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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 29 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]

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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, Director
Administrative Appeals Office

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

The petitioner is an importer. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director also found that the petitioner had not established that it is a United States employer within the meaning of 8 C.F.R. § 204.5(l). The director denied the petition accordingly.

On appeal, counsel submits a statement.

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.

8 CFR § 204.5(l) states, in pertinent part: "Any United States employer may file a petition on Form I-140 for classification of an alien under 203(b)(3) [of the Act] as a skilled worker . . .."

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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(g)(2). The petitioner must demonstrate that it qualifies as a United States employer within the meaning of 8 CFR § 204.5(l). Finally, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 26, 2000. The proffered wage as stated on the Form ETA 750 is $46,220 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience as either a bookkeeper or office manager.

The Form ETA 750 originally stated that the petitioner's address was 3700 Yale Street in Houston, Texas. That address was amended to 2411 Washington Avenue in Houston Texas on November 6, 2000. The petition, which the petitioner's owner signed on March 14, 2002, gives the petitioner's address as 4771 Sweetwater Boulevard, Suite 233, Sugarland, Texas.

With the petition, counsel submitted an undated letter from the petitioner's owner. That letter states that during 1998 the petitioner's annual sales were $305,809 and during 2000 they were $361,689. Counsel submitted a page of web content from an on-line financial service. That web content shows the checking account, savings account, and mortgage principal balances for a customer with the User Name "PONNI." The entity to whom those funds belong, and that owes that debt, is not otherwise identified.

Finally, counsel submitted 1998, 1999, and 2000 Schedules C from the petitioner's owner's Form 1040 U.S. Individual Income Tax Returns. Those documents show that the petitioner suffered losses of $7,716, $10,441.76, and $34,327.48 during those years, respectively. Those documents also indicate that the petitioner was a sole proprietorship and that its business address was 5090 Richmond Avenue, #235, Houston, Texas, during each of those years.

The Form ETA 750, Part B, which the beneficiary signed on June 22, 2000, instructed the beneficiary to list any jobs she held which were related to the proffered position. The beneficiary stated that she had worked as a bookkeeper for "Tile Factory," Negambo, Sri Lanka, from January 1978 to February 1983 and again from May 1984 to February 1987. The beneficiary listed no other related experience. The petitioner provided no evidence in support of the beneficiary's employment claim.

On July 16, 2002, the Texas Service Center requested additional evidence. The Service Center requested that the petitioner provide evidence that the labor certification is valid, notwithstanding that the petitioner appeared to have moved from Sugarland, Texas to Houston, Texas. The Service Center noted that the petitioner had reported an address on the Schedules C submitted which differed from the address shown on the Form ETA 750 and asked for an explanation of that apparent discrepancy. The Service Center also

requested a copy of the petitioner's current lease and an explanation of the petitioner's failure to advise the Department of Labor of its change of address.

Further still, the Service Center requested additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center stipulated that, if the petitioner wished to rely on tax returns as evidence of that ability, it must provide complete tax returns, rather than merely the Schedules C.

Finally, the Service Center requested evidence that the beneficiary has the requisite experience for the proffered position as stated on the Form ETA 750. Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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.

In response, counsel submitted a letter, dated October 14, 2002. In that letter, counsel stated that the address shown on the Form I-140 is in error, and that "the correct address at which the beneficiary will work was (sic) Counsel further stated that, during April of 2001, the petitioner moved from that address to 904 West 34th Street, Houston, Texas. Counsel stated that the Form ETA 750 is still valid as the beneficiary will be employed in Houston.

Counsel also stated that 4771 Sweetwater Boulevard #233, Sugarland, Texas is a mailing address at a commercial mailing services facility. Counsel explained that 5090 Richmond #235, Houston, Texas is another commercial mailing facility address that the petitioner used previously, until that facility proved unreliable.

Counsel stated that the petitioner now has two locations in Houstor Counsel stated that the petitioner previously had a location at 2411 Washington Avenue, which it closed when it moved to th location in April 2001. Counsel observed that the location was used on the Form ETA 750 and stated that the petitioner did not inform DOL of the change of address because the prospective employment location was still within Houston, Texas. Counsel notes that, in any event, Sugarland, Texas is within the same standard metropolitan statistical area as the Houston and implies that the Form ETA 750 would therefore still be valid even if the petitioner had moved to Sugarland.

As to the petitioner's ability to pay the proffered wage, counsel cited the petitioner's gross income, the petitioner's owner's adjusted gross income, the amount in two investment accounts, and the balances of the two accounts for which a monthly statement was previously submitted.

In support of his statement pertinent to the petitioner's various addresses, counsel submitted an undated statement of the petitioner's owner, stating the same essential facts. Counsel also submitted (1) a photocopy of a check showing the address and the petitioner's owner's name; (2) a photocopy of a six-month space lease, ratified March 4, 1996 and commencing April 1, 1996, for premises at an unspecified address, (2) a photocopy of another space lease with the same lessor, executed July 5, 2000 and

commencing July 1, 2000[1], at an unspecified address, (3) a photocopy of a three-month lease, executed February 19, 2001 and commencing January 1, 2003[2], of warehouse space at 904 West 34th Street in Houston.

In support of the beneficiary's claimed employment experience, the petitioner provided an undated letter from the and a letter dated November 3, 1982 from

The letter from Sujan Tiles stated that the beneficiary worked as a typist and bookkeeper in the office of signatory, Antony Fola, from 1984 through 1989. The letter does not state the title of the signatory or whether the employment was full-time.

The letter from Multistretch stated that beneficiary worked there "as a bookkeeper hand and was later absorbed into the permanent cadre." The meaning of that phrase is unclear to this office. That letter states that the beneficiary worked in various capacities, including assisting in stores, purports to have been signed by a factory manager. According to that letter, the beneficiary was capable of carrying out minor accounts payable and receiving, payroll, receiving merchandise, drawing checks, and answering the phones. The letter does not state the beginning and ending dates of the petitioner's employment or whether the employment was full-time.

As evidence of the petitioner's ability to pay the proffered wage, counsel submitted the petitioner's owner's 1998, 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax Returns and corresponding Schedules C showing the petitioner's profits or losses during those years. Because the priority date is June 26, 2000, evidence pertinent to the petitioner's financial condition prior to 2000 is not directly relevant to the petitioner's ability to pay the proffered wage beginning on the priority date.

The 2000 Schedule C shows that during that year, the petitioner declared a loss of $34,327.42. The petitioner's owner's tax return for that year shows that he declared adjusted gross income of $8,832.46.

The 2001 Schedule C shows that during that year the petitioner declared a loss of $62,679.85. The petitioner's owner's tax return for that year shows that he declared a loss of $56,822.34 as his adjusted gross income.

Counsel submitted additional printouts of web content from the on-line financial service. One page of that web content shows the checking account, savings account, and mortgage principal balances for the same accounts previously described but, again, without identifying the account holder. Two more pages of web content show the amounts in two investment accounts. Those investment accounts are identified as belonging to users "PONNI 94660" and "PONNI 90646."

The director found that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience, and that the evidence does not establish that

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[1] The chronological order of the execution of that contract and the beginning of the lease term are unusual.

[2] Again, the chronology of the signing of the lease and its commencement is unusual.

the petitioner is a U.S. employer within the meaning of 8 C.F.R. § 204.5(l). The director denied the petition on November 16, 2002.

On appeal, counsel stated, "We believe we submitted evidence that established eligibility for approval. Under the regulations we met all requirements. The examiner in this case failed to properly consider the evidence."

Counsel indicated that he would be sending a brief to supplement the appeal within 30 days. This office has received no further information, argument, or documentation. The appeal shall be adjudicated based on the evidence of record.

Counsel's reliance on the petitioner's gross receipts is misplaced. Showing that the petitioner petitioner's gross receipts exceeded the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses[3] or otherwise increased its net income,[4] the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

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[3] The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employees wages, and that those obviated wages would be sufficient to cover the proffered wage.

[4] The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The petitioner, however, is a sole proprietorship. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his own income and assets, the petitioner's income and assets are properly combined with the income and assets those of the petitioner's owner, if properly evidenced and shown to be available to pay the proffered wage, in the determination of the petitioner's ability to pay the proffered wage. If relying on the owner's income and assets, however, the petitioner's owner is obliged to demonstrate that he could have paid the proffered wage and still supported himself.

In this case, counsel has submitted evidence pertinent to bank and investment account balances. Counsel's reliance on those balances is misplaced. First, bank and investment account balances are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot, ordinarily, show the sustainable ability to pay a proffered wage. Third, counsel failed to demonstrate that the funds reported in those accounts belong to the petitioner or the petitioner's owner.

The priority date is June 26, 2000. The proffered wage is $46,220 per year.

During 2000 the petitioner declared a loss of $34,327.42. The petitioner has not shown the ability to pay any portion of the proffered wage out of its income. The petitioner's owner declared adjusted gross income of $8,832.46 during that year. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss of $62,679.85. The petitioner has not shown the ability to pay any portion of the proffered wage out of its income. The petitioner's owner declared a loss of $56,822.34 as his adjusted gross income during that year. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of the petitioner's owner's income during that year. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

As to the beneficiary's claim of qualifying employment experience, this office notes that, on the Form ETA 750, Part B, the beneficiary stated that she had worked as a bookkeeper for "Tile Factory," in Negambo, Sri Lanka, from January 1978 to February 1983 and again from May 1984 to February 1987.

In support of her employment claim, counsel provided evidence that the beneficiary had worked for Sujan Tiles Katuneriya, Sri Lanka as a typist and bookkeeper from 1984 through 1989. Whether that employment was full-time is unknown. The position of the person who confirmed that employment is unknown. That employment does not seem to match either of the two employment claims the beneficiary asserted on the Form ETA 750, Part B. For those reasons, that employment documentation is not credible and will not serve to demonstrate that the beneficiary is eligible for the proffered position.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also provided evidence that the beneficiary worked for during some unstated period, first as a bookkeeper hand and second as a member of the "permanent cadre." That distinction is unclear. The period of time during which the beneficiary allegedly worked for that firm as a bookkeeper is unknown. Whether that employment was full-time is also unclear. That documentation does not seem to match either of the two employment claims the beneficiary asserted on the Form ETA 750, Part B. For those reasons, that employment documentation is not credible and will not serve to demonstrate that the beneficiary is eligible for the proffered position.

Counsel submitted no other evidence to demonstrate that the beneficiary has the requisite two years of experience in the proffered position or a similar position. The evidence submitted does not demonstrate that the beneficiary is qualified for the proffered position.

The remaining basis for the decision of denial is the director's finding that the petitioner had failed to demonstrate that it is a U.S. employer within the meaning of 8 CFR § 204.5(l). The director found the manifold addresses used by the petitioner not to be credible. When asked to explain, counsel and the petitioner gave explanations for the various addresses used by the petitioner in different contexts and at different times.

Although the explanations of counsel and the petitioner are manifold, they contain no aspects that are mutually inconsistent or manifestly implausible. The petitioner has submitted sufficient evidence to demonstrate that it is a U.S. employer within the meaning of 8 CFR § 204.5(l).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. For both of those reasons, 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.