

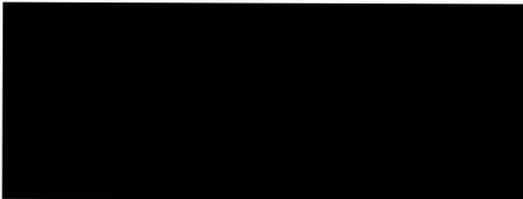


U.S. Citizenship  
and Immigration  
Services

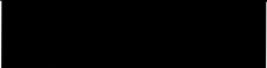
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B6



FILE:



Office: VERMONT SERVICE CENTER

Date:

**AUG 21 2007**

SRC-03-046-52833

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:

SELF-REPRESENTED

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center (Texas Director). The Acting Director, Vermont Service Center (Vermont Director), subsequently revoked the approval of the petition after issuing a notice of intent to revoke the approval of the petition (NOIR). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a family day care. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The petitioner filed the instant petition on November 25, 2002 and the Texas director approved the petition on June 13, 2003. Based on the widespread scope of the malfeasance perpetrated by ██████████<sup>1</sup> Citizenship and Immigration Services (CIS) determined that it should scrutinize all visa petitions for immigrant workers represented by ██████████. On September 26, 2005, the Vermont director consequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) since ██████████ was the recorded attorney for the instant petition. In a Notice of Revocation (NOR), the Vermont director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because the record did not include a response to the NOIR and thus the grounds of revocation had not been overcome.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 2005 NOR, the single issue in this case is whether or not the petitioner has overcome the grounds of revocation in the director's NOIR dated September 26, 2005.

The regulation at 8 C.F.R. § 103.2(b)(16)(i) states in pertinent part:

If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his /her own behalf before the decision is rendered, ...

On appeal, the petitioner asserts that she did not have the opportunity to submit any evidence to overcome the grounds of revocation because she did not receive the NOIR and requests a copy of the NOIR. The record shows that on September 26, 2005, the Vermont director issued the NOIR to the petitioner at ██████████. However, the record does not contain any tracking information for mailing the NOIR. The submission of the instant appeal itself indicates that the petitioner does not have intent to abandon this immigrant petition by not responding the NOIR. If the petitioner had received the NOIR, it could have submitted its assertions and additional evidence to rebut the grounds of intent to revoke on appeal. The petitioner should be given a real opportunity to submit any evidence to overcome grounds of revocation instead of just a time frame. Therefore, the petition will be remanded to the Vermont Director to reissue and resend a NOIR to the petitioner so that the petitioner will have an opportunity to submit evidence to rebut the grounds of revocation.<sup>2</sup>

<sup>1</sup> On April 14, 2005, after a jury trial in the United States District Court for the District of Maryland, Northern Division, ██████████ was convicted of multiple counts of immigration fraud. ██████████ was convicted of falsifying labor certification applications and conspiracy to submit false labor certifications.

<sup>2</sup> The AAO recommends that the director use a return receipt mail service when issuing the NOIR.

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).

Beyond the director’s NOIR, the AAO has identified additional grounds of revocation and will discuss these issues. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In the instant case, the petitioner is a family child care home. The labor certification was approved for the beneficiary to fill a full-time cook position and to perform the duties: “Prepare sandwiches and meals according to menu & children’s health needs and parent’s preferences. Also prepare drinks & juices. Estimated[sic] consumptions & serve.” However, the record does not contain any evidence establishing that the petitioner’s job offer to the beneficiary is a *bona fide* and realistic one. The petitioner did not provide information about the numbers of its current employees and the children it took care of at the time of filing the labor certification. Therefore, it is not clear whether the petitioner had a full time cook position open at the priority date.

In addition, the labor certification requires 2 years of experience in the job offered. The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

The instant I-140 petition was submitted on November 25, 2002 with an experience letter dated June 2, 2002 from [REDACTED] This letter states in pertinent part that:

This letter is to state that [the beneficiary] has worked with us as a cook from April 1, 1995 to January 31, 1998. He cooked variety of dishes, lunches and dinners from recipes. In addition, he managed kitchen and ordered supplies. He was a diligent worker and we highly recommend him for any related position.

The experience letter is on the restaurant letterhead and was signed by [REDACTED] However, the letter does not contain the writer’s title in the company and a complete address with contact information. The letter does not confirm the beneficiary’s full time employment. If the beneficiary worked on a part time basis, then the 34 months of experience verified in the letter can only be counted any 17 months of full-time experience. The letter describes the beneficiary’s duties with that restaurant in Pakistan as “cooked

variety of dishes, lunches and dinners.” The petitioner did not provide its children customer information or explain how the beneficiary’s experience in Pakistan 5 years ago cooking a variety of lunch and dinner dishes would qualify him to perform the duties of preparing sandwiches and meals for children in the United States. Therefore, it appears that the petitioner failed to demonstrate that the beneficiary possessed the qualifying experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The regulation 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, 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.50 per hour (\$23,920 per year). Evidence in the record shows that the petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor’s income, liquefiable 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. In

addition, they 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 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. However, the record contains only part of Schedule C of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 2001, but not the complete tax return, any evidence of compensation paid by the petitioner to the beneficiary during the relevant years or any other regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage. Nor did the petitioner submit evidence of the sole proprietor's personal expenses. Without these documents, the petitioner failed to establish its ability to pay the proffered wage. Therefore, the Texas director approved the petition in error.

In view of the foregoing, the previous decision of the Vermont director will be withdrawn. The petition is remanded to the director to provide the petitioner an opportunity to rebut the grounds of revocation by sending another NOIR preferably by return receipt mail. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.