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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

MAR 0 2 2004

File: WAC 02 094 55432 Office: California Service Center Date:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii).

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 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 chemical and equipment manufacturer. It seeks to employ the beneficiary permanently in the United States as a tile shader. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submitted additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 continuing ability to pay the proffered wage beginning on the priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on January 5, 1998. The proffered salary as stated on the labor certification is $12.44 per hour which equals $25,875.20 annually.

With the petition, counsel submitted no evidence of the

petitioner's ability to pay the proffered wage. Therefore, on April 1, 2002, the California Service Center requested evidence pertinent to that ability. Specifically, the Service Center requested, pursuant to 8 C.F.R. § 204.5(g)(2), that the petitioner submit copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted a letter, dated June 12, 2002, from Mr. [redacted] signing as president of Vortex Sprayliners, Inc. That letter states that the company recently changed its name from Universal Bathtub Liners, Inc. In that letter Mr. [redacted] declined to submit his tax returns, citing confidentiality and did not address the alternative types of proof specified in the Service Center's request.

Mr. [redacted] also submitted the Form DE-2 wage report of Vortex Sprayliners for the last quarter of 2001. That form indicates that Vortex Sprayliners employed six people during the quarter.

On July 11, 2002, the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage. The director noted that the petitioner had declined to provide the evidence required by 8 C.F.R. § 204.5(g)(2).

On appeal, counsel submitted a letter, dated August 6, 2002, from the petitioner's accountant. That letter states that the petitioner is able to pay the proffered wage. That letter is not accompanied by copies of annual reports, federal tax returns, or audited financial statements.

Counsel also submitted a letter which stated that the petitioner had inadvertently filed as KTT Enterprises, and that its correct name is Vortex Sprayliners, Inc.

The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage at any time during the pendency of this petition. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

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.