



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: Texas Service Center

Date:

AUG 16 2000

IN RE: Petitioner:
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:



Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a country club which seeks to employ the beneficiary permanently in the United States as a sports instructor. 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 July 25, 1996, the filing date of the visa petition.

On appeal, counsel provides a brief and additional evidence.

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 July 25, 1996. The beneficiary's salary as stated on the labor certification is \$10.50 per hour or \$19,110 annually (35 hour work week).

Counsel initially failed to submit any documentation of the petitioner's ability to pay the proffered wage at the time of filing the petition. On May 28, 1999, the director requested evidence of the petitioner's ability to pay the proffered wage as of July 25, 1996 and continuing to the present.

In response counsel submitted copies of the petitioner's 1996, 1997 and 1998 Form 990 Return of Organization Exempt From Income Tax. The 1996 return reflected total revenue of \$570,219.21; total expenses of \$614,984.81; and a deficit of \$44,765.60. Part IV of the form reflects total current assets of \$91,396.98 with a loss of \$5,596.04 in cash and total current liabilities of \$57,481.65.

The 1997 return reflected total revenue of \$445,142; total expenses of \$598,012; and a deficit of \$152,870. Part IV of the form reflects total current assets of \$83,626 with \$3,551 in cash and total current liabilities of \$53,950.

The 1998 return reflected total revenue of \$491,228; total expenses of \$558,771; and a deficit of \$67,543. Part IV of the form reflects total current assets of \$75,788 with a loss of \$4,272 in cash and total current liabilities of \$65,403.

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 and denied the petition accordingly.

On appeal, counsel provides a letter from the general manager of the business and a financial report for the 12 months ending December 31, 1998 and December 31, 1997.

Counsel states:

... [REDACTED] Country Club is a long term, viable employer. It has been in continuous operation for more than 75 years. Membership increased by 30% during 1999. Net profit increased by more than \$100,000 in 1998 over 1997. The Club has engaged in a capital improvement campaign since its new management in October 1998. This is an employer that is in business for the long haul and who clearly has the ability to pay the wages offered the beneficiary in the instant position. In fact, the increased revenues generated by the presence of a Tennis Coach at the Club will more than offset her salary of a mere \$10.50 per hour.

The general manager for the business reports:

Our Club has been in continuous operation since 1922. We are a stable organization, and have no intention of closing. While we have experienced difficulties in these past few years that have resulted in serious loss in revenue as well as valuable members, the Club came under new management in October, 1998, and the old practices have been replaced with innovative and positive ideas. We are investing in the Club - hiring a new Executive Chef, building all new cart paths on the golf course, and internal improvements in the Clubhouse to name a few. These things have brought about a dramatic turnaround which has been evidenced by an increase of thirty percent in membership in 1999. We fully expect this trend to continue.

A review of the 1996 tax return reflects that the petitioner had a deficit of \$44,765.60 and a cash loss of \$5,596.04. Depreciation was \$29,025.14, not enough to overcome the deficit and the cash loss.

A review of the 1997 tax return reflects that the petitioner had a deficit of \$152,870 and cash of \$3,551. Depreciation was \$26,238. The depreciation and the available cash together was not enough to overcome the deficit.

A review of the 1998 tax return reflects that the petitioner had a deficit of \$67,543 and a cash loss of \$4,272. Depreciation was \$23,953, not enough to overcome the deficit and the cash loss.

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 1996 was an uncharacteristically unprofitable year for the petitioner.

Accordingly, after a review of the Forms 990 and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered since the filing 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.