

U.S. Department of Homeland Security

Citizenship and Immigration Services

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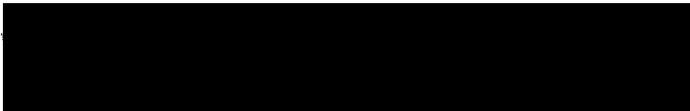
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536



NOV 25 2003

File: EAC 02 036 53193 Office: Vermont Service Center Date:

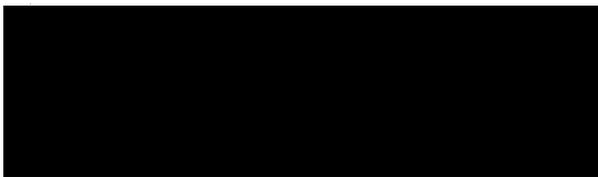
IN RE: Petitioner:
Beneficiary:



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.

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 Administrative Appeals Office 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 priority date of the visa petition.

On appeal, counsel submits a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. To date, however, no further documentation 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 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 10, 1999. The beneficiary's salary as stated on the labor

certification is \$11.47 per hour or \$23,857.60 per annum.

Counsel submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for fiscal year from September 1, 1999 through August 31, 2000 which reflected gross receipts of \$1,358,873; gross profit of \$801,461; compensation of officers of \$0; salaries and wages paid of \$196,354; and a taxable income before net operating loss deduction and special deductions of - \$35,685.

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

...you submitted one page from the 1997 U.S. Corporation Income Tax Return for the year ending August 31, 1998; a statement of your revenues and expenses for the twelve months ended August 31, 1999; a statement of your assets for August 31, 1999; the 2000 U.S. Return of Partnership Income Form 1065 for October 1, 2000 to December 31, 2000; the 2001 U.S. Return of Partnership Income Form 1065 for 2001, three Employer's Quarterly Federal Tax Returns; two Virginia Employer's Quarterly Tax Reports; and State Tax Rates Notices for 1991 and 1997. Although requested and mention is made by the attorney of record to figures on it, the 1998 U.S. Corporation Income Tax Return for the year ending August 31, 1999 was not submitted.

On appeal, counsel argues that:

INS should have considered employee's ability to generate income when determining the employer's ability to pay salary---especially since the position offered is the core of the employer's business, i.e., a cook in an Italian restaurant.

M. of Great Wall, 16 I&N Dec 142 (1977), - M. of Sonogawa, 12 I&N Dec 612 (1967) Masonry Masters Inc. v. Thornburgh, 875 F.2d 898 (DC Cir. 1989).

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 *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 1999 was an uncharacteristically unprofitable year for the petitioner.

Matter of Masonry Masters, Inc. v. Thornburg, 875 F.2d 898. D.C. circ. 1989 is a decision that is not binding outside the District of Columbia. It does not stand for the proposition that a petitioner's unsupported assertions have greater evidentiary weight than the petitioner's tax returns. The court held that CIS should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not provided evidence that there is a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia.

The petitioner's Form 1120 for fiscal year from September 1, 1999 through August 31, 2000 shows a taxable income of -\$35,685. The petitioner could not pay a proffered wage of \$23,857.60 a year out of this income.

No additional evidence of the petitioner's ability to pay the wage offered has been received. Accordingly, after a review of the evidence submitted, 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.

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.