

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



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

AG

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 25 2005**

WAC 03 002 53270

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

Robert P. Wiemann

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 a textile company. It seeks to employ the beneficiary permanently in the United States as a cloth designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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. The director also determined that the beneficiary did not meet the education and experience required by the labor certification.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on June 12, 2000. The proffered salary as stated on the labor certification is \$25 per hour or \$52,000 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return, for fiscal year April 1, 2000 through March 31, 2001. The tax return reflected a taxable income before net operating loss deduction and special deductions of -\$72,263 and net current assets of \$240,127. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on December 30, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present. The director specifically requested a signed copy of the petitioner's 2001 federal tax return, and copies of Form DE-6, Quarterly Wage Report, for all employees for the last four quarters that were accepted by the State of California. The director stated that the petitioner should include the job title and description of duties of each employee listed on the Forms DE-6. In addition, the

director requested that the petitioner provide evidence that establishes the beneficiary's experience as listed on the Form ETA-750 and evidence of the beneficiary's baccalaureate degree or foreign equivalent degree to include the courses taken and the credits received and any certificate or degree bestowed.

In response, counsel provided copies of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year April 1, 2001 through March 31, 2002, a copy of the beneficiary's certificate of graduation, the 2001 fourth quarter wage statements for each employee, job titles and descriptions for each employee, and property tax statements for fiscal year July 1, 2001 to June 30, 2002 and July 1, 2002 to June 30, 2003. The federal tax return reflected a taxable income before net operating loss deduction and special deductions of -\$238,753 and net current assets of -\$88,741. The wage statements do not show that the beneficiary worked for the petitioner during the fourth quarter of 2001. The petitioner, through counsel, states:

We have been trying to contact Kangmi Costume Shop located in Seoul, S. Korea. However, Mr. [REDACTED] the president of the Kangmi Costume Shop, retired and [is] unreachable. Accordingly, we are unable to provide the employment that you requested. We have enclosed the copy of Certificate of Employment which was previously submitted, dated 09/16/1996. It shows the name and title of the person, business address, beneficiary title, and dates of employment.

Currently, the applicant is not working at the petitioning company. Please refer to the enclosed letter from the petitioner [that] shows that the employment will be continually based upon the permanent residence.

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 that the evidence did not establish that the beneficiary possessed the required education experience. On May 22, 2003, the director denied the petition.

On appeal, counsel submits a copy of the beneficiary's 2002 Form W-2, Wage and Tax Statement, and a letter from The Greenspan Co./Adjusters International. The beneficiary's 2002 Form W-2 reflects wages earned of \$12,000. The letter from The Greenspan Co./Adjusters International states:

Please be advised and so note for your record that **The Greenspan Company/Adjusters International** has been retained by the above named Insured to advise and assist in connection with the above captioned claim.

* * *

Please take note that it is the intention of the Insured to make claim for loss and damage under the Replacement Cost endorsement if said endorsement is made part of the Policy of Insurance.

Counsel asserts:

In the year 2001, the petitioner suffered misfortune. A truck driver tried to unload since [sic] heavy fabrics and other goods. He lost his balance and accidentally hit the spring cooler on the ceiling. All fabrics were soaked and damaged. The petitioner suffered an enormous loss from that accident (please refer to the enclosed letter from insurance company). It caused a decrease in the business income, but the totals of the petitioner's adjusted gross income for 1998 through 2000 are still more than the proffered wage.

Their goal was to increase the business income rate to 50% within 5 years. Through the year of 2003 to 2005, the rate of increase is projected to be over 30% of the prior year. With the statistic complied above, the petitioner's adjusted gross income will grow larger every year and sales will pick up considerably. With Mrs. [redacted] specialized knowledge and experience gained over the decades, she is assure[d] that the petitioner will prosper and [be] able to keep GMA Textile at the top of its field, which is the principal reason for her presence at GMA Textile, Inc.

* * *

Previously, we submitted the Verification of Employment from Kangmi Costume Shop indicating that the applicant had worked there from December of 1989 to January of 1992. The applicant came to the United States on 11/29/1992.

After we received a request for evidence letter from the INS, the applicant tried to contact Kangmi Costume Shop to provide **currently dated** employment verification. Unfortunately, the owner had retired and was unreachable. Nevertheless, we resubmitted the copy of employment verification issued on 09/16/1996.

The applicant was not allowed to work for the petitioner because she did not have an employment authorization card. However, she wants to work voluntarily on a part-time basis to gain a practiced hand. She didn't expect the ETA 750 application to be prolonged.

Alternative arguments

Initially, when she applied for the ETA 750 application on April of 1996 (approximately 7 years ago). The application was denied because of a careless anonymous person who answered the phone and responded incorrectly, when an EDD officer call[ed] to verify if there was a job opening for the position of pattern maker. We resubmitted the application and obtained the current priority date. The applicant applied for I-765 on 09/27/02 and started to work there on a full-time basis (Please refer to the enclosed Form W-2 for the last quarter of 2002).

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000, 2001, and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, 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 the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. 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.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 fiscal years 2000 and 2001 were \$240,127 and -\$88,741, respectively. The petitioner could have paid the proffered wage in fiscal year 2000 from its net current assets, but not in fiscal year 2001.

Counsel states that in the year 2001 the petitioner suffered an enormous loss due to an accident involving heavy fabrics and other goods. If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. While CIS will ordinarily consider the totality of the circumstances, in the instant case, the letter provided by The Greenspan Company/Adjusters International does not explain the amount of the loss or even if the petitioner filed a claim. The Greenspan Company/Adjusters International's letter simply states that they represent the petitioner and that it is the intent of the petitioner to file a claim for replacement cost if the petitioner has a replacement cost endorsement as part of its policy.

Counsel further states, "the petitioner's adjusted gross income for 1998 through 2000 are still more than the proffered wage." Counsel has not, however, provided any evidence (tax returns) for the petitioner for those years. 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 also asserts that the beneficiary's specialized knowledge and experience will help the petitioner prosper and be able to keep GMA Textile at the top of its field. In this instance, however, no detail or documentation has been provided to explain how the beneficiary's employment as a pattern maker will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. As such, this office does not find counsel's comparison of the facts of the instant case and those of *Sonegawa* convincing.

The second issue in this proceeding is whether the petitioner has established that the beneficiary meets the education and experience requirements as stated on the Form ETA-750.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is June 12, 2000.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 contained the only information appearing in these sections. This information appears as follows:

Education	College Degree Required	
Grade School: 9 years	4 years – BA – Clothing Design	
High School: 3 years		
Experience Job Offered	Related Occupation	Related Occupation
2 years	0 years.	0 years

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of cloth designer must have a bachelor's degree in clothing design and two years experience as a cloth designer.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence relevant to qualifying experience or training must be submitted in the form of letters from current or former employers or trainers and must include the

name, address, and title of the writer and a specific description of the alien's duties. If this evidence is unavailable, other documentation will be considered.

In this case, the petitioner submitted an English translation of a copy of the beneficiary's Certificate of Employment, dated September 16, 1996 and an English translation of a copy of the beneficiary's Certificate of Graduation, dated September 11, 1996. The petitioner did not provide copies of the beneficiary's college transcripts or an original letter from the beneficiary's prior employer, Kangmi Costume Shop, as requested. Counsel states, "We have been trying to contact Kangmi Costume Shop located in Seoul, S. Korea. However, Mr. [REDACTED] the president of the Kangmi Costume Shop, retired and [is] unreachable." Counsel, has not, however, indicated whether the Kangmi Costume Shop is still in business, and if so, why a letter from the current owner/president is not available to corroborate the beneficiary's claimed experience. Furthermore, the director requested an original letter from the beneficiary's prior employer. The director did not indicate that the current letter, dated September 16, 1996, would be insufficient if it were presented in the original with all the appropriate stamps and signatures and in the Korean language. The same can be said for the Certificate of Graduation, dated September 11, 1996. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide an original letter of the beneficiary's employment experience, an original certificate of graduation, and transcripts of the beneficiary's college classes taken and credits received. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.