

identifying data deleted to
prevent ~~the~~ warranter
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

MAY 03 2005



FILE:

EAC 99 178 5223

Office: VERMONT SERVICE CENTER

Date:

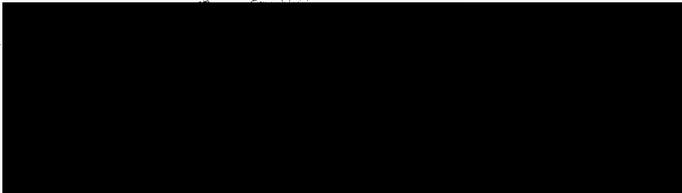
IN RE:

Petitioner:

Beneficiary:

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 service center director initially approved the employment-based petition. Based on an investigative report and interview of the beneficiary, the director first issued a notice to revoke the petition and then revoked the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for withdrawal of the revocation of the petition and for further consideration of the petitioner's ability to pay the proffered wage.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a dietary cook. 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 was working for the petitioner full-time, and revoked the petition accordingly.

On appeal, counsel states the director addressed the wrong legal issue in his decision. Counsel submits a brief.

Section 205 of the Act, 8 U.S.C. 1155, states: "The Attorney General 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." Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition 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. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In order to properly revoke a petition on the basis of an investigative report, the report must have some material bearing on the grounds for eligibility for the visa classification. The investigative report must establish that the petitioner failed to meet the burden of proof on an essential element that would warrant the denial of the visa petition. Observations contained in an investigative report that are conclusory, speculative, equivocal, or irrelevant do not provide good and sufficient cause for the issuance of a notice of intent to revoke the approval of a visa petition and cannot serve as the basis for revocation. *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988).

On May 5, 2003, the director issued a Notice of Intent to Revoke (NOIR) to the petitioner stating that after an interview with the beneficiary at the district office in Philadelphia, it was determined that the beneficiary's fulltime employment with the petitioner was questionable. The director stated that the petitioner spends much of his time in the hospital and that the beneficiary testified that she also works sixteen hours a week at Temple University. Based on the investigative report, the director was not persuaded that the beneficiary had a full time forty hours a week job with the petitioner.

A Memorandum of Findings in the record stated that on September 10, 2001, the Vermont Service Center issued a Case Relocation Memorandum requesting the beneficiary be interviewed to verify her work experience and current employment. The memo further stated that on October 25, 2002, the applicant was interviewed. The memo stated that, according to the applicant's sworn testimony, she works an unset schedule at ten dollars per hour caring for Mr. [REDACTED] and was paid \$400 a week. The beneficiary also testified that she helped Mr. [REDACTED] manage his diabetes by cooking for him and giving him his insulin shots. She stated that her work schedule was flexible because Mr. [REDACTED] spends much of his time in the hospital, and that she also worked sixteen hours a week at Temple University.

In response to the notice of intent to revoke the petition, the new attorney of record stated that the legal issue is not the employment relationship between the petitioner and the beneficiary prior to the adjustment of status, or issuance of an immigrant visa abroad, but whether the petitioner intends in good faith to offer the beneficiary, and whether the beneficiary in good faith intends to accept a job that "is not of a temporary or seasonal nature." INA § 203(b)(3). Counsel stated that a letter from the petitioner describes in detail the job that remains available to the beneficiary as soon as the processing of her case and the adjustment of her status is complete.

Counsel stated that at the time of the beneficiary's interview, the petitioner was hospitalized. Counsel states that the interviewer and the beneficiary had a misunderstanding and the interviewer concluded the petitioner "spends much of his time in the hospital." The petitioner affirmed in his letter that he does not spend much of his time in the hospital, and is almost always at home. Counsel stated that a job offer is no less real and bona fide if the employee has time off when the business is closed for vacation, or in the case of a fire or other business interruption. According to counsel, the job as described in the ETA 750 and the I-140 was available to the beneficiary as soon as the petitioner got out of the hospital, and remains available today.

With regard to the beneficiary's work at the hematology lab at Temple University Hospital, counsel submitted a letter from June Dugan, the supervisor that confirmed the beneficiary worked there sixteen hours a week at night, and with flexible hours and days. Counsel stated that this additional work did not conflict in any way with the petitioner's position. Counsel asserted that the beneficiary could perform her duties for Mr. [REDACTED] and also work her second job, and that the total of fifty-six hours a week is far less than many other employees work, and the flexibility in days and hours of the second job made the two jobs especially easy.

The petitioner's letter stated that he is eighty years old and suffered from poorly controlled diabetes, with a history of heart trouble. The petitioner stated that at the time of the beneficiary's interview, he was in the hospital due to a stroke, but that he did not spend much of his time in the hospital, but was almost always at home. The petitioner states that, like many people with diabetes, he did not eat three meals a day, but rather five or six smaller meals a day. The petitioner states that he needs fresh foods, and a diet that is very low in salt, which can take a long time to prepare. The petitioner stated that the beneficiary shopped, planned meals, prepared and cooked the food, and that these responsibilities could easily be forty hours or even more. The petitioner states that he was aware that the beneficiary was working nights at Temple University Hospital; however, this job did not interfere with the beneficiary's work for the petitioner, as she would do the second job after the petitioner had his last meal of the day, or could arrange her schedule to another night if the petitioner needed dinner late on a particular day. The petitioner stated that he did not eat late very often, as the

body is more insulin resistant overnight and early in the morning, and people with diabetes should have their last meal for the day on the early side and make it a light one. The petitioner stated that he started the petition process a long time ago, and it is hard for him to live with the uncertainty of not knowing when the beneficiary would get her green card. The petitioner stated that nothing had changed since the petition was approved in March 2000.

The letter from [REDACTED] stated that the beneficiary worked part-time at the Hematology laboratory in late October. According to the writer the beneficiary worked flexible hours and days, and was budgeted for 16 hours per week. The writer also added that the beneficiary only worked night shifts, usually midnight to 8 AM.

On September 12, 2003, the director revoked the petition. The director stated that there was not sufficient documentary evidence to clearly establish that the beneficiary will be working full-time, 40 hours a week, for the petitioner. The director noted that the petitioner stated that his sickness made the beneficiary's work schedule unpredictable depending on how he feels during a period of 24 hours a day, seven days a week. The director then noted that the beneficiary working at any other job would be jeopardizing the health situation of the petitioner and therefore not be considered working full time on the flexible basis determined by the beneficiary's needs, which is the beneficiary's job requirement for having a medical background as well as being the petitioner's dietary cook.¹

On appeal, counsel requests oral argument of the appeal. Counsel states that the petitioner is eighty years old, and the case has been pending for six and half years, and has been revoked, apparently due to simple miscommunication. Counsel also submits a brief that reiterates statements made in the petitioner's response to the notice of intent to revoke. Counsel also states that the notice of revocation claims the director made up a job requirement based on the petitioner's comments in his letter sent in response to the director's notice of intent to revoke. Counsel states that the director added an additional requirement that the beneficiary be available twenty four hours a day, seven days a week to the job offer the petitioner made six and a half years ago. Counsel states that the director revoked the petition because he assumed that the beneficiary's part-time employment would not allow her to satisfy the petitioner's need for 24 hours a day, seven days a week assistance. Counsel states that there is no 24 hours, seven days a week job requirement in the labor certification, the petition, and or in the petitioner's letter in response to the Notice of Intent to Revoke. Counsel states that the petitioner made it very clear in his letter that the beneficiary's part time employment at night in the hematology lab did not interfere with the beneficiary's work for the petitioner.

Upon review of the record, the director's decision to revoke the employment-based petition is conclusory and speculative. There is nothing in the law or regulations that requires the beneficiary's employment to conform to the terms of the ETA 750 prior to the alien's adjustment of status. In addition, the director's remarks with regard to the beneficiary not appearing to work a forty-hour workweek presently are speculative. The work schedule described by the petitioner that involves possible evening meals based on the petitioner's health needs, if anything, suggests that the beneficiary may work more than a basic forty-hour workweek, which is

¹ Although the director stated the beneficiary's needs determined the flexible work schedule, in the context of the record, it appears that the director was referring to the petitioner's needs.

not required. The director's comments with regard to the beneficiary's 16 hours a week job jeopardizing the health situation of the petitioner and thus the beneficiary would not be considered working full time are both confusing and irrelevant. While both counsel and the petitioner could have provided more probative evidence with regard to the petitioner's health and frequency of hospitalization, counsel is correct in pointing out that any hospitalization of the petitioner would not invalidate the full time nature of the position. Based on the speculative nature of the director's remarks and on the fact that such full time employment need only commence at the time the beneficiary obtains legal permanent resident status, the director's revocation of the instant petition is withdrawn.

Beyond the decision of the director, the record is not clear that the petitioner has established that it has the capability of paying the proffered wage as of the priority date and onward. 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.

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 February 2, 1997. The proffered wage as stated on the Form ETA 750 is \$11.44 per hour, which amounts to \$23,785 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted documents with regard to the beneficiary's academic and work credentials, an advisory educational evaluation document prepared by World Education Services, New York, New York; and the petitioner's Forms 1040, individual income tax return for 1996 and 1997. The record also contains a letter from the petitioner, dated October 25, 1996 that states he wished to employ the beneficiary as a caregiver supplying an auxiliary nursing service, and that the petitioner was able to secure funding for at least three years from the date of the letter, based on his work as a car dealer.²

On October 4, 1999, the director requested that the petitioner submit an original completed Labor Department Form ETA-750. In response, prior counsel stated that the beneficiary sent the ETA 750 to the Vermont

² The record is not clear when this letter was submitted to the record for this petition or some other petition, as the instant I-140 petition was filed May 24, 1999.

Service Center separate from the I-140 petition, and as a consequence, counsel had asked legacy INS to request a duplicate ETA-750 from the Department of Labor. Counsel submitted a copy of the approved ETA 750, as well as correspondence from a DOL certifying officer. The Vermont Service Center received the duplicate document on January 21, 2000, and the I-140 petition was then approved in March 2000.

With regard to the petitioner's ability to pay the proffered wage as of the priority date and to the present, the record contains the petitioner's federal income tax returns for 1996 and 1997. Since the priority date is February 28, 1997, the petitioner's income tax return for 1996 is not dispositive. However, since no other evidence is in the record, the AAO will examine the financial data contained in both years for purposes of this proceeding.

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 1997. In addition, the beneficiary did not claim to have worked for the petitioner prior to or after the February 1997 priority date. Although the beneficiary claimed in her testimony to the legacy INS employee that the petitioner paid her ten dollars an hour, or \$400 a week at the time of the interview in 2003, there is no evidence in the record to further substantiate this assertion. The assertions of counsel, of the petitioner, or of the beneficiary do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaighena*, 19 I&N Dec. 534 (BIA 1988). Therefore, the petitioner has not established that it employed or paid the beneficiary the proffered wage as of the priority date and onward.

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).

A private household is analytically similar to a sole proprietorship, which is 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. 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 (7th Cir. 1983). Thus, the AAO will consider the personal assets of the petitioner in this case.

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 petitioner supports himself and his wife. The petitioner's adjusted gross income was \$48,514 in 1996 and \$54,594 in 1997. The beneficiary's proposed salary of \$23,785 is less than 50 percent of the petitioner's adjusted gross income for both years, and the petitioner would have \$24,514 in 1996 available to pay his annual expenses and \$30,809 in 1997. While the director did not request an itemized list of monthly expenses from the petitioner, and as a result, the petitioner did not submit such a list, it is conceivable that the petitioner and his wife could pay their monthly expenses from the funds remaining after the beneficiary's salary was deducted. What the record does not reflect is whether the petitioner's financial resources were sufficient to pay the beneficiary's salary in the ensuing years between 1997 and the approval of the initial petition in 2000. It is noted that the petitioner in a letter submitted to the record stated that he thought he had sufficient funds to pay the beneficiary for three years. Without more persuasive evidence, the petitioner has not established that it has the capability to pay the beneficiary's salary and meet its monthly expenses as of the priority date and onward. Thus, the petition should be remanded to the director to address this issue.

While the petitioner has established that the revocation of the petition was based on speculative and conclusory reasoning, it has failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1997 and onward. Therefore, the petition will be remanded to the director for withdrawal of the revocation of the petition and for further consideration of the petitioner's ability to pay the proffered wage.

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 met that burden, in part. However the petition will be remanded for further consideration of the petitioner's ability to pay the proffered wage.

ORDER: The petition is remanded to the director for further consideration of the petitioner's ability to pay the proffered wage.