

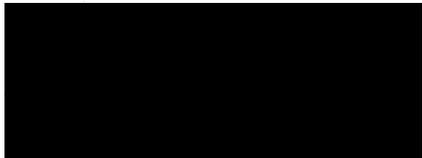
PUBLIC COPY

U.S. Department of Homeland Security
Citizenship and Immigration Services

B6

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: EAC 01 269 53137

Office: VERMONT SERVICE CENTER

Date:

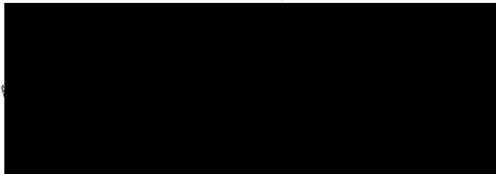
DEC 3 - 2003

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)

IN 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 Citizenship and Immigration Services (CIS) 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), 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 CFR § 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). The petition's priority date, in this instance, is March 16, 2001. The beneficiary's salary as stated on the labor certification is \$12.24 per hour or \$25,459.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 7, 2001, the director requested additional evidence (Form I-797) to

establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. In particular, the Form I-797 required the petitioner's complete 2000 federal income tax return and 2000 Wage and Tax Statements (Forms W-2), showing payments to the beneficiary.

Counsel submitted U.S. Corporation Income Tax Returns (Forms 1120) with Schedule L, the balance sheet, for fiscal years beginning August 1, 1998 and 2000 and ending July 31. They related to YJM Enterprises, [REDACTED] at Brookfield, CT, a corporation, and were signed by Yutaka Yoshida (President). Each Schedule L expressed a negative balance of net current assets, i.e., the difference of current assets minus current liabilities. Form 1120 for 1998 showed taxable income before net operating loss deduction of \$11,422. Form 1120 reported a loss of (\$10,768), less than the proffered wage, for fiscal year 2000, encompassing the priority date. The appeal acknowledged a loss for fiscal year 1999. A Wage and Tax Statement (Form W-2) showed the payment of wages to the beneficiary of \$6,500 in 2000, less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition on February 26, 2002. These proceedings put in issue whether new evidence on appeal overcomes the basis of the director's decision and requires the AAO to remand the record for further consideration.

Counsel offers seven (7) exhibits and interprets them in ten (10) points. Points 3 and 4 of the appeal claim the adverse effect on [REDACTED] in Brookfield, CT (the petitioner), from the closing of a Caldor store in 1999, though they concede that a Kohl's opened in less than a year. The brief stated no particular in which those events affected the petitioner's lease and building except that, generally, wetlands issues might reduce the number of businesses. The record does not support counsel's general claim that events "provide considerable verification to the petitioner's claim regarding falling into unprofitability and recovering thereafter."

A news article, of January 29, 2002 (Exhibit 1), announces new construction for a Lowe's in Brookfield, CT in competition with a nearby existing Home Depot. An accompanying picture is said to picture buildings subject to demolition, but the text does not identify or mention the one in which the petitioner did business. (Exhibit 1). The second news article, of April 19, 2002 (Exhibit 2), has several interviews of business owners. They expected to be displaced because of diminished business, but the petitioner was not one of them. Later on, a customer says that the site has been razed. Exhibit 6.

The third news article, of July 10, 2002 (Exhibit 3), states, in contradiction, that the demolition in Brookfield expanded the shopping center. Somehow, that discouraged the petitioner's President to the point that he might have retired to Japan or resumed active management of an enterprise in Milan, Italy.

Events, as reported in the news articles, occurred before the priority date. The petitioner knew of them upon filing of the Immigrant Petition for Alien Worker (I-140) on September 10, 2001 and in responding to the I-797. The petitioner's knowledge did not depend on revelations in the local newspaper. Though they are not new evidence, the facts will be considered in full.

A fourth article, of August 6, 2002 (Exhibit 4), states that a friend encouraged the petitioner's President, a bank loved him, and he was now opening House of Yoshida, or Yoshida Enterprises LLC (Yoshida), in Bethel, CT. A menu (Exhibit 5) and unaudited financial documents (Exhibit 7) of the new Bethel site are offered to support a history of success at the former restaurant, to establish for both the "beneficial ownership" of the President, and to prove the profitability of the petitioner. Exhibits 5 and 7, however, relate only to the new site.

The brief relies on assets of the President, as the "beneficial owner" of both the petitioner and of Yoshida:

1. On September 10, 2001, [the petitioner] filed an I-140 petition on behalf of [the beneficiary], asking that [the beneficiary] be classified in the EB3 visa category after a labor certification from the Secretary of labor was issued. While the appellant/petitioner is a business, Sushi Yoshi, a Japanese restaurant, the 100% beneficial owner of that business is [the President]...

A note in the Financial Statements of September 30, 2002 (the accounting review) contradicts the brief, stating that Yoshida will file income tax returns as a sole proprietor:

There is no provision for income taxes in that the income of the company is taxed at the member's individual rates (sic).

Regardless of the choice of assumptions, and contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and

distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The accounting review disclaims the status of an audited financial statement under 8 CFR § 204.5(g)(2), *supra*. Moreover, it claims to be for Yoshida for operations beginning June 7, 2002. The brief stipulates that:

9. [REDACTED] the beneficial owner of the [petitioner] opened a restaurant in a new location, 25 Grassy Plain St., Bethel, CT under the trade name of House of Yoshida, and a corporate entity, Yoshida Enterprises, LLC.

Unaudited statements are of little evidentiary value as proof of the ability to pay the proffered wage because they are based solely on the representations of management. 8 CFR § 204.5(g)(2), *supra*. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. The news articles, similarly, lack evidentiary value of financial facts.

Even if the accounting review were acceptable evidence of [REDACTED] profitability from June 7, 2002, it would not support the petitioner's ability to pay the proffered wage at the priority date. 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 that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I & N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The petition may not be approved for the additional reason that the record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that Yoshida has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the ownership of the petitioner and of [REDACTED] are said to be the same does not establish that [REDACTED] is a successor-in-interest to the petitioner. In addition, in order to maintain

the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986)

The petitioner has not offered the agreement to establish these facts. The record does not establish that the successor-in-interest assumed all of the rights, duties, and obligations of the predecessor.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel avers that a period of 16 years in business proves the ability to pay, but the petitioner does not establish any period of profitability. Tax returns, for fiscal years 1998 and 2000, report taxable income and net current assets less than the proffered wage. The record omits the fiscal year 1999 tax return of the petitioner, but counsel stipulates that it showed a loss. No credible evidence supports taxable income or net current assets equal to, or greater than, the proffered wage.

In fact, the petitioner concedes limitations of its Brookfield site, such as the month-to-month tenancy, low water pressure, excess of space, dark interior, smoking privileges, and full bar. See Exhibits 3 and 4. The petitioner ceased business, and the alleged successor-in-interest commenced, simultaneously, without any interruption of business, according to points 8 and 9 of the appeal brief. This line of reasoning does not suggest either an unusually successful business or a hiatus in its conduct.

Counsel, notwithstanding, argues that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), applies. Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is misplaced. It relates to a petition 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, news articles, financial statements, exhibits, and brief, 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.