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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: EAC 01 115 53057 Office: VERMONT SERVICE CENTER Date: **DEC 26 2002**

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

Petition: Immigrant Petition for Other Worker Pursuant to § 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 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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning business including tailoring and repairs. It seeks to employ the beneficiary permanently in the United States as its manager. 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 at the priority date of the visa petition and continuing to the present.

On appeal, the petitioner and counsel submit a letter, memorandum, supplement, and additional evidence. The petitioner's counsel withdrew on June 10, 2002. The Service will provide notice only to the petitioner. 8 C.F.R. 292.4(a) and 8 C.F.R. 292.5(a).

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 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is

January 14, 1998. The beneficiary's salary as stated on the labor certification is \$31,180 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage as of the priority date of the petition. On August 16, 2001, the director requested 1999 and 2000 U.S. federal income tax returns and the beneficiary's W-2 if employed.

In response, counsel submitted 1999 and 2000 Forms 1040 U.S. Individual Income Tax Returns with various schedules, including Schedule C. Counsel also submitted, for 1998, various schedules, including Schedule C, but neither Form 1040 itself nor Schedules A and B. The 1998 Schedule C reflected net income of \$9,826. and the payment of no wages. The federal tax return for 1999 showed both wages paid of \$3,863 and a profit of \$26,519.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing to the present. The director denied the petition accordingly.

On the appeal of March 22, 2002, counsel contends that the history of the petitioner's business after the priority date and his personal assets at all times must be considered. Counsel states that, in 1998, the beneficiary used personal resources to pay his salary. Their application was said to dictate approval of the petition. Counsel and the petitioner elaborate, as follows.

The petitioner submits his Affidavit on appeal in regard to personal assets. It states, pertinent to the priority date of January 14, 1998:

8. In 1998, I had personal assets, available for use in the business or to meet income needs sufficient to satisfy the wage offer, as detailed below:

Certificate of Deposit, Bank of India [88]	\$ 5,000.
Certificate of Deposit, Bank of India [21]	\$ 3,000.
Certificate of Deposit, Bank of India [83]	\$12,000.
Loan Receivable, J. & A. Desai	\$ 4,500.
Loan Receivable, D. & F. Shah	\$ 5,500.
Loan Receivable, D. & F. Shah	<u>\$10,000.</u>

Total	\$40,000
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Please see Exhibits at Tab A

Exhibits for the certificates of deposit specify, respectively, a

"value date" of January 9, 1997; February 12, 1997; and February 5, 1996. They do not confirm assets available on the priority date. The sum of certificates of deposit and the net income at \$29,826 is less than the proffered wage. Finally, five (5) checks, dated from June to October of 1999 and issued by Desai and Shah, bear the memo "borrowed money return," but no document establishes a "Loan Receivable" at the priority date of the petition.

The petitioner submits selected bank balances beginning June 14, 1999. They show a median balance of \$3,329 with individual balances fluctuating between \$16,640.68 and \$1,339.90. They do not relate to the priority date of the petition. 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).

Former counsel's Memorandum in Support of Appeal relies on the proposition that the Service must consider all of these assets. Full Gospel Church v. Thornburgh, 730 F. Supp. 441, 449 (D.C. DC 1988). None, however, demonstrably existed at the priority date of the petition. Similarly, former counsel mistakes the result in Matter of Great Wall, 16 I & N Dec. 142 (Acting Reg. Comm. 1977). In fact, that decision confirms that the petitioner must establish the ability to pay at the priority date of the petition, in this case January 14, 1998.

Former counsel concludes on appeal, "Where [the petitioner] shows reasonable expectations of increased business the application should be approved" and cites Matter of Sonogawa, 12 I & N Dec. 612 (Reg. Comm. 1967).

The Sonogawa decision relates to petitions filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in Sonogawa had been in business for over 11 years and routinely earned a gross income of about \$100,000. 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 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 1998 was an uncharacteristically unprofitable year for the petitioner.

Former counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and that it establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

The petitioner must demonstrate the ability to pay the proffered wage with particular reference to the established priority date of the petition. In addition, the petitioner must continue to demonstrate the ability to pay the proffered wage until the beneficiary obtains lawful permanent resident status. See Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532 (N.D. Texas 1989). The regulations require the same result. 8 C.F.R. 204.5(g)(2), 8 C.F.R. 103.2(b)(1), and 8 C.F.R. 103.2(b)(12).

Accordingly, after a review of the federal tax returns, 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 attains lawful permanent resident status. 8 C.F.R. 204.5(g)(2).

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.