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.
BCIS, AAO 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: WAC 02 052 53973 Office: California Service Center Date: MAY - 6 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

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.

Helen E. Crawford for

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 a board and care facility. It seeks to employ the beneficiary permanently in the United States as a board and care manager. 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 the priority date of the visa petition.

On appeal, counsel submits a brief.

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 November 13, 1997. The beneficiary's salary as stated on the labor certification is $2,060.00 per month or $24,720.00 per annum.

Counsel submitted copies of the petitioner's 1997 through 2000 Form

1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's 1997 Form 1040 reflected an adjusted gross income of $17,299. Schedule C reflected gross receipts of $37,800; gross profit of $37,800; wages of $0; and a net profit of -$4,583. The petitioner's 1998 Form 1040 reflected an adjusted gross income of $29,170. Schedule C reflected gross receipts of $45,600; gross profit of $45,600; wages of $0; and a net profit of -$565.

The petitioner's 1999 Form 1040 reflected an adjusted gross income of $21,059. Schedule C reflected gross receipts of $55,600; gross profit of $55,600; wages of $0; and a net profit of $11,909. The petitioner's 2000 Form 1040 reflected an adjusted gross income of $38,396. Schedule C reflected gross receipts of $45,130; gross profit of $45,130; wages of $0 and a net profit of $3,770.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's Form 1040 reflected an adjusted gross income of $66,859. Schedule C reflected gross receipts of $55,250; gross profit of $55,250; wages of $0; and a net profit of $10,276

Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967).

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 1997 was an uncharacteristically unprofitable year for the petitioner.

The tax return for calendar year 1997 shows an adjusted gross income of -$4,583. The petitioner could not pay a salary of $24,720.00 a year out of this figure.

In addition, the tax return for 1999 also shows an inability to pay the wage offered. While the petitioner has established the ability to pay the beneficiary's salary in 1998, 2000, and 2001, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

Accordingly, after a review of the federal tax returns for 1997 and 1999, 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 to present.

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.