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U.S. Citizenship  
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Services

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B6

DATE: JAN 11 2012

Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The director subsequently denied a motion to reconsider. The matter is now before the AAO on appeal. The AAO withdraws the director's decision and remands the case for further investigation and review and entry of a new decision.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as an Italian food cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).<sup>1</sup> As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established its continuing financial ability to pay the proffered wage,<sup>2</sup> and denied the petition on July 10, 2008.

On August 8, 2008, counsel filed a Form I-290B designated as a motion to reconsider. In the attached brief, he also characterizes the motion as a motion to reopen.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

Upon review of the motion, the director found that the petitioner had not provided sufficient evidence for USCIS to reopen or reconsider and denied the motion on September 8, 2008.

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<sup>1</sup> In pertinent part, section 203(b)(3)(A)(i) of the Act 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 nature, for which qualified workers are not available in the United States.

<sup>2</sup> The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The AAO does not concur as to the director's decision on counsel's motion to reconsider. Although no new evidence was submitted to support a motion to reopen, the petitioner's counsel raised assertions related to the proration of the proffered wage in 2005 and also cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the petition's approval.<sup>3</sup> The director should articulate his reasons to deny the petition in response to these specific assertions raised by counsel. For this reason, the director's denial of counsel's motion to reconsider is withdrawn and the case will be remanded to the director for further consideration and review of the record which should include his specific responses to counsel's motion for reconsideration.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director.<sup>4</sup> Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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<sup>3</sup> *Matter of Sonogawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however 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 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 petitioner had 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.

<sup>4</sup> In reviewing the record, the director should also inquire into the viability of the corporate petitioner since a new visa petition has been approved for the restaurant that uses a different corporate identification number and a different corporate name and address. Other matters such as the beneficiary's experience letter and the petitioner's ongoing ability to pay the proffered wage may also be addressed.