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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



File: EAC 01 238 52947

Office: VERMONT SERVICE CENTER

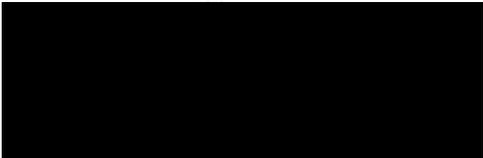
Date: DEC 10 2003

IN RE: Petitioner:
Beneficiary:



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)

ON BEHALF OF PETITIONER:



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 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.

Almase for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen and/or reconsider. The motion will be granted. The prior AAO decision is affirmed and the petition will be denied.

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 priority date of the visa petition. The AAO affirmed this determination on appeal.

Counsel submits a motion to reopen and/or reconsider with new documentation. Pursuant to 8 C.F.R. § 103.5(A)(2), a motion to reopen must: "state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must:

state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel asserts on motion that the petitioner qualifies for reopening/reconsideration based on the submission of new evidence in the form of the petitioner's recent tax returns, which when analyzed will show a reasonable expectation of continued increase in business and profits. Additionally, counsel submits a payroll record, dated August 2002, for "the current incumbent in the position." Counsel further asserts that the prior AAO decision was incorrect due to a misapplication of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel has met the regulatory requirements for reopening and reconsideration based on the submission of new evidence and assertion of misapplication of law, respectively. Thus, the motion is granted.

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 May 18, 2000. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

The record of proceeding contains the petitioner's 1999 Internal Revenue Service (IRS) Form 1120 for the fiscal year July 1, 1999 through June 30, 2000 which reflected gross receipts of \$426,386.00; gross profit of \$283,249.00; compensation of officers of \$55,500.00; salaries and wages paid of \$38,988.00; and a taxable income before net operating loss deduction and special deductions of -\$3,226.00. The record of proceeding also contains the petitioner's unaudited financial statement for the period ended June 30, 2001. The unaudited financial statement is not evidence meeting regulatory requirements set forth at 8 C.F.R. § 204.5(g)(2) which clearly establishes that only audited financial statements may be considered in connection with the petitioner's ability to pay wages. Additionally, the director and the AAO correctly determined that the petitioner could not pay a proffered wage of \$23,854.60 per annum with a taxable income of -\$3,266.00.

On motion, counsel submits a copy of the petitioner's Internal Revenue Service (IRS) Form 1120 for the fiscal year beginning July 1, 2001 and ending June 30, 2002 which shows a taxable income of \$19,787.00 and net current assets of \$24,194.00.

Counsel asserts that the new evidence illustrates that the size of the employer's business has increased. Counsel suggests that there

are reasonable expectations of continued increase in business and profits enabling the employer with the present ability to meet the wages stipulated in the labor certification. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) as analogous to the instant petition.

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.

Contrary to counsel's assertions, the petitioner has provided no evidence which establishes that unusual circumstances exist in this case which parallel those in *Sonogawa*, nor has it been established that 2000 was an uncharacteristically unprofitable year for the petitioner. The tax return for fiscal year from July 1, 2001 through June 30, 2002 shows net current assets of \$24,194.00. The petitioner could pay a salary of \$23,857.60 a year from this figure, however, the petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Thus, the petitioner has failed to establish the regulatory criteria set forth at 8 C.F.R. § 204.5(g)(2).

On motion, counsel also submits a payroll record for an Esther Quispe indicating accrued salary earnings received from the petitioner totaling \$17,100.00 from January until August 2002. Counsel states in her motion that this payroll record is for the "current incumbent in the position." Counsel also references a high turnover rate in the petitioner's restaurant business but "at any given time there is a cook earning at or near the prevailing wage offered." Counsel previously stated on appeal that "[t]he employer established ability to pay with credible statement (sic) that it intends to replace incumbent in position upon aliens (sic)

receipt of employment authorization." At the outset, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

When this case was before the director, evidence was requested concerning the position as follows:

Will the prospective employee fill a newly created position? ____ If your answer is no, how long has this position existed? ____ What wage have you been paying the incumbent to this position? ____/year. Identify the former employee, submit evidence of the salary paid to him or her, and document that the position was vacated. Submit copies of Form 941 for the period in question.

With counsel's response to the director's request for evidence, an unidentified individual handwrote answers to the director's questions on the face of the request, answering that the position is not new and has existed since 1992, and that wages of \$22,000 per year had been paid to the incumbent in the position. Additionally, a handwritten response stated that "[t]here is no 941 because the incumbent has not vacated the position. The incumbent will not vacate position yet because alien is not yet authorized to work."

Contrary to counsel's assertions, the record does not contain a statement from the petitioner concerning its intention to replace the incumbent. The individual who handwrote answers on the director's request for evidence did not identify him/herself. There is no evidence in the record concerning the identity of the incumbent in the position that would be offered to the beneficiary. There is no evidence that Esther Quispe holds the position of cook at the petitioner's restaurant. Additionally, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to present.

Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage *at the time of filing* the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). (emphasis added). Therefore, the petition can not be approved.

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 sustained that burden.

ORDER: The AAO's previous decision of August 2, 2002, is affirmed. The petition is denied.