

BG

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536



File: WAC 99 160 52701

Office: CALIFORNIA SERVICE CENTER

Date: MAR 26 2003

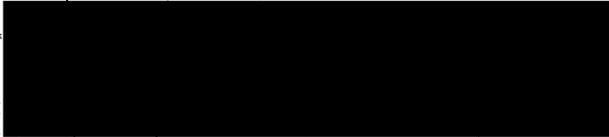
IN RE: Petitioner:
Beneficiary:



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)

PUBLIC COPY

ON BEHALF OF PETITIONER:



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 the Bureau of Citizenship and Immigration Services (Bureau) 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an Indian style restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

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 April 3, 1996. The beneficiary's salary as stated on the labor certification as amended is \$11.29 per hour or \$23,483.20 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage at the priority date and continuing to the present. On July 5, 2000, the director requested additional evidence to establish that the petitioner had

the ability to pay the proffered wage to the beneficiary.

In response, counsel submitted copies of the petitioner's 1996, 1997, and 1998 Schedule C Profit or Loss from Business (Sole Proprietorship), apparently extracted from Form U.S. 1040 Income Tax Returns. The extract for 1999 followed with the appeal. They showed from 1996 to 1999, respectively, net loss of (\$3,264) and (\$2,610) and net profit of \$11,375 and \$4,860.

The director concluded that the petitioner's evidence did not establish the ability to pay the proffered wage at the priority date of the petition and denied the petition on September 19, 2000. Counsel objected to certain of the director's computations, called attention to increasing gross receipts, and filed a motion to reconsider on October 23, 2000.

The director granted the motion to reopen, but determined that the petitioner did not have sufficient income to pay the beneficiary's wage at the time the priority date was established. The petition was, again, denied on December 11, 2000.

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Reliance on that authority is misplaced. It 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. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 1996 was an uncharacteristically unprofitable year for the petitioner.

The petitioner acknowledges only "a little setback" from the establishment of a Bureau facility next to the restaurant and does not connect it to the priority date of the petition.

Counsel contends that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or that his reputation would increase the number of customers.

Counsel argues that:

... The petitioner has also declared that the wages and expenses he charged to himself would have been waived and used to pay the beneficiary's wages. Over the years, the wages and expenses charged to appellant would have been enough to pay beneficiary's wages...

The record does not establish the amounts. Even if it did, the petitioner already expended them. They were not available, therefore, to apply to the beneficiary's wages at the priority date of the petition or continuing to the present.

Moreover, there is no evidence that the position of the owner involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). See also *Matter of Great Wall*, 16 I&N Dec. 142, 145; *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The regulations require the same result. 8 C.F.R. § 204.5(g)(2) and 8 C.F.R. § 103.2(b)(1) and (12).

Counsel further contends that appellant has been in business for over seven (7) years and has seen a steady increase in gross receipts for the business and a return to profitability. Counsel concludes that the petitioner's situation, regarding the totality of the evidence, warrants the approval of the petition. It is

not, however, reasonable to consider assets and gross income without reference to the liabilities and expenses incurred to generate that income. The court has rejected the argument that the Bureau should consider income before expenses were paid rather than net income. The petitioner must establish the ability to pay the proffered wage when the petition is filed, as well as the time it is adjudicated. *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985). See also *Chi-Feng Chang v. Thornburgh*, *supra*.

Although the petitioner submitted Schedule C of Form 1040 U.S. Individual Income Tax Return, the remainder of the federal tax return is not available. Consequently, the AAO cannot determine whether other assets of the sole proprietor of the petitioner might support the ability to pay the proffered wage.

After a review of the federal tax returns, 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 and continuing until the beneficiary obtains lawful permanent residence.

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.