

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

[Redacted]

FILE: [Redacted]
WAC 96 088 50367

Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2005

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based preference visa petition. Subsequent to an investigation conducted by the American Consulate, Seoul, Korea, 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 remanded for further consideration.

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 manufacturer of men's and women's garments. It seeks to employ the beneficiary permanently in the United States as a shop tailor. 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 a tailor as stated on the Form ETA 750. The director 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 February 7, 1996. It was initially approved on February 22, 1996. Following the receipt of information from the American Consulate, Seoul, Korea, relevant to the beneficiary's experience, the director concluded that the I-140 was approved in error and issued a notice of intent to revoke the petition on September 13, 2001. It is noted that the investigative report from the American Consulate in Seoul, Korea is not in the record of proceeding.

In response to the NOIR, counsel submitted evidence in support of the beneficiary's work experience that included an affidavit from the beneficiary's prior employer and an affidavit from the current owner of the prior employer's business.

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. The director revoked the petition's approval on January 17, 2003 pursuant to section 205 of the Act, 8 U.S.C. § 1155.

On appeal, counsel submits additional affidavits and reiterates his assertion that the petitioner has established that the beneficiary met the experience requirements as stated on the Form ETA 750.

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 February 27, 1995. As noted on the labor certification, the beneficiary must have two years experience in the job offered of shop

tailor 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, counsel previously submitted a letter from the beneficiary's prior employer, Park's Tailor, verifying the beneficiary's employment from February 1984 to October 1986.

It appears from the notice of revocation that the Consulate's investigation consisted of neighborhood interviews, biographic information from a previous nonimmigrant visa application, and information that the beneficiary was not currently employed in the position of a tailor. Since the investigative report is not in the record of proceeding, it is impossible for the AAO to draw a clear and correct conclusion from the consular investigation.

Again, *Matter of Estime, supra*, states 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. In the instant case, there was no evidence of record at the time the decision was issued. Rather there was only a summary of a report. Therefore, there was not good and sufficient cause to revoke the petition based on the grounds cited by the director. Even assuming that there was a report in the record of proceeding and that it was accurately summarized by the director, it would seem that the Consulate determined that the petition should be revoked based merely on supposition. The beneficiary is not required to work in the job offered or even in a related job at the time of his interview. S/he is only required to have the required experience before the priority date. Moreover, the summarized results of the "neighborhood investigation" are in no way conclusive. Finally the AAO cannot determine the significance of the beneficiary's nonimmigrant visa application since it is not in the record of proceeding. In this case and without the investigative report, there is no evidence that shows the beneficiary did not have that experience.

Beyond the decision of the director, another issue concerning the instant case is whether the petitioner had established its continuing ability to pay the proffered wage from the priority date.

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 February 27, 1995. The proffered salary as stated on the labor certification is \$1,950 per month or \$23,400 per year.

With the petition, counsel submitted a copy of the petitioner's 1994 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss From Business. The tax return reflected an adjusted gross income of \$17,639 and Schedule C reflected gross receipts of \$297,316, gross profit of \$179,275, wages of \$49,248, and a net profit of \$22,208. The petition was approved on February 22, 1996 and the issue was not discussed in the NOIR or notice of revocation.

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 had employed or paid the beneficiary a salary equal to or greater than the proffered wage.

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).

The petitioner is 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 (7th 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 three. In 1994 after paying the beneficiary's salary (\$23,400), the petitioner would have had nothing remaining to support a family of three (\$17,639 adjusted gross income - \$23,400 proffered wage = -\$5,761).

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's experience as a tailor and to the petitioner's ability to pay the proffered wage. If he wishes to continue to rely on the consular recommendations, the director must also include in the record of proceeding the investigative report from the Consulate in Seoul, Korea. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 17, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision.