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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 99 066 51773 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:



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 an antique furniture retailer which seeks to employ the beneficiary permanently in the United States as an antique furniture restorer. 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 October 24, 1995, the filing date of the visa petition.

On appeal, counsel for the petitioner provides a brief.

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 October 24, 1995. The beneficiary's salary as stated on the labor certification is \$15.75 per hour (35 hours) or \$28,665 annually.

Counsel for the petitioner initially submitted a copy of the petitioner's Schedule C Profit or Loss From Business (Sole Proprietorship) for 1995.

The director concluded that the documents submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On April 22, 1999, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of October 24, 1995. Specifically, the director requested that the petitioner submit an itemized list of all of its expenses and the beneficiary's W-2 for 1995.

In response, counsel provided a copy of another Schedule C. The director acknowledged that the petitioner provided 1996-1998 Schedule C, but determined that the forms are of no value because they do not cover the date of filing.

The director determined that the petitioner's 1995 Schedule C indicates a net income of \$28,723.84. However, the director stated that the form failed to show that wages or employee benefits were paid. The director stated that although the petitioner claims to have employed the beneficiary from July 1995, the petitioner failed to provide any evidence to support the claim. The petitioner furnished a 1995 tax return for the beneficiary that showed wages of over \$28,000, but the director found that the petitioner failed to provide any evidence establishing that the income shown came from the petitioner.

The director also noted that the petitioner filed another petition with the same proffered wage. According to the director, in order to pay both beneficiaries, the petitioner would have to show surplus cash of \$57,330. The director determined that the petitioner failed to show it possessed sufficient funds.

On appeal, counsel provides a brief.

Counsel states:

The petitioner has sufficient ability to pay the proffered wage to the beneficiary. Matter of Sonegawa 11 [sic] I&N Dec 612 provides that the approval of a visa petition is not precluded by the fact that Petitioner's net profit is not commensurate with the salary expectation of the labor certification where it is found that the petitioner's business has increased, profits have increased and a continued increase in profits and business are reasonable expectations. The petitioner has

been a viable business entity since 1985. The beneficiary's tax returns previously submitted (Exhibit 1-4!), and the petitioner's accountant's letter (Exhibit 5!), provide ample and credible evidence of the petitioner's ability historically and prospectively to pay the proffered wage. The petitioner has submitted on record the previous four years business tax returns, and a letter duly signed by an accountant. A review of this evidence reveals substantial assets and capability to pay the proffered wage to the beneficiary. . . The allocation of this expense for future payroll expenditures in lieu of commissions and fees for labor expenses to be paid out by the petitioner provides sufficient assets to pay the proffered wage.

The petitioner cites Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), to support its claim. According to the petitioner, the approval of a visa petition is not prevented when the petitioner's net profit is less than the salary on the labor certification when it is determined that the petitioner's business and profits have increased and a continued increase is reasonably expected. The petitioner however, has misread and misapplied Matter of Sonegawa.

Matter of Sonegawa, supra relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case which parallel those in Sonegawa, nor has it been established that

1995 was an uncharacteristically unprofitable year for the petitioner.

The petitioner also claims that it has provided sufficient documentation to support its claim that it has the ability to pay the offered wage. While the Schedule C for 1995-1998 shows an increase in net profit, it does not indicate that this represented any real profit for the petitioner.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition.

The petitioner has also provided a letter from an alleged accountant. The letter states that the petitioner traditionally listed its business labor expenses on the commissions and fees line of the Schedule C. However, the accountant's statement is not supported by any corroborating evidence, consequently, the statement is not proof of the petitioner's ability to pay the proffered wage. No evidence other than the Schedule C for 1995-1998 were submitted to substantiate the accountant's 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).

The petitioner was also instructed to provide the beneficiary's W-2 for 1995. The petitioner responded by submitting an unsigned copy of the beneficiary's 1995 Form 1040 U.S. Individual income Tax Return. However, the record fails to determine that the Form 1099 was actually filed with the Internal Revenue Service. Absent verification that the federal tax return was filed with the Internal Revenue Service, it is simply a document which has been generated after the establishment of the priority date. Documentation created after the priority date is established is suspect at best and clearly does not establish the petitioner's ability to pay the proffered wage at the time of filing. It is the sole discretion of the Service to determine what evidence is credible and what weight the evidence will be given.

Accordingly, after a review of the documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered on October 24, 1995, 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.