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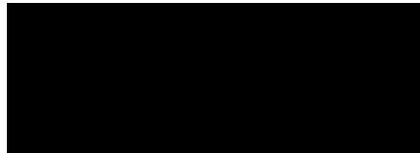
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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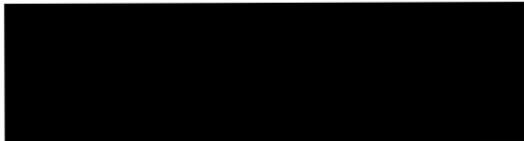
Office: TEXAS SERVICE CENTER

Date: JAN 03 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's application to adjust status to lawful permanent resident and results of a subsequent investigation and additional interview, inconsistent and/or contradictory information was obtained and the director consequently 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. The petition's approval will remain revoked.

The petitioner is a shoe repair shop. It seeks to employ the beneficiary permanently in the United States as a shoe repair supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established its continuing ability to pay the proffered wage, that the petitioner misrepresented the job to DOL in the labor certification process, and therefore, the labor certification is deemed invalid, and that the beneficiary does not plan to perform the job as stipulated by the employer and is therefore not qualified for a skilled worker visa. The petition's approval was revoked for fraud accordingly.

The record shows that the appeal is properly filed and 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 March 2, 2005 revocation, the first issue in this case is whether or not the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date.

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.

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 July 2, 1997. The proffered wage as stated on the Form ETA 750 is \$10.75 per hour (\$22,360 per year). The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$74,7871, to have a net annual income of \$54,188, and to currently employ 1 worker. On the Form ETA 750B, signed by the beneficiary on June 19, 1997, the beneficiary did not claim to have worked for the petitioner.

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).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 beneficiary did not claim to have worked for the petitioner and the petitioner did not submit any evidence showing that the petitioner paid the beneficiary any compensation, and thus, the petitioner has not established that it employed and paid the beneficiary the proffered wage from the priority date in 1997 onwards.

As previously noted, the evidence indicates that the petitioner in the instant case 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<sup>1</sup>, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. However, the petitioner submitted the schedule Cs of Form 1040 for the years 1997 through 2003. The schedule Cs show that the sole proprietor had net profit of \$12,562 in 1997, \$11,663 in 1998, \$14,815 in 1999, \$10,615 in 2000, \$9,887 in 2001, \$6,230 in 2002, and \$9,934 in 2003, which are \$9,798, \$10,697, \$7,545, \$11,745, \$12,473, \$16,130 and \$12,426 less than the proffered wage respectively. Counsel's reliance on the business gross receipts and gross income is misplaced. Counsel's reliance on the sole proprietor's Schedule C is also misplaced. CIS considers the sole proprietor's adjusted gross income in determining the ability to pay the proffered wage and only net profits on Schedule C are reported as part of adjusted gross income reflected on the Form 1040, not the gross receipts, nor the gross income. The schedule Cs show that the sole proprietor had insufficient net profits to pay the proffered wage for the years 1997 through 2003. The record of proceeding does not contain a complete copy of the sole proprietor's 1040 tax returns for 1997 through 2003. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in the NOIR, the petitioner declined to provide copies of the sole proprietor's complete tax returns for 1997 through 2003. The tax returns would have demonstrated the amount of adjusted gross income the sole proprietor reported to the IRS and further reveal his or her ability to cover their existing business expenses as well as pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In addition, the sole proprietors must show that they can sustain themselves and their dependents. The petitioner did not submit a statement of monthly expenses for the sole proprietor's household, and did not submit the sole proprietor's adjusted gross income reflected on line 33 of the Form 1040 tax return. Therefore, it is not clear whether the sole proprietor had sufficient income to cover the existing business expenses, and to pay the proffered wage as well as the sole proprietor's household living expenses. Therefore, the petitioner failed to establish that it had sufficient income to pay the proffered wage to the beneficiary for 1997 through 2003 because it failed to submit regulatory-prescribed evidence to establish the sole proprietor's continuing ability to pay.

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<sup>1</sup> The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 35 for 2002 and Line 34 for 2003.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding contains bank statements for the petitioner's business checking account and sole proprietor's personal checking account. If the accounts are savings accounts, money market accounts, certificates of deposits, or other similar accounts, such money should be considered to be available for the sole proprietor to pay the proffered wage and/or personal expenses. However, these statements represent the sole proprietor's checking account, and are funds most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Therefore, the balance on the petitioner's business checking account cannot be considered as the sole proprietor's additional income or liquefiable assets as part of the petitioner's ability to pay.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets.

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).

In her NOIR on January 18, 2005 the director realized that the petition was approved in error because the tax returns submitted did not clearly indicate the petitioner had the ability to pay the proffered wage, that the petitioner failed to establish that there are other employees which would be supervised by the beneficiary, and that it was not persuasive that the beneficiary intended to work for the petitioner 100 miles away from where the beneficiary resided. The director provided the petitioner thirty days to rebut the grounds to revoke. On February 18, 2005, in response to the NOIR counsel submitted a letter from the petitioner stating that it wishes to employ the beneficiary upon his lawful permanent resident status, the petitioner's 2003 tax return with insufficient net income or net current asserts to pay the proffered wage, and bank statements for the petitioner's business checking account. For the reasons to be discussed below in detail, the petitioner's evidentiary submissions and counsel's assertions are non-responsive to the critical issue and material fact of this case: the petitioner's continuing ability to pay the proffered wage. Therefore, the AAO finds that the director had good and sufficient cause to revoke the approval of this petition.

The second issue in the revocation is whether or not the petitioner misrepresented the job to DOL in the labor certification process, and therefore, the labor certification is deemed invalid and whether or not the petitioner and the beneficiary have the intent to engage in employment as stipulated by the petitioner.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany*

*v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, describes the job opportunity in details. The job offer consists of the name of job title “shoe repair supervisor” set forth at Item 9, the duties of “supervise, coordinate, train and evaluate workers” set forth at Item 13, the minimum requirements that an applicant must have four years of experience in the job offered of shoe repair supervisor set forth at Item 14 and that the beneficiary will supervise two employees set forth at Item 17.

Section 212(a)(6)(C)(i) of the Act provides that “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured ) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”

The director determined that the petitioner misrepresented the job to DOL in the labor certification process because the petitioner did not submit evidence to prove that the beneficiary would supervise two employees and the Schedule C forms for 1997 through 2003 do not support the petitioner’s assertion. Counsel argues on appeal with the petitioner’s affidavit that the number of employees that the beneficiary will supervise as listed on Form ETA 750 is an estimate or prediction, and the number listed was not relevant or material to the merits or adjudication of the application, as long as the petitioner has at least one employee for the beneficiary to supervise.

The AAO concurs with the director’s conclusion. First of all, the labor certification is certified for a full time supervisory position. Supervisor’s main duties are to supervise other employees. It is most unlikely that supervising one employee would make the beneficiary perform his supervisory duties on a full time basis. The number of employees the beneficiary will supervise on the Form ETA 750 is not just an estimate or prediction. It is a material part of the terms and condition of the job opportunity. Without the two employees to be supervised by the beneficiary, the labor certification application might not have been certified because a supervisory position cannot exist without enough number of employees to be supervised. It is also noted that the petitioner implicitly indicates that the beneficiary will supervise multiple employees when it describes the job duties as “supervise, coordinate, train & evaluate workers” using the plural instead of singular for the employees to be supervised. Furthermore, although counsel and the petitioner claim that the petitioner sometimes had two employees, the owner’s two sons, but always had at least one employee, they never submitted any documentary evidence to support their assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Finally, contrary to counsel’s and the petitioner’s assertions, the evidence submitted in the record shows that the petitioner failed to demonstrate that it had ever at least one employee from the priority date. The petitioner did not submit any W-2 forms or payroll records for any of alleged employees for any year during the relevant period from 1997 to 2003. Instead the petitioner’s submitted Schedule C forms for 1997 through 2003 indicate that the petitioner did not pay any wages to anyone during these years. The AAO finds that the director has reasonable grounds to

determine that the petitioner misrepresented a material fact involving the labor certification application pursuant to Section 212(a)(6)(C).

On appeal counsel is citing *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990), which relates to a decision to revoke approval of a visa petition because the beneficiary entered into a prior marriage for the primary purpose of obtaining immigration within the purview of section 204(c) of the Act, 8 U.S.C. § 1154(c) (1988), as a marriage entered into for the purpose of evading the immigration laws. In *Matter of Tawfik*, the Board of Immigration Appeals sustained the appeal based on a determination that where the district director concluded that there was evidence in the record from which it could "reasonably be inferred" that a marriage had been entered into for the primary purpose of obtaining immigration benefits, the substantial and probative evidence, requisite to the revocation of a subsequently approved visa petition, was not presented. However, the instant case relates to invalidation of labor certifications after issuance based on a determination of fraud or willful misrepresentation of a material fact involving the labor certification application under Section 212(a)(6)(C)(i) of the Act and the regulation at 20 C.F.R. § 656.30(d). Counsel does not state how *Tawfik's* rule applying section 204(c) of the Act is binding on a case under Section 212(a)(6)(C)(i) of the Act and the regulation at 20 C.F.R. § 656.30(d).

The regulation at 20 C.F.R. § 656.30(d) provides in pertinent part that: "After issuance labor certifications are subject to invalidation by the [CIS] or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." Accordingly the director's decision to invalidate the labor certification is affirmed.

Counsel also asserts that the director erred in concluding that the beneficiary did not intend to work in the proffered position because the job offer is 100 mile away and he has worked in the construction field for the last ten years. The AAO agrees with counsel's assertion that the fact that the beneficiary has worked in the construction field for the last ten years and that the offered position is 100 miles away does not simply signify that the job offer is not bona fide or that the beneficiary does not intend to perform the job upon obtaining permanent resident status. However, on the other hand, considering the totality of the circumstances in addition to the fact of a job offer 100 miles away and the beneficiary only working in construction for the last ten years instead of repairing shoes, it is doubtful that the beneficiary will relocate to the Naples area, accept the job offer and perform the duties upon his permanent resident status approval. 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).

The regulation at 8 C.F.R. § 204.5(l)(3) 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 beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for [REDACTED] in Honduras as a shoe repair supervisor from February 1970 to July 1983. After that, he represented that he has been working in construction field. He does not provide any additional information concerning his employment background on that form.

The record of proceeding contains an experience letter for the beneficiary from an individual named [REDACTED] as who is living in Miami, Florida. [REDACTED] alleged that he was the owner and general manager of [REDACTED], located at [REDACTED] Honduras, C.A. [REDACTED] in his letter dated April 22, 1997 certified that the beneficiary was employed with their company from February 18, 1970 to July 30, 1983 as a leather goods and shoe crafter supervisor. The letter does not appear to exactly meet the requirements set forth by the above-quoted regulation. According to a plain reading of the language of the regulation, an experience letter should come on behalf of the company or business entity the beneficiary worked for and was signed by someone in a position authorized to act on behalf of the company with the company's address and contact information.

Although the regulation at 8 C.F.R. § 204.5(g)(1) allows to consider other documentation relating to the beneficiary's experience or training, it is applicable only in the circumstances the required primary evidence is unavailable. Neither the petitioner nor [REDACTED] explained why a letter directly from the business "[REDACTED]" as the required **primary evidence is not** available. [REDACTED] did not indicate what kind of records he based the beneficiary's employment verification on with exact starting and ending dates of 27 years ago. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

In addition, as discussed before the petitioner failed to establish its continuing ability to pay the proffered wage. The petitioner and the beneficiary both agreed that the beneficiary did not start his working in the proffered position although the petitioner claimed to hire the beneficiary in the position when it filed the labor certification and the beneficiary is able to work legally since he obtained his employment

authorization document. The petitioner's schedule C forms indicate that the petitioner never paid any wages to its employee(s), and therefore, failed to establish that he ever hired any employees. The beneficiary married in Miami in 1997 and since then he and his family have been living in that area; the beneficiary is not only working in Miami but also doing business as a tile contractor; the beneficiary's spouse also runs a janitorial business in Miami. It appears that the beneficiary and his family have roots in that area. As the director pointed out the form G-325 indicates that the beneficiary has been in the construction industry since 1997 and his job in shoe repair ended in 1983. The beneficiary did not provide any information about his employment background for the period between 1983 and 1997. It is doubtful for the beneficiary to have intent to go back to his previous career after more than 14 years in Naples, 100 miles away from Miami when the petitioner filed the labor certification on his behalf in 1997 and when he had his adjustment of status interview in Miami in September 2004.

Counsel's assertions on appeal cannot overcome grounds of the director's revocation. The AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the insufficient evidence in factual assertions presented by the petitioner concerning its ability to pay the proffered wage, by the beneficiary concerning his qualifications for the proffered position and based on the petitioner's misrepresentation of material fact involving the labor certification application.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed. The director's decision on March 2, 2005 is affirmed. The petition's approval remains revoked.