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U.S. Department of Homeland Security  
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Washington, DC 20536

U.S. Citizenship  
and Immigration  
Services



FILE:



Office: VERMONT SERVICE CENTER

Date: APR 28 2004

IN RE:

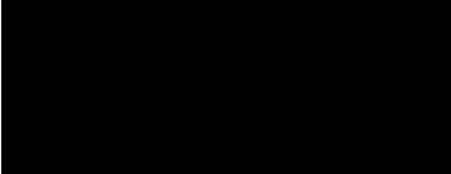
Petitioner:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was initially denied by the Director, Vermont Service Center. The director determined that the petitioner had failed to establish its continued ability to pay the proffered wage as of the visa priority date. The Administrative Appeals Office (AAO) affirmed this decision on appeal. The petitioner and beneficiary (plaintiffs) subsequently commenced an action for declaratory judgment in the U.S. District Court for the District of New Jersey (*Delta Fence Co., Inc. and Bermudez v. United States, et al.*, CV-99-3199).

Pursuant to an order from the court, based upon the stipulation and consent of the parties, the case was remanded to the AAO on April 5, 2000, for further consideration. The court's order included three conditions: 1) that [REDACTED] Inc. (the petitioner herein) provides written consent to the U.S. Attorney's Office to obtain the petitioner's federal tax returns; 2) that the plaintiffs would be permitted to submit additional evidence relevant to whether the petitioner had the ability to pay the beneficiary's proposed wages as of July 3, 1996; and 3) that the AAO might request additional evidence from the plaintiffs relevant to the same issue of the petitioner's ability to pay the proffered wage.

The petitioner had sought the beneficiary's classification as an employment-based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petitioner is a fencing installation company. It sought to employ the beneficiary as a combination welder. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor. The proffered wage as of the visa priority date of July 3, 1996, is \$16.10 per hour or \$29,302 per annum, based on a 35-hour week.

Pursuant to the district court's order, the AAO reopened the case on November 27, 2000. The AAO noted that Form ETA-750, Part B, Statement of Qualifications of Alien indicated that the petitioner had employed the beneficiary since June 1990. The AAO requested the petitioner to provide evidence of the wages earned by the beneficiary for the years 1990 to the present in the form of Wage and Tax Statements, (W-2s), Internal Revenue Service Form 1099, Miscellaneous Income, or any other payroll or accounting records that clearly show both the petitioner's and the beneficiary's names. The AAO requested the petitioner to submit this evidence within thirty days.

To date, more than three years later, the record shows that the petitioner failed to submit the evidence requested by the AAO on November 27, 2000. The regulation at 8 C.F.R. § 103.2(b)(13) provides that an application may be considered abandoned if the requested additional evidence is not submitted by the required date. A petition may also be denied because of failure to submit requested evidence that precludes a material line of inquiry. 8 C.F.R. § 103.2(b)(14). In view of the petitioner's failure to respond to the request for evidence of the beneficiary's claimed employment, the AAO cannot approve this petition.<sup>1</sup>

It is further noted that in the context of the petitioner's federal tax returns submitted to the record by the Assistant U.S. Attorney, the AAO cannot conclude that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable in this case. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful

<sup>1</sup> The plaintiffs submitted no other evidence to the record following the remand by the district court.

operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. 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 unique circumstances have been shown to exist in this case, which parallel those in *Sonegawa*. Rather, the petitioner's federal tax returns for the years 1992 through 1998, submitted to the record by the U.S. Attorney, reflect a generally uneven or declining net income; \$10,353 in 1992; \$84,038 in 1993; \$43,271 in 1994; \$29,511 in 1995; -\$26,199 in 1996; \$22,143 in 1997; and -\$12,235 in 1998.<sup>2</sup>

In view of the foregoing, the AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the beneficiary's proffered wage as of the visa priority date of July 3, 1996. The petitioner has not sustained its burden of proof to establish eligibility for the visa classification sought. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The AAO's prior dismissal of the appeal is reinstated. The petition remains denied.

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<sup>2</sup> It is additionally noted that neither the petitioner's 1996 net income of -\$26,199, nor its net current assets of \$8,837 (as shown on Schedule L) could cover the beneficiary's proffered wage, prorated to \$14,530.