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"Identifying data deleted to prevent clearly unwarranted invasion of personal privacy."

U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 99 270 50246 Office: Vermont Service Center Date: 28 JUN 2002

IN RE: Petitioner: [redacted]
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:

[redacted]

Public Copy

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

Helen E. Crawford 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 Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently as a manager of food services. 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 proffered wage as of the filing date of the petition.

On motion, counsel submits 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 January 13, 1998. The beneficiary's salary as stated on the labor certification is $26,000 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition. The Associate Commissioner further noted that the record contained a letter from the president of the petitioning entity which stated that the beneficiary was not employed by the company in 1998 and 1999.

On motion, counsel submits copies of the beneficiary's W-2 Wage and Tax Statement which shows she was paid $25,500 in 1998 and $25,000 in 1999. Other than the statement "notwithstanding the alleged statement of the President of [redacted] that [redacted] Patel was not employed by the petitioner during 1998 and 1999, the Service has already viewed a W 2 for 1999 that contains her name," no other explanation for the statement by the president of the petitioning entity that the beneficiary did not work for the entity in 1998 and 1999 has been submitted.

Counsel further argues that Matter of Sonegawa pertains to the instant case.

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 [redacted] 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 1998 was an uncharacteristically unprofitable year for the petitioner.

The petitioner's tax return for calendar year 1998 shows an ordinary income of $25,920. The petitioner could not pay a salary of $26,000 a year from a negative income.

The petitioner's tax return for calendar year 1999 shows an ordinary income of -$19,688. The petitioner could not pay a salary of $26,000 from a negative income.

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 Associate Commissioner's decision of July 30, 2001 is affirmed. The petition is denied.