

Blo

U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, Rm 3042  
425 I Street, N.W.  
Washington, DC 20536



File: WAC 02 170 54677 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

DEC 17 2003

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)

ON BEHALF OF PETITIONER:  
[Redacted]

Identification data deleted to  
prevent unauthorized  
invasion of personal privacy

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an insurance service corporation. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 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 turns, in part, 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 January 12, 1998. The beneficiary's salary as stated on the labor certification is \$14.16 per hour or \$29,452.80 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated June 18, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1998, 1999, and 2001.

Counsel submitted the petitioning corporation's 1998-2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation. They reflected ordinary income (loss) from trade or business activities of, respectively, \$443,696, \$338,566, \$212,706, each equal to, or greater than, the proffered wage, and, finally, in 2001, a loss of (\$40,390), less than the proffered wage. Counsel enclosed, also, copies of Form 1040, the U.S. Individual Income Tax Return, of SJW and BW for 2000 and 2001, and referred to Wage and Tax Statements (Form W-2) and Miscellaneous Income (Form 1099) of SJW.

The director considered the loss in 2001, determined that the evidence did not establish that the petitioning corporation had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel submits a letter (Exhibit A) and personal financial statement (Exhibit B) of SJW. They introduce an entity known as WWG, LLC, but do not document any connection to the petitioning corporation. WWG, LLC offers its 2001 Form 1065, U.S. Return of Partnership Income of WWG, LLC with Schedule K-1 for SJW (Exhibit C), and an unaudited financial statement and bank account summary of WWG, LLC for seven (7) months, ending July 31, 2002 (Exhibit D). Finally, two (2) miscellaneous sheets from unaudited financial statements of the petitioning corporation state income and expenses for a period ending August 30 [sic], 2002, but two (2) others are statements of MetLife and MONY of amounts owed to SJW personally, not the petitioning corporation. (Exhibit E).

The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. They are of little evidentiary value because they are based solely on the representations of management.

Counsel, nonetheless, states of Exhibits A-E on appeal that:

All of these assets would be available to pay [the beneficiary's] wage if [the petitioning corporation] is unable to pay her wages...

Based on the foregoing, it is respectfully requested that the I-140 [Immigrant Petition for Alien Worker] filed by [SJW] on behalf of [the beneficiary] be approved.

Counsel's prayer reveals a basic misunderstanding. SJW signed the I-140, as well as the Form ETA 750, as the President of the petitioning corporation. These documents and the pertinent tax returns for an S corporation refer to a petitioning corporation, not an individual named SJW, nor his commissions on sales, nor his partnership interests, nor his individual federal tax returns.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel insists that the petitioning corporation may, on the order of SJW, command all of the assets stated in Exhibits A-E to pay the proffered wage. Contrary to counsel's primary assertion, CIS (formerly the Service or the INS) 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.

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 *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 *Sonegawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioning corporation. The I-140 claimed only two (2) employees. Schedule L of the federal tax returns reported substantial deficits of net current assets, the difference of current assets minus current liabilities, for the priority date and continuing years. Deficits were (\$281,716) in 2001, (\$441,614) in 2000, (\$261,273) in 1999, and (\$83,194) at the priority date.

After a review of the federal tax returns and briefs and exhibits on appeal, 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 other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. Though not a part of the RFE or the director's decision, the AAO cannot reach a favorable conclusion on this record.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, the petitioner specifically required, in block 14 of Form ETA 750, two (2) years of experience in the job offered.

As signed by her in Part B of Form ETA 750, the beneficiary, initially, gave dates of previous employment as October 1994 to November 1995. Her statement of August 18, 1998 asserted that those were a clerical error and that RBC employed her from October 1994 to August 1996. A manager of RBC stated, in an undated "Certification," that, after all, the beneficiary worked at RBC "from October 1994 up to August 1996." The beneficiary's term is imprecisely stated and suggests the manager's lack of access to personnel records. In any case, it is less than two (2) years. Moreover, the evidence does not establish that the qualifying experience included full-time employment. See 20 C.F.R. § 656.3, *Employment*. For this additional reason, the petition may not be approved.

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.