

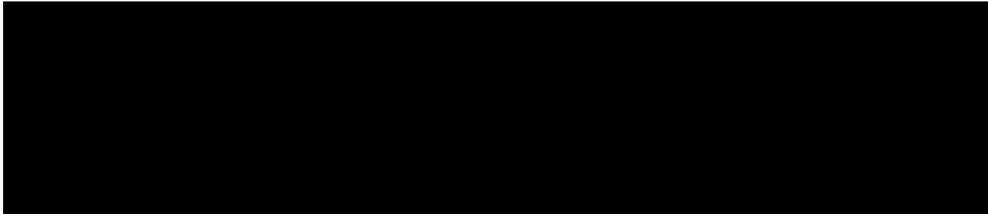
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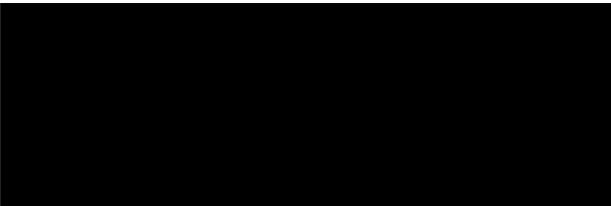


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005  
WAC 95 161 51925

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:



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 Director, California Service Center, initially approved the employment-based preference visa petition. In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). A Notice of Intent to Revoke is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Notwithstanding the CIS burden to show "good and sufficient cause" in proceedings to revoke the approval of a visa petition, the petitioner bears the ultimate burden of establishing eligibility for the benefit sought. The petitioner's burden is not discharged until the immigrant visa is issued. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as cook, specialty foreign food. 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 the beneficiary met the experience requirements as stated on the Form ETA 750 and revoked the approval of the petition accordingly.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the Service Center on May 26, 1995. It was initially approved on June 1, 1995. The alien beneficiary filed an application to adjust her status to that of lawful permanent resident on June 13, 1995. Following the receipt of information from an investigation conducted by the Embassy in Seoul, Korea relevant to the beneficiary's experience, the director concluded that the I-140 was approved in error and issued an intent to revoke the petition on September 9, 1999. The director concluded that the petitioner had failed to establish that the beneficiary met the requirements of the labor certification as of the visa priority date. Even though counsel asserts that it responded to the NOIR (although late due to an addressing error), the record of proceeding does not contain evidence of that response except on appeal. The director revoked the petition's approval on March 13, 2000, pursuant to section 205 of the Act, 8 U.S.C. § 1155. Generally, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, where a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intention to revoke. See *Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). However, in the interest of due process and fairness, the merits of the case will be discussed below.

On appeal, the petitioner, through counsel, provides additional evidence and asserts that the beneficiary does meet the experience requirements as stated on the Form ETA 750. Counsel states that the Embassy's investigation was incomplete and that CIS failed to investigate the beneficiary's work history in Argentina.

The beneficiary's employment history is set forth in the ETA 750-B, signed by the beneficiary under penalty of perjury. It describes the beneficiary's past position with Paekma Restaurant in Incheon, Korea and with Sanyuhwa Restaurant in Buenos Aires, Argentina. The beneficiary was employed as a Korean specialty cook from June 1983 to August 1986 for Paekma Restaurant and from April 1987 to June 1989 for Sanyuhwa Restaurant, thus reflecting that she had the requisite two years of experience required by the position certified by the Department of Labor. The visa petition was approved on June 1, 1995.

Pursuant to a subsequent investigation by United States immigration officials in Seoul, Korea, the director issued a notice of intent to revoke on September 10, 1999. It stated in relevant part:

On November 04, 1996, a copy of the beneficiary's passport application was obtained from the Passport Section of the Ministry of Foreign Affairs. It showed that the beneficiary was not employment [sic] at the time of applying for her passport on February 19, 1986. Also, on November 15, 1996, a copy of the beneficiary's Resident Record was obtained from the Kansuk-4-dong Office in Incheon-city. The record showed that the beneficiary resided at Kansuk-dong, Nam-Ku, Incheon-city from 1981 until she immigrated to the [sic] Argentina in November 1986.

On December 26, 1996, the Service Investigator made a neighborhood inquiry at beneficiary's prior address. A neighbor was interviewed and stated that the beneficiary was not employed at the time she lived in the neighborhood and that beneficiary's spouse was a plumber working in the same district area of her residence.

On December 27, 1996, the Service Investigator made an unannounced visit to the Paekma Restaurant at 4, Chungsan-1-dong, Chung-Ku, Incheon-city the address given on the beneficiary's employment verification letter. The restaurant is a Sushi (Raw Fish) Restaurant, not a Korean food restaurant, and the owner is the elder brother of beneficiary's husband, [REDACTED]. [REDACTED], the owner, was interviewed. He indicated that the beneficiary had worked as a Korean Specialty Cook at this restaurant from June 1983 to August 1986. He also indicated that the beneficiary came to work with two children since her two children were grown up enough to walk and to follow her. He was reminded that her daughter was only three months old when beneficiary started to work at the restaurant. He failed to respond. Additionally, he was asked to present any documents to prove beneficiary's working experience but failed to present any evidence.

The Service Investigator made an inquiry around the neighborhood of the restaurant. The restaurant is located on [a] small island called "Yongjong Island." The island is a summer beach resort. He interviewed an unidentified neighbor, who indicated that the island restaurants were busy only in the summer months. And in the summer seasons, relatives of the restaurant owners help. The beneficiary was one of the relatives who occasionally came to work at the restaurant. And the neighbor also indicated that the restaurant has been a Sushi (Raw Fish) Restaurant from the beginning to the present.

The director concluded that the petitioner had not established that the beneficiary had the requisite two years of experience required by the offered position.

Counsel asserts that he responded to the notice of intent to revoke on October 12, 1999. In that response, submitted on appeal, counsel submits eight affidavits in rebuttal to the investigation, an affidavit regarding the beneficiary's employment in Argentina, and two certificates of employment showing the beneficiary's husband was employed by [REDACTED] from February 16, 1983 to February 17, 1985 and from May 17, 1985 to December 29, 1985. Counsel stated:

First, it should be noted that the "investigation" performed by the INS office in Seoul, upon which the revocation is based, did not address the fact that the beneficiary noted on Form MA 750 Part B, where she had gained two years of experience for the offered position through employment at Sanyuhwa Restaurant. A Korean Restaurant located in Buenos Aires, Argentina, from April 1987 through June of 1989. (See attached MA 750 (b) and Exhibit "1" Declaration of [REDACTED].)

It should be further noted in this regard that the day following the Adjustment interview held on July 18, 1996, INS District Adjudicating Officer Fierro stated that he would send a field investigation to Korea and to Buenos Aires Argentina to verify both employment periods. (See Attached Exhibit "12", correspondence dated October 22, 1997.)

\* \* \*

Second, the Service's characterization of the Paekma Restaurant as a "Sushi" (Raw Fish) Restaurant and not a Korean Food Restaurant is erroneous, in fact no Japanese type "Sushi" is served there. (See attached Exhibit "13", Menu and Photographs of the Restaurant.)

Although the sign outside the Restaurant means "Sashimi" in Japanese, the Korean style "Sashimi" is distinct form [sic] the Japanese style and is know[n] as "HOI". A close observation of the food served there would have clearly established the Restaurant as Korean. Indeed no "Sushi" is served there. (See attached Menu, photographs and statements.)

Third, the owner of the "Paekma Restaurant" confirmed the employment of the beneficiary for the period she claimed. Such direct personal knowledge carries much more weight than reports from "unidentified" neighbors. (See attached statements from witnesses willing to be named and offer sworn testimony in court.)

Fourth, the fact that the owner of the "Paekma Restaurant" did not have documentation of the beneficiary's employment after over 15 years is clearly not unusual. Assuming the INS has access to Korean government records, a full investigation may have revealed confirmation of the employment. The INS bears the burden of producing substantial

evidence in support of a revocation and the evidence supplied by INS investigators in Seoul fails to meet this burden.

Fifth, even the "unidentified neighbor" confirmed the beneficiary's employment at the Paekma Restaurant during the summer months, rendering the finding that the statements by the beneficiary were not true, unsubstantiated.

The director revoked the petition on March 13, 2000, stating that CIS had received no response to the notice of intent to deny.

On appeal, counsel reiterates his position that the beneficiary meets the experience requirements as stated on the labor certification and states:

As noted above, the INS "investigation" of the beneficiary's prior employment experience simply failed to consider her employment experience in Argentina, and thus cannot meet the "good and sufficient cause" nor the "clear and convincing" standards.

\* \* \*

Moreover, the Board of Immigration Appeals has found that the standard for "good and sufficient cause" for revocation cannot be met where a "Notice of Intent to Revoke" is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and had not been advised of derogatory evidence. In such a case revocation of the visa petition cannot be sustained, **even if the petitioner did not make a timely response to the notice of intention to revoke.**" See *Matter of Estime*, Int. Dec. 3029 (BIA 1987), *Matter of Arias*. Int. Dec. 3049 (BIA 1988)

The unstated presumption is that the Argentine employment experience noted in the MA 750B was investigated by the Service and found to be untrue. The Notice of Intent to deny reflects an investigation of the MA 750B information regarding employment experience in Korea. It completely ignores the information regarding employment experience in Argentina.

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 2, 1994. As noted on the labor certification, the beneficiary must have two years experience in the job offered as set forth on Block 14 of the ETA 750.

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(l)(3) additionally 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 regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part

(b) *Evidence and processing*—

(1) *General*. An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits*—

(i) *General*. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as pay stubs or tax documents verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). It is noted that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence.

On appeal, counsel asserts that the evidence shows that the beneficiary has the required two years of experience. In this case, as noted above, no credible employer letter was submitted for the beneficiary's work experience in Argentina. There was no explanation as to why it was unavailable and no relevant secondary evidence such as payroll records or tax information was offered. The only affidavit attempting to corroborate the beneficiary's work experience in Argentina was not submitted until after the notice to revoke was issued. Again, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Counsel has provided several affidavits in support of the beneficiary's work experience at Paekma Restaurant; however, none of those affidavits describe the beneficiary's actual job (except to say she was a cook) or state that her work was in a full-time position. Seasonal work for three years does not equate to two years of experience. In addition, counsel has not provided any explanation as to why the owner of Paekma Restaurant cannot provide primary or relevant secondary evidence to establish that the beneficiary was employed by it from June 1983 to August 1986, only that it is not unusual.

Counsel states:

[t]he standard for "good and sufficient cause" for revocation cannot be met where a "Notice of Intent to Revoke" is based upon an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence. In such a case revocation of the visa petition cannot be sustained, even if the petitioner did not make a timely response to the notice of intention to revoke. See *Matter of Estime*, Int. Dec. 3029 (BIA 1987), *Matter of Arias*, Int. Dec. 3049 (BIA 1988)

The unstated presumption is that the Argentine employment experience noted in the MA 750B was investigated by the Service and found to be untrue. The Notice of Intent to deny reflects an investigation of the MA 750B information regarding employment experience in Korea. It completely ignores the information regarding employment experience in Argentina.

In the present case, the beneficiary clearly stated that she was unemployed on February 19, 1986 when she applied for her passport. According to her subsequent statements, however, she claimed to have been employed by Paekma Restaurant at that same time. When two contradictory statements are in the record of proceedings, this office will assign more weight to the initial statement, especially when the initial statement was contemporaneous to the events they describe and made under circumstances where the beneficiary's response was not material to her eligibility for a United States immigration benefit. Moreover, while counsel contested many of the other statements in the Notice of

Intent to Revoke, neither counsel nor the beneficiary provided any specific rebuttal of or explanation for why the beneficiary's statement on the passport form that she was unemployed was not accurate. Instead, counsel provided various affidavits that re-stated the beneficiary's contention that she had been working during that time.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (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.

Finally, since this office has concluded that the beneficiary has not demonstrated two years experience as a specialty cook from the claimed employment in Korea, the merits of the beneficiary's claimed experience from Argentina must be evaluated. Not until counsel's rebuttal (not in evidence until appeal), did the petitioner provide any evidence (employment letters, payroll records, etc.) of the beneficiary's employment in Argentina. The record does not contain sufficient evidence to support a finding that the beneficiary has obtained two years experience as a specialty cook in Argentina. Had the director approved the petition on the basis of the evidence of experience in Argentina, such finding clearly would have been in error. Counsel's presumption that CIS investigated the beneficiary's work experience in Argentina is unfounded. As for the lack of a second investigation in Argentina, it is unrealistic to expect CIS to continue investigating the beneficiary's claims when those claims have already shown to be unreliable. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

On appeal, counsel refers to the regulation at 8 C.F.R. § 246.1 and requests a hearing before an immigration judge. However, the regulation at 8 C.F.R. § 246.1 relates to the rescission of lawful permanent resident status, and the record of proceeding reflects that the beneficiary has not been accorded that status.

Beyond the decision of the director, the petitioner has not clearly shown the continuing ability to pay the proffered wage from the priority date of June 2, 1994.

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 2, 1994. The proffered salary as stated on the labor certification is \$390 a week or \$20,280 per year.

The record of proceeding shows that the petitioner was incorporated on December 9, 1994. The record also shows that the petitioner provided a copy of its 1994 Form 1040, U.S. Individual Income Tax Return including Schedule C, Profit or Loss From Business, and a copy of its 1995 Form 1120, U.S. Corporation Income Tax Return, as evidence of its ability to pay the proffered wage. The Form 1040 reflected an adjusted gross income of \$32,584, and Schedule C reflected gross receipts of \$104,514, wages of \$7,500, and a net profit of \$35,061. The Form 1120 reflected a taxable income before net operating loss deduction and special deductions of \$36,439 and net current assets of \$1,664. The petitioner could have paid the proffered wage in 1995 from its taxable income. However, in 1994 the petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of two. In 1994, after paying the beneficiary's salary (\$20,280) the petitioner would have had \$12,304 remaining to support a family of two. As the petitioner failed to provide a statement of monthly expenses for 1994 (it is noted that the director failed to request this information), the AAO cannot determine if the petitioner was able to pay the proffered wage and his household expenses with the remaining income. The record of proceeding does not contain any other evidence or source of the petitioner's ability to pay the proffered wage for 1994. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date of June 2, 1994.

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.