on in his statement regarding modest or projected gross income, since the gross income reported in Part 5 of the Form I-129 is \$1,655,605. In addition, the director stated:

You claim to have answered the question of work for the beneficiary in the instant petition when you submitted the first page of your 1999 federal income tax return. It is noted that you filed the instant petition in December 2001, so it is not clear how this evidence highlights your having the work available in the future for the beneficiary. This evidence also indicates you only made about \$14,800 in that fiscal year.

The statement that an income tax return is of little use in documenting future work is accurate, but the director seemed to be confused about why a 1999 income tax return was submitted in December 2001. In looking at the return, it is dated 1/18/01, and

indicates that the petitioner's tax year was 12/1/99-11/30/00, and this would have been the most current return available in December 2001. Nowhere on this tax return is a figure of "about \$14,800" and it is not clear how the director determined that this was the petitioner's income for 1999.

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 sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.