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U.S. Department of Justice  
Immigration and Naturalization Service

RECONSIDERATION CASE ORDER TO  
EXAMINE CLEARLY UNWARRANTED  
APPEAL - RECONSIDER SERVICE

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



File: EAC 00 228 51385 Office: VERMONT SERVICE CENTER Date: 01 JUN 2002

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:  
[Redacted]

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.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS  
*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Unit

**DISCUSSION:** The employment-based preference immigrant visa petition was denied by the Director, Vermont Service Center. In response to a subsequent motion to reconsider, the director affirmed his decision to deny the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a supervisor, health care. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional documentation.

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 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 July 10, 1996. The beneficiary's salary as stated on the labor certification is \$475.00 per week which equates to \$24,700.00 per annum.

Counsel initially submitted a copy of the petitioner's 1997 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's 1997 Form 1040

reflected an adjusted gross income of \$31,350. Schedule C reflected gross receipts of \$275,400; gross profit of \$275,400; depreciation of \$0; wages of \$0; and net profit of \$30,136. The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage.

On November 16, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of July 10, 1996, to include the complete federal tax return for 1996.

In response, counsel submitted a copy of the petitioner's 1996 sole proprietorship's Schedule C, Profit or Loss from Business Statement and bank statements for the period ended from June 31, 1996 through December 31, 1996. On Schedule C the business declared gross receipts of \$272,800; gross profit of \$272,800; depreciation of \$0; wages of \$0; and a net profit of \$32,775.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that there was no way to determine the petitioner's ability to pay the proffered wage from the submission of Schedule C alone.

On appeal, counsel argues that the bank statements submitted for six months in 1996 is evidence that the petitioner is able to afford this employee. Counsel further argues that "the employer's business has increased, there are reasonable expectations of continued increase in business and profits, and the employer has the present ability to meet the wages stipulated in the labor certification."

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) 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 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 Sonogawa 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 1996 was an uncharacteristically unprofitable year 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 record does not contain any evidence of the petitioner's personal expenses nor does it show that the petitioner had other income or assets with which to pay the proffered wage. The petitioner's adjusted gross income in 1996 was not included in the evidence submitted and, therefore, is it is impossible to determine if the petitioner had income sufficient to pay the beneficiary and meet any expenses incurred by the petitioner and his family.

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.

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 at the time of filing of the petition and continuing to present.

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.