circumstances in which the Respondent took his decision to end the Applicant's services.

As regards secretarial costs, the Applicant received much help from UNRWA itself until mid-August 1983, but since then he has incurred some expenditure and the Tribunal notes that he was not assisted by counsel from the United Nations panel.

XII. In accordance with the above considerations, the Tribunal

(*a*) does not consider that allegations of prejudice have been established;

(*b*) considers that procedural difficulties have not deprived the Applicant of due process or vitiated the course of justice, but that his rights of rebuttal have not been fully respected, and so orders the Respondent to pay the Applicant a sum of $US 2,000;

(*c*) orders the Respondent to pay the Applicant $US 500 for secretarial costs, and

(*d*) dismisses all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Luis M. de POSADAS MONTERO
Member

Herbert REIS
Member

Jean HARDY
Executive Secretary

Geneva, 28 May 1984

Judgement No. 332

(Original: English)

Case No. 307:
San José

Against: **The Secretary-General of the United Nations**

Request by a locally recruited staff member of the United Nations to rescind the decision denying support for the application for a United States G-5 visa for a domestic servant.

Conclusion of the Joint Appeals Board that the practice of the Visa Committee of distinguishing between locally recruited non-United States nationals and internationally recruited staff was flawed from the standpoint of equity and principles of good administration.—Recommendation of the Board that the practice be reviewed and that meanwhile the Applicant's application be considered applying the same standards to all applications.—Recommendation rejected.

Question whether the denial complained of could amount to non-observance of the Applicant's contract of employment or her terms of appointment within the meaning of article 2.1 of the Tribunal's statute.—Conclusion of the Tribunal that the procedure by which requests for a visa application were screened by the Visa Committee was a term of the Applicant's appointment.—Decision of the Tribunal that it is competent.

Respondent's contention that the privileges of the United Nations are granted solely in the interest of the Organization and that no staff member has a right to any of these privileges.—Contention accepted.—Finding of the Tribunal that the revised terms of reference of the Visa Committee, by excluding the consideration of all applications from locally recruited staff who are almost invariably General Service staff, amounted to discrimination and were a denial of due

process of law.—Applicant's contention that the Respondent gave no consideration to her acquired rights.—In view of its aforementioned conclusion the Tribunal finds it unnecessary to examine this contention.

The Tribunal orders the rescinding of the decision and the submission of the request to the Visa Committee for consideration on merits.—Award of compensation equal to three months' net base salary in case the Secretary-General decides that the Applicant should be compensated without further action being taken.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Luis M. de Posadas Montero; Mr. Roger Pinto;

Whereas at the request of Mrs. Evelina T. San José, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 February 1983 the time-limit for the filing of an application to the Tribunal;

Whereas, on 11 February 1983, the Applicant filed an application the pleas of which read as follows:

"1. The staff member appeals to the Administrative Tribunal to consider her case, made with great care and attention and in considerable detail to the Joint Appeals Board, and upheld by such Board, and order the Secretary-General to implement paras. 73 to 75 of the Board's report.

"2. The staff member also urges the Administrative Tribunal to rescind the original decision of the Secretary-General against her, whereby she will be denied a G-5 visa for a domestic servant to assist her family enabling her and her husband more easily to pursue their respective jobs in the United Nations.

"3. The staff member requests the Administrative Tribunal publicly to recognize the acquired rights of the staff member under the Staff Rules, since having previously enjoyed the grant of a G-5 visa in accordance with U.S. laws and through the intermediary of the United Nations, she should be able to continue to enjoy such privilege, it not having been withdrawn from her through any direct action of the U.S. government of which she is aware but rather through the arbitrary decision of the United Nations Secretary-General.

"4. The staff member also requests the Administrative Tribunal to consider in detail the relevant parts of the new instruction of the Secretary-General to the staff regarding visas.";

Whereas the Respondent filed his answer on 5 May 1983;

Whereas the facts in the case are as follows:

The Applicant, a national of the Philippines, entered the United States on a tourist visa and, while in New York, joined the United Nations on 28 February 1966 as a locally recruited staff member in the General Service category, whereupon she received a United States G-4 visa as an employee of an international organization. On 24 June 1967 she married another locally recruited General Service staff member, also of Philippine nationality and holder of a G-4 visa. On 17 October 1967 the Applicant submitted to the Office of Personnel Services, through the Visa Committee, a form (PT.62(10-66)) requesting a G-5 visa for a Miss Ricario, a Philippine national, to enter the United States as her household employee in accordance with the terms of

reference of the Visa Committee as set out in the annex to the Secretary-General's Bulletin ST/SGB/131 on the Organization of the Secretariat which stated:

> "Examines requests for visas in respect of members of the household of non-United States Staff members other than their spouse or children under twenty-one, in accordance with the principles established by the Office of the Legal Counsel in consultation with the United States Mission to the United Nations."

The reverse side of the form provided the following information:

> "1. Such persons are granted entry to the United States under the U.S. Immigration and Naturalization Act of 1952. Upon the approval of the Office of Personnel, the United Nations Purchase and Transportation Service requests a United States Consulate to grant a visa under this Act: a G-4 visa for family members, and G-5 for household employees.
>
> "2. The staff member is responsible for keeping the Office of Personnel informed of all members of his family and any household employee residing in the United States. This is important so that they may be properly registered with the Department of State of the United States Government. As an immediately practical matter, unless they are so registered, they will not be entitled to renewal of visa, or to certain immunities and privileges. The Office of Personnel and the Executive Office of the staff member are to be provided with the following information: full name, relationship to staff member, age, date of entry to the United States, port of entry, means of transportation, passport number and visa number.
>
> ". . .
>
> "4. Before a request is forwarded to a U.S. Consulate for a visa for a household employee, it will be necessary for the staff member:
>
> "(i) to file with the Office of Personnel (by signing this form) a statement to the effect that the staff member will be responsible for the employee including the cost of repatriation in the event of the employee leaving the staff member's service.
>
> "(ii) to provide the following information to the prospective employee: (*a*) An indication of the prevailing wages of household employees and of the cost of living in the New York area; (*b*) The general conditions of employment, including the board and lodging to be provided, the number of members of the household, and the functions to be performed; (*c*) That he/she is required to live in the same household.
>
> "5. A G-5 visa for a household employee is normally granted on a yearly basis (sometimes six months) and is likely, therefore, to need renewal. It is most important that the Office of Personnel be provided with the information mentioned in paragraph 2 above so that it may be duly transmitted to the appropriate United States authorities and be readily available when renewal is requested. Thirty days before the expiration date of the visa of the household employee, an "Application to Extend Time of Temporary Stay" form (U.S. Department of Justice, Immigration and Naturalization Service Form I-539) must be filed with the Immigration and Naturalization Service. A carbon copy of this Form (I-539) should be sent to the Office of Personnel for the records.
>
> ". . ."

On 30 October 1967 the Visa Committee approved the request and on 31 October 1967 the United Nations Purchase and Transportation Service requested the United States Embassy at Manila to issue a G-5 visa to Miss Ricario. On 1 February 1968 the Applicant received a permanent appointment. On 29 December 1969 the Chairman of the Visa Committee addressed to the Director of Personnel a memorandum entitled "New policy of Visa Committee concerning G-5 visas" in which he informed him of a new practice concerning G-5 visas which the Visa Committee had been applying lately on a trial basis. After noting that the United States legislation allowed any United Nations staff member on a G-4 visa to bring into the country his attendant servants and personal employees on G-5 visas and that the Visa Committee had been approving all G-5 applications which appeared to satisfy the minimum requirements, whether submitted by international recruits or local recruits, the Chairman of the Visa Committee stated:

"The UN does establish a clear distinction between local recruits and international recruits. It grants to the latter specific entitlements not accorded to the first, such as travel and removal costs upon recruitment, installation grant, home leave, repatriation grant and return travel and removal upon separation. These entitlements clearly recognize the expatriate status of the staff member and the responsibility of the Organization therefor.

"The Terms of Reference of the Committee also provide that the importation of a household employee should bear a reasonable relationship to the expatriate status of the staff member. This relationship, which is clear in the case of international recruits, does not exist in the case of local recruits, who have entered the United States on their initiative and found employment at the UN while on a tourist or student visa status.

"*Other consideration*

"The Visa Committee had been observing for a considerable period of time the development of certain trends which have disturbing implications. It believes that if these trends are allowed to continue unchecked they may sooner or later have an adverse effect on the good name of the UN and on its relations with the host country. It noted that more applications were submitted by General Service than by Professional staff, that an abnormal proportion of applications in the first group came from nationals of countries where great numbers of persons are seeking to enter into the United States as immigrants, that practically all applicants had entered the U.S. on tourist or student visas, had secured UN employment and, shortly after converting to G-4 visa status, had applied for household help often for the purpose of freeing both spouses for employment. In most cases, the spouse of the UN staff member is also on G-4 visa status which normally precludes the acceptance of remunerated employment in the U.S. It should be noted that in the past the U.S. authorities have been extremely liberal in this area by permitting such employment without specific restrictions. However, this has been clearly understood to be an act of tolerance, not the recognition of a right. Lately the U.S. Mission has tended to be more restrictive. It is now authorizing the employment of G-4 visa holders only when it conforms with the regulations of the Department of Labor. Under these regulations non-immigrants can be gainfully employed only when American citizens or residents are not available or qualified to fill a given job. Since the chances of non-compliance with these requirements are numerous, the UN might unwittingly be put in the position of facilitating

the violations of the host country's labour and immigration laws if it continues to sponsor the importation of domestics by locally recruited staff.

"The Committee also noted that several locally recruited staff members had had a succession of servants on G-5 visas who had remained—illegally—in this country after leaving the service of the original employers. In this connexion, informal exchanges have taken place with the U.S. Mission on the advisability of demanding the posting of a bond by the employer to cover the cost of repatriation of the domestic servant imported on G-5 status.

"In view of the above, the Committee has decided not to process, in general, G-5 visa applications submitted by locally recruited staff. It feels that, as a rule, locally recruited staff who are holders of G-4 visas should be treated as other locally recruited personnel (U.S. residents and U.S. citizens). It recognizes, however, that exceptions may be justified when special circumstances are present.

"It would be difficult to make a comprehensive list of situations meriting exceptional treatment. The Committee thinks, however, that the common denominator to look for would be the existence of humanitarian reasons. Each case would be considered on its own merits within this framework.

". . ."

On 17 August 1971 the Applicant reported to the Office of Personnel Services that Miss Ricario had disappeared leaving no trace of her whereabouts; she requested authorization to bring a new household helper to assist her in her household chores and baby-sit her two children aged 3 1/2 and 1 1/2 respectively. On 30 September 1971 she submitted a form (PT.62(8-68)) requesting a G-5 visa for a Miss de la Vega, a Philippine national, to enter the United States as her household employee and on 3 November 1971 the Visa Committee approved the request. On 17 May 1974 the Applicant advised the Office of Personnel Services that Miss de la Vega had disappeared the previous month leaving no trace of her whereabouts. On 12 June 1976 the terms of reference of the Visa Committee were amended as follows:

"Examines requests for visas in respect of family members of non-United States staff members other than their spouse or children under 21 years of age or in respect of household employees of internationally recruited staff members who are holders of G-4 visas, in accordance with the principles established by the Office of Legal Affairs in consultation with the United States Mission to the United Nations."

On 7 February 1979 the Applicant submitted to the Visa Committee the following request for a G-5 visa for a household employee:

"1. My former household helper had left my employ five years ago leaving no trace of her whereabouts and the matter was reported to the Personnel Officer.

"2. My health has been poor lately and have decided to bring a new household helper to assist me in our household chores, especially baby-sitting of our three children, aged 10, 8 and 7.

"3. In view of the above, I would respectfully request that permission be granted for the replacement of household employee."

On 13 March 1981 the Secretary of the Visa Committee advised the Applicant that

"Your request for a G-5 visa for household employee cannot be considered as it does not meet the established criteria for the granting of G-5 visas, i.e. that General Services staff who are not internationally recruited are not eligible for the granting of household employees."

On 10 April 1981 the Applicant wrote to the Secretary-General asking for a review of that decision and on 9 June 1981, having received no reply, she lodged an appeal with the Joint Appeals Board. The Board submitted its report on 2 July 1982. The Board's conclusions and recommendations read as follows:

"*Conclusions and recommendations*

"67. The present practice of the Visa Committee distinguishes between two categories of G-4 visa-holding United Nations staff members, between whom United States law makes no comparable distinction.

"68. While such difference in treatment appears to have been based upon the necessity of restricting the grant of G-5 visas for household employees and upon the allegedly greater likelihood of abuse of the privilege by locally-recruited non-United States nationals (principally General Service staff) than by internationally-recruited personnel (principally Professional staff) no adequate evidence has been adduced in favour of this differentiation.

"69. Even had such evidence proved that abuses were more prevalent in regard to G-5 visa-holders entering the United States to work in the households of locally-recruited United Nations staff members, this would not, of itself, justify the difference in treatment between the two categories, which are extremely broadly defined.

"70. 'Likelihood of abuse' is, in the best of circumstances, an imperceptive test and a precarious basis for decision-making. When the 'likelihood' is ascribed to a category of staff, it invites special scrutiny to ensure that elementary principles of just administration are not contravened. Should it, however, emerge that the category-distinction itself is not supported by cogent—or indeed any sustainable—evidence, the danger of injustice becomes pervasive. But, once the flawed postulate is linked to a projection of hypothetical future conduct on the part of all persons who have been arbitrarily placed in the overbroad category, an indefensible administrative practice is clearly revealed.

"71. The Board believed, moreover, that the change of practice which led to the making of the impugned distinction was not the subject of adequate, or indeed any, consultation between the Administration and duly-authorized staff representatives, and that this omission further seriously undermines its acceptability.

"72. Having regard to all the factors mentioned, the Board concludes that the decision which affected the appellant was seriously flawed from the standpoints of equity and of the principle of good administration.

"73. The Board therefore recommends that an urgent review of the present practice of the Visa Committee in regard of the granting of G-5 visas be instituted. It should be conducted in full consultation with all those concerned in accordance with the Staff Rules. In any such review, consideration might be given to the criterion of need, applied equitably to all staff members holding G-4 visas, associated of course with appropriate guarantees in each individual case.

"74. Until the completion of such review, the Visa Committee should consider applying the same standards to all G-4 visa-holders' applications.

"75. The Board accordingly recommends that the appellant's application be considered in the manner described in paragraph 74 of these conclusions and recommendations."

On 9 September and 22 October 1982 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided to maintain the contested decision; she added:

"The Secretary-General's decision is based on his determination that the policy followed by the Visa Committee is well-founded in that it serves the interests of the United Nations and does not violate the rights of staff members, as confirmed by administrative instruction ST/AI/294 . . . issued on 16 August 1982."

On 11 February 1983 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. By relying on Administrative Instruction ST/AI/294 dated 16 August 1982 in support of a decision made several years earlier, the Respondent's final decision violates fundamental principles of jurisprudence.

2. In his final decision the Respondent has given no consideration to the Applicant's acquired rights nor to her international status in the United States as recognized by the host country.

3. The Respondent's policies are discriminatory against the Applicant as a General Service staff member. They are also discriminatory in respect of the application to the United States immigration laws, which are ultimately more generous in their application to staff members of the International Monetary Fund and the World Bank as well as to comparable staff members working in missions to the United Nations.

4. The United Nations' interposing itself between the Applicant and the Government of the host country is of questionable validity.

Whereas the Respondent's principal contentions are:

1. The privileges and immunities attached to the United Nations by virtue of the Charter, the Convention on the Privileges and Immunities of the United Nations, the Headquarters Agreement and subsidiary national legislation are granted solely in the interests of the Organization and, accordingly, no staff member has a right to any of those privileges unless the Secretary-General determines that granting such privileges is in the interests of the Organization.

2. A discretionary decision that the granting of privileges attached to the United Nations would not be in the interests of the Organization is not reviewable by the Tribunal unless it is clearly established by the Applicant that such decision is discriminatory, improperly motivated or influenced by prejudice. A decision that it is in the interests of the United Nations to restrict the privilege of bringing domestic servants into the United States to internationally recruited staff is a legitimate exercise of the Secretary-General's discretion.

The Tribunal, having deliberated from 7 to 29 May 1984, now pronounces the following judgement:

I. The Tribunal is competent, under article 2.1 of its Statute

". . . to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

II. The Applicant is a locally recruited General Service staff member of the Secretariat of the United Nations, and her application alleges that the administration has taken an arbitrary decision which has caused her to be denied a G-5 visa to enable her to bring into the United States of America a domestic servant from the Philippines, a country of which the Applicant is a national. The question therefore arises whether this denial could amount to non-observance of her contract of employment or of her terms of appointment within the meaning of article 2.1 of the Statute.

III. The Staff Regulations and Rules of the United Nations do not include any provision as to G-5 visas for servants from abroad. The relevant laws of the host country provide that the United States authorities may grant a G-5 visa to enable foreign nationals to come to the United States as servants of holders of G-4 visas, of which the Applicant is one. According to the Respondent,

"during the first few years of the United Nations, staff applied directly to United States authorities for both G-4 and G-5 visas. . . . However, in 1947, in order to assist the host State determine who should be granted visas, a Visa Committee was established. The host State will not consider applications for either G-4 or G-5 visas unless supported by and forwarded to the United States authorities by the United Nations."

These procedures had therefore been well established by February 1966, at which time the Applicant joined the staff of the United Nations. It is significant that the Respondent uses the word "traditionally" in respect of the composition of the Visa Committee and that "Organization of the Secretariat: A concise guide to the functions and organization of the Secretariat", revised September 1966 (ST/SGB/131) and January 1974 (ST/SGB/Organization), includes a statement of the then composition and functions of the Visa Committee.

IV. The Tribunal is therefore of the opinion that, by 13 March 1981, the date on which the Visa Committee refused to consider the Applicant's request for a G-5 visa for a household employee, the procedure by which such requests were screened by the Visa Committee had been long established and enshrined in Staff Bulletins. Accordingly, it was a term of the Applicant's appointment. It follows that, under article 2.1 of its Statute, the Tribunal is competent to hear and pass judgement upon the application.

V. The Applicant's request for a G-5 visa, made on 7 February 1979, came before the Visa Committee on the basis of revised terms of reference given to it by the Secretary-General on 12 June 1976 which had the effect of thenceforth excluding from examination by the Visa Committee requests from locally recruited staff. A literal interpretation of the revised terms of reference might be taken to mean that requests from locally recruited staff were to be considered by the Administration without the assistance of the Visa Committee, but the Tribunal is satisfied, in all the circumstances, that the true meaning was that they were not to be considered at all.

It was not until more than two years later, on 13 March 1981, that the Secretary of the Visa Committee advised the Applicant that her request did not comply with the established criteria for the granting of G-5 visas, "i.e. that

General Services staff who are not internationally recruited are not eligible for the granting of household employees". The Applicant has not, however, sought compensation for the delay of two years.

VI. The Applicant concedes that it was at the insistence of the United States authorities that applications for G-5 visas were not granted unless endorsed by the United Nations Secretariat. Nevertheless she questions the validity of the United Nations interposing itself between the Applicant and the Government of the host country. The Tribunal accepts the contention of the Respondent that the privileges in question are granted solely in the interest of the Organization and that accordingly no staff member has a right to any of those privileges. This view accords with Judgement No. 369 of the International Labour Organisation Administrative Tribunal (*Nuss*) as well as with the Tribunal's judgement No. 326 (*Fischman*).

VII. It is evident from the memorandum of 29 December 1969 addressed by the Chairman of the Visa Committee to the Director of Personnel that the Visa Committee feared that the grant of G-5 visas was more likely to lead to abuse in the case of General Service staff than of Professional staff. In the Tribunal's view, the purpose of the revised terms of reference was to counter the abuse feared by the Visa Committee, under colour of a distinction between internationally and locally recruited staff (a distinction already appearing in Staff Rule 104.7), by excluding from consideration all applications from locally recruited staff who are almost invariably General Service staff and not Professional staff. Although the revised terms of reference do not mention General Service or Professional staff, the underlying intention is apparent from all the circumstances and from the terms of the memorandum by which the Secretary of the Visa Committee advised the Applicant of the denial of her request, which specifically mentioned the exclusion of General Service staff. This, in the Tribunal's view, amounted to discrimination as noted by the Joint Appeals Board and, in precluding all consideration of the request, was a denial of due process of law.

VIII. The Applicant further contends that the Respondent has given no consideration to her acquired rights. In view of the conclusion reached by the Tribunal in the preceding paragraph, it is not necessary for the Tribunal to examine that contention.

IX. For the foregoing reasons, the Tribunal orders the rescinding of the decision conveyed to the Applicant on 9 September and 22 October 1982. The Tribunal further orders that any request for a G-5 visa made by the Applicant shall be submitted to the Visa Committee for consideration on its merits. Should the Secretary-General decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case, the Tribunal fixes the amount of compensation to be paid to the Applicant at three months' net base salary.

X. All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice President, presiding

Roger PINTO
Member

Luis M. de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary

Geneva, 29 May 1984