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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

[redacted]

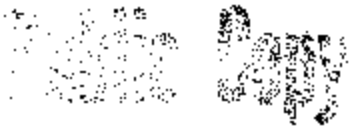
File: EAC 01 018 51454 Office: Vermont Service Center Date: MAY 29 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]



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, 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 the filing date of the visa petition.

On appeal, counsel provides a statement and requests 60 days in which to submit a brief and/or evidence to the AAO. No further documentation, however, has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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 January 14, 2000. The beneficiary's salary as stated on the labor certification is $18.69 per hour (35 hour week) or $34,379.80 per

annum.

Counsel initially submitted copies of the petitioner's bank statements for the period from December of 1999 through June of 2000.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On June 12, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 14, 2000, to include the petitioner's 1999 corporate income tax return.

In response, counsel submitted a copy of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation, and copies of the petitioner's bank statements for the period from December 28, 1999 through January 28, 2000. The 1999 federal tax return reflected gross receipts of $173,812; gross profit of $89,872; compensation of officers of $4,699; salaries and wages paid of $19,670; depreciation of $4,164; and an ordinary income (loss) from trade or business activities of $1,378.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the petitioner has established its ability to pay the proffered wage in 2000 because its bank statements, assets, capital, and depreciation exceeded the wage offered. Counsel further argues that "under Matter of Sonegawa, 12 I&N Dec.612 (BIA 1962), where net profit for previous year is not commensurate with the salary specifications, a visa petition may be approved where it is shown that business increased and expectations of continued increase of business and profits are reasonable expectations."

Matter of Sonegawa, 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 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.

Counsel has provided no evidence which establishes that unusual circumstances existed in this case which parallel those in Sonegawa, nor has it been established that 2000 was an uncharacteristically unprofitable year for the petitioner.

The petitioner's Form 1120S for the 1999 calendar year shows that its ordinary income was $1,378. The petitioner could not pay a proffered wage of $34,379.80 per year out of this income.

Regarding the bank statements, the submission of such evidence does not persuade the Service that the petitioner, itself, has the ability to pay the proffered wage. In Elatos Restaurant Corp., etc. v. Sava, 632 F. Supp. 1049 (S.D.N.Y. 1986), the court held that the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in K.C.P. Food Co., Inc. v. Sava, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage.

No additional evidence has been received to date. Accordingly, after a review of the federal tax return furnished, 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.