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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

*Bo*

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2004

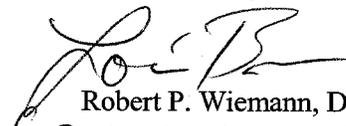
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

*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 The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a manufacturer and wholesaler of prom gowns and evening wear. It seeks to employ the beneficiary permanently in the United States as a pattern maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and that the beneficiary was not qualified for the position, and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States.

The first issue to be discussed in this case is whether or not the petitioner established its ability to pay the proffered wage. The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 5, 2001. The proffered wage as stated on the Form ETA 750 is \$20.45 per hour, which amounts to \$42,536 annually.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on January 24, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the year 2002.

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income <sup>1</sup>	\$1,367	\$936
Current Assets	\$217,877	\$306,988
Current Liabilities	\$252,405	\$358,835
Net current assets	-\$34,528	-\$51,847

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the quarters ending December 31, 2002, September 30, 2002, June 30, 2002, and March 31, 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. Counsel states that "[w]e do not understand the statement on the [request for evidence] that the 'tax return for 2001 does not appear to establish ability to pay,'" and cites the petitioner's gross income and amounts paid out in salaries to all of its employees.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 12, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's only paid officer would forego compensation to enable the petitioner to show its ability to pay the proffered wage. The petitioner re-submits the petitioner's income tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next 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 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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 (7th Cir. 1983). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than

<sup>1</sup> Taxable income before net operating loss deduction and special deductions on Line 28.

the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's net income for 2001 and 2002 was \$1,367 and \$936, respectively. Both amounts are too low to cover the proffered wage of \$42,536 and thus the petitioner cannot establish its ability to pay the proffered wage out of its net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the years in question, 2001 and 2002, however, were negative. As such, the petitioner cannot establish its ability to pay the proffered wage out of its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only \$1,367 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a net income of only \$936 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel suggests the following:

For the sake of our argument, if the [beneficiary] was placed on the payroll during the years of 2001 and 2002, then the only paid officer would have accepted less compensation. In other words, if the petitioner is offering a salary of \$42,536 yr [sic], and had to pay this offered wage it would still leave compensation to the only paid officer as follows :

year 2002:       \$214,000 compensation less offered salary of \$42,536 or \$171,464 left for  
the officer

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

year 2001: \$208,000 compensation less offered salary of \$42,536 or \$165,464 left for the officer

The above large amounts would be more than sufficient for the personal income of the officer. In fact, the large officer compensation was taken simply to reduce the corporate tax due ( on line 34) to close to zero.

At the outset, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if counsel's assertions were deemed representative of the petitioner's intentions and corroborated with documentary evidence, such an assertion fails because the monies were already expended on the officer's compensation. To undo that expenditure now impermissibly alters the visa petition's presentation of factual eligibility at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Thus, the director's decision that the petitioner had failed to establish its continuing ability to pay the proffered wage beginning on the priority date is affirmed.

The second issue to be discussed in this case is whether or not the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 5, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of pattern maker. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Not required
	Grade School	Not required
	High School	Not required
	College	Not required
	College Degree Required	Not required
	Major Field of Study	Not required

The applicant must also have two years of employment experience in the job offered, but none in a related occupation. Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she was employed by [REDACTED] located a Song pa [REDACTED] in Seoul, Korea, as a pattern maker, from June 1994 through December 1997. Dong Yang Apparel was apparently a manufacturer of men's and women's clothing, and the beneficiary worked forty hours per work doing the following:

I was responsible for cutting out, and [sic] drawing sets of master patterns for the manufacture of men's and women's clothing. I worked according to sketches and design specifications [sic] to ascertain number, shapes[, and] quantity of cloth working according to knowledge of manufacturing processes and characteristics of fabrics.

She provides no further information concerning her employment background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

With the initial petition, the petitioner submitted a certificate of employment in Korean with a certified English translation. The certificate confirms the beneficiary's employment with [REDACTED] as a pattern maker from June 1994 through December 18, 1997. The certificate is signed by a "Representative" of [REDACTED] Apparel and does not detail the beneficiary's responsibilities. Additionally, the translation of the certificate does not indicate that the certificate is on [REDACTED] letterhead.

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on January 24, 2003. The director specifically requested that the employment verification evidence:

**be submitted in letterform on the previous employer's letterhead** showing the name and title of the person verifying this information. This verification should state the beneficiary's title, **duties**, and dates of employment/experience and **number of hours worked per week**.

Note: The submitted letter from the beneficiary's previous employer claimed lacks the above bold-faced information.

(Emphasis in original).

In response to the director's request for evidence, the petitioner provided an updated experience letter, in Korean with a certified English translation, from the beneficiary's past employer. The updated letter is on [REDACTED] Apparel letterhead and has an official seal affixed with [REDACTED] underneath the seal. The updated letter provides a section on working hours indicating eight hours on weekdays and three hours on Saturdays and provides a job description for pattern makers similar to the job duties the beneficiary set forth on the Form ETA 750B.

In the director's decision, he stated the following:

The petitioner initially submitted as evidence a copy of Certificate of Employment in Korean

language with its English translation from [REDACTED] indicating that the beneficiary had worked as a pattern maker from June 8, 1994 to December 18, 1997. However, the submitted Certificate of Employment neither describes duties performed by the beneficiary nor indicates the number of hours worked per week. Furthermore, the Certificate of Employment was not signed by the person who certified the statement made on it. Therefore, on [CIS's] request for evidence notice dated January 24, 2003, the petitioner was requested to submit evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750. The petitioner was also advised that evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information and that this verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

In response, the petitioner submitted a description of the position of Pattern Maker rather than the actual duties performed by the beneficiary and the working hours of the company without indicating that those hours are the beneficiary's working hours. In addition, although the submitted statement in Korean language with its English translation bears the seal, it is not signed. Therefore, the evidence of record is insufficient to establish that the beneficiary possesses the experience required on the Form ETA 750.

On appeal, counsel states that the hours referenced in the employment verification letter are the beneficiary's hours of employment and not the employer's working hours. Counsel asserts that the duties provided in the letter are the same as those provided on the Form ETA 750B as the past employment duties. Finally, counsel states that the letter has the "official seal and signature of the employer. The seal in Korea is used exactly as the signature is used in the United States."

At the outset, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's commentary on the use of seals and signatures in Korea and the intention behind the past employer's content in its employment verification is not dispositive without corroborating evidence.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience,

and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO find the letters pertaining to the beneficiary's qualifications to be acceptable evidence of her past employment. According to the guiding regulation, the experience letter must provide the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. Given the initial employer's certification of the beneficiary's employment as a pattern maker, the letter provided in response to the director's request for evidence providing the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien was sufficient. The director was mistaken in requiring additional detail in the experience letter. Thus, the part of the director's decision finding that the beneficiary was not qualified for the proffered position is withdrawn. As stated above, however, the petitioner has not demonstrated its ability to pay the proffered wage as of the priority date and continuing until the 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.