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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



**FEB 14 2003**

File:   
WAC 01 287 51422

Office: CALIFORNIA SERVICE CENTER Date:

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:



**PUBLIC COPY**

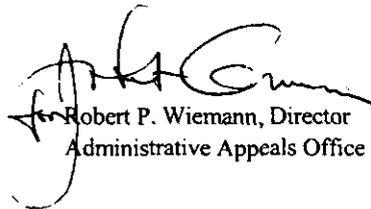
**INSTRUCTIONS:**

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 Service 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.

  
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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an ice cream plant. It seeks to employ the beneficiary permanently in the United States as a refrigeration mechanic. 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). Here, the petition's priority date is November 14, 1997. The beneficiary's salary as stated on the labor certification is \$2,880.80 monthly or \$34,569.60 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent

residence. In a request for evidence dated February 4, 2002 (I-797), the director required the petitioner's 1997, 1998, and 1999 federal income tax returns, as well as quarterly wage reports for the last four (4) quarters (Forms DE-6).

Counsel, in response, submitted the petitioner's Forms 1120S U.S. Income Tax Return for an S Corporation, including Schedule L, the balance sheet, for 1997 to 2001. The federal tax returns revealed ordinary income (losses) of (\$86,843) in 1997, (\$77,531) in 1998, (\$25,455) in 1999, (\$1,225) in 2000, and ordinary income of \$55,325 in 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition on May 10, 2002.

On appeal, counsel submits a brief. For the year 2002, it made offers of proof of unaudited financial statements of the petitioner signed by its shareholder and of his bank statements and real property holdings. Counsel's brief offers the assessment of the petitioner's certified public accountant (CPA), Bernard Kotkin & Company LLP (the CPA assessment). Counsel further offered the letter of the petitioner's shareholder dated April 3, 2002 (the shareholder letter). It stated that improved buying strategies and increasing sale prices had not produced a profit until 2001.

Counsel's brief invokes "Minutes of ESC/AILA Liaison Teleconference, Nov. 16, 1994, reprinted in AILA Monthly Mailing 44, 46-47 (Jan. 1995)" (AILA minutes). They are said to compel the addition of depreciation to income.

In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather

than the petitioner's gross income. 623 F.Supp. at 1084.

Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The AILA minutes consider the subtraction of current liabilities from current assets to ascertain net current assets, as a measure of the ability to pay the proffered wage. Counsel's reliance on the AILA minutes in this instance is misplaced. Net current assets were less than the proffered wage in 2000 and declined over the period from 1997 to 2001.

Counsel does not provide a published citation relating to the use of net current assets or depreciation. While 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel offers the CPA assessment to support the proposition that the shareholder has the ability to pay the proffered wage. The CPA assessment, in fact, reveals that an unfortunate accident reduced the ability of the sole shareholder to practice dentistry and, thus, contribute to the petitioner in 2000 and 2001.

Counsel argues, nonetheless:

The sole shareholder of the petitioner ... funds all negative cash flows [of the petitioner], as evidenced by the appropriate schedules of the corporation tax returns.... We have attached evidence of [the sole shareholder's] assets.

Contrary to counsel's primary assertion, the Service 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 can not be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's brief concludes:

The corporation has assets that may be liquidated to raise capital for payroll expenses; and as the history shows, the corporation had reasonable expectations to increase business and profit margins, which, under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) constitutes sufficient proof of ability to pay the wage.

Counsel's reliance on *Matter of Sonogawa* 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 *Sonogawa*, have been shown to exist in this case, nor has it been established that 2000, when net current assets were less than the proffered wage, was an uncharacteristically unprofitable year for the petitioner.

The shareholder letter concedes that the buying and pricing strategies of the petitioner were not apt to have produced profitability at the priority date. The CPA assessment concedes that there was none until 2001.

After a review of the federal tax returns, the shareholder letter and the CPA assessment, 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 Form ETA 750, the labor certification. Counsel, on appeal, emphatically insists that the Service has raised no issue except the ability to pay. Counsel does raise another.

Counsel presents the CPA assessment and it urges:

[The shareholder] has great trust in [the beneficiary] and needs [the beneficiary] to manage [the petitioner]. "Lowe's" home improvement center has recently opened across the street and store activity is increasing.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Application for Alien Employment Certification (Form ETA 750), in block 14, detailed the minimum education, training, and experience to perform the job of refrigeration mechanic. The petitioner provided an evaluation report of Foreign Consultants, Inc. (FCI), including the beneficiary's diploma of engineer-mechanic and transcript of study from 1984 to 1990 at the All Union Postal Tuition Institute of Food Industry of Russia for that position.

The job offer portion of the Form ETA 750 in Block 13 detailed in 200 words the petitioner's position for a refrigeration mechanic. It describes no reliance on the beneficiary's management expertise and, in fact, not a single managerial duty.

To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is, in fact, qualified for the certified job. The Service will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.*

v. Coomey, 661 F.2d 1 (1st Cir. 1981).

In the I-797, the director required evidence of such education and experience as the position specified in the Form ETA 750 demanded, including courses, credits, the conferral of certificates or degrees, and the official college or university transcript for them. It was the petitioner's response and documentation that did not, until this appeal, introduce evidence that this certification included the managerial responsibility to realize profitability after the opening of a Lowes home improvement center across the street.

The Form ETA 750 states a different capacity than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the position described on the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

The petitioner could have clarified or changed its requirements before the Form ETA 750 was certified by the Department of Labor. Since that was not done, it is too late on appeal for the petitioner to assert different ones.

On appeal, counsel's submissions propose an entirely different field of endeavor.

*Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not established that the managerial employment will be in accordance with the terms of the Form ETA 750,

certified by the Department of Labor for a refrigeration mechanic. 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.