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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 29 2006  
WAC-99-189-52078

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

PETITION: 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 preference visa petition was initially approved by the Director, California Service Center. In connection with the results of the beneficiary's adjustment of status interview, an overseas investigation was requested. Based on the finding of the investigation, the director determined that the beneficiary had not met the qualification requirements and served the petitioner with a 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 case is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is a Sri Lankan restaurant. It seeks to employ the beneficiary permanently in the United States as a cook for specialty Sri Lankan 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 was qualified for the proffered position and revoked the petition accordingly.

The AAO will evaluate whether or not the director correctly revoked the approved petition in the director's January 31, 2005 decision based on whether or not the beneficiary has met the qualifications as listed on the Form ETA 750.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is September 16, 1997.

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) or 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.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook for specialty Sri Lankan food. According to item 14, the petitioner requires a minimum of four years of experience in the job offered.

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. According to an addendum to the Form ETA-750B, the beneficiary was employed by "Grosvrnor Caterers Limited Sea View Restaurant" in Colombo, Sri Lanka from April 1980 to March 1989.<sup>1</sup> The beneficiary claimed that the employer was a "Restaurant, Specialty, Sri Lankan Food," and he was employed as a "COOK, Specialty Sri Lankan Food." Evidence submitted with the initial petition includes a letter dated July 18, 1997 from [REDACTED] the general manager of "Grosvrnor Caterers Limited." According to the letter, the beneficiary was employed as a cook from April 1980 to March 1989 and also "worked at our subsidiary Sea View Restaurant."

The I-140 petition was approved on December 1, 2000. The beneficiary attended his adjustment of status interview, and according to the director's NOR, "questionable information surfaced regarding the beneficiary's previous employment, which led to a request for an overseas investigation . . . conducted on or before January 16, 2003."<sup>2</sup> The investigation resulted in the discovery by U.S. investigators that the beneficiary was never employed by the Sea View Restaurant at anytime. Based on this adverse information, the director issued a NOIR on December 10, 2004. The director informed the petitioner about the results of the investigation and provided the petitioner with 30 days for rebuttal.

In response to the director's NOIR, the petitioner submitted another letter from [REDACTED] dated December 23, 2004, a letter from T.G. Hinni Appuhamy Taxis dated December 28, 2004, a letter from [REDACTED] dated December 27, 2004, a letter from [REDACTED] dated December 28, 2004, a letter from [REDACTED] dated December 26, 2004, and an affidavit from the beneficiary dated January 5, 2005.

The director revoked the petition on January 31, 2005, stating that the beneficiary had not met the minimum requirements as stated on the Form ETA 750 and the evidence submitted on rebuttal failed to overcome the grounds for revocation.

On appeal, counsel states that the director breached 8 C.F.R. § 103.2(b)(16) by not providing a copy of the investigation report to the petitioner and the beneficiary, the director did not specify for which years the records investigated encompassed, and the beneficiary was denied due process. Counsel also states that the director rejected all of the evidence submitted without an explanation and unreasonably limited the types of acceptable evidence.

Counsel states that "[both the NOIR and the NOR] did not provide [the] [p]etitioner and [the] [b]eneficiary with either specific facts or documentary evidence for which they can provide a rebuttal or explanation . . . [s]pecifically, the [director] did not provide, with either [n]otices, a copy of the investigator's report." Counsel also states that "[the director's determinations] are no more than repetitions of hearsay evidence provided by USCIS investigators."

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<sup>1</sup> The evidence in the record uses both "Grosvrnor" and "Grosvenor." For instance, the letter from [REDACTED] dated July 18, 1997 uses "Grosvrnor" in its letterhead whereas the second letter from [REDACTED] dated December 23, 2004 uses "Grosvenor" in its letterhead.

<sup>2</sup> Counsel errs in stating that the beneficiary's file was returned to the director with a request for an overseas investigation on January 16, 2003 because according to the director's NOR and the investigation report, the investigation was conducted on or before January 16, 2003.

According to the regulation at 8 C.F.R. § 103.2(b)(16), “[a]n applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.” Both the NOR and the NOIR state:

U.S. investigators reviewed the employment records of personnel department for the Sea View Restaurant to discover that the beneficiary was never employed by the restaurant at anytime.

According to the investigation report dated January 16, 2003:

Embassy Colombo verified [the subject’s employment history] from Sea View Restaurant located at 15 Sea View Avenue, Colombo 3. According to records at personnel department of the restaurant, the above named had not been employed by it at anytime.

A comparison of the director’s statement in both the NOR and the NOIR with the actual wording of the investigation report shows that the director did in fact provide all the essential information in the investigation report even though the actual report was not provided to the petitioner or the beneficiary. The information was specific in that it reveals that the records at Sea View Restaurant’s personnel department indicate that the beneficiary was not employed there at anytime. Since the director stated the finding of the investigator’s report in his NOR and NOIR, provision of the actual investigation report is unnecessary. Thus, the AAO finds that the director did not breach 8 C.F.R. § 103.2(b)(16) because the petitioner and the beneficiary had “the record of proceeding which constitutes the basis for the decision” in the NOR and the NOIR for inspection. Moreover, as indicated above, the director’s determinations were based on the investigation report, which the director stated in his decisions, and not on hearsay evidence.

Counsel states that “[the director] fails to specify for which years the records investigated encompassed . . . it is unclear from the [NOR] whether USCIS investigators were reviewing record from 1980 – 1989 or 2003 (years after [the beneficiary] had left his employment).” The NOR and the NOIR both state that “the beneficiary was never employed by the restaurant at *anytime*.” (Emphasis added.) Thus, the plain language of the NOR and the NOIR sufficiently conveys that the investigators reviewed the records for all the years available, and not just from 1980 to 1989 or in 2003.

Counsel states that without the investigation report, the beneficiary “has been denied his due process rights to present his case and respond to USCIS’s allegations regarding his previous work experience.” Counsel’s argument is without merit because the beneficiary was afforded two opportunities “to inspect the record of proceeding which constitutes the basis for the decision,” as stated at 8 C.F.R. § 103.2(b)(16), because the director stated the finding of the investigator’s report in the NOR and the NOIR.

Counsel states that “[the director] does not explain on what grounds he rejects all this evidence confirming the veracity of [the] [b]eneficiary’s claimed work experience” and the director erred in stating that mere assertions of counsel do not constitute evidence because several statements from witnesses were submitted.

Counsel’s assertion that the director failed to provide an explanation in rejecting the evidence submitted is without merit because the director explained in the NOR that “[the] letters were submitted without corroborating and credible documentary evidence of work verification” and listed examples of acceptable corroborating and credible documentary evidence. Counsel even states on appeal that “[the director] rejected the documentary evidence . . . claiming that the [p]etitioner failed to submit [certain types of documents].”

The AAO, however, finds that the evidence submitted should have been considered. The regulation at 8 C.F.R. § 204.5(g)(1) states that “[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s).” Evidence submitted with the initial petition includes a letter dated July 18, 1997 from ██████████ the general manager of “Grosvenor Caterers Limited.” According to the letter, the beneficiary was employed by the company as a cook from April 1980 to March 1989 and “worked at our subsidiary Sea View Restaurant.” The director requested additional evidence in the NOIR, and additional evidence was submitted. According to another letter from ██████████ dated December 23, 2004, the beneficiary worked under ██████████’s supervision and management, and “neither the catering business nor the restaurant would have kept, and would have available for current review, employment records for the period of 1980 to 1989, dating back from 15 to 25 years ago.” The letter from T.G. Hinni Appuhamy Taxis dated December 28, 2004 states that as a transport contracting company, the company became acquainted with the beneficiary “in 1980, when he was a cook at Grosvenor Caterers Ltd.” The letter from ██████████ dated December 27, 2004 states that “I worked under [the beneficiary’s] supervision from 1982 to 1985 at Grosvenor Caterers.” The letter from ██████████ dated December 28, 2004 states that “[the beneficiary’s] catering company in Sri Lanka The Grosvenor Caterers undertook to do the catering for my wedding reception in May 1985.” The letter from ██████████ dated December 26, 2004 states that the beneficiary was offered a job in 1986 but “declined the offer as he was gainfully employed in renowned catering company in Sri Lanka, Grosvenor Caterers.” The record also contains the beneficiary’s affidavit dated January 5, 2005, in which the beneficiary states that “██████████ told me that he is not aware of any visit or inquiries by the investigators.”

The first letter from ██████████ dated July 18, 1997 meets the kinds of evidence required by 8 C.F.R. § 204.5(g)(1), but the reliability of the letter was called into question as a result of the overseas investigation. The other letters and the affidavit submitted on appeal provide corroborating evidence to the first letter from ██████████. The letter from ██████████ dated December 23, 2004 likewise provides an explanation as to why the investigators did not find any information regarding the beneficiary on Sea View Restaurant’s personnel records, namely that such information does not exist. The AAO finds that these statements from witnesses and acquaintances should have been taken into consideration because they corroborate the contents of the letter from ██████████ dated July 18, 1997 and provide sufficient explanation for the investigation’s result.

The director states that corroborating and credible documentary evidence of work verification includes “the beneficiary’s employment records such as the wage and earnings statements and Individual Income Tax Returns for the period of employment, the foreign companies’ employment records such as certified annual Sri Lankan government income tax returns (similar to U.S. Federal Income Tax Returns) and quarterly wage and earning reports. Counsel states that the director unreasonably limited the types of acceptable evidence because “it is unreasonable to demand that [the] [p]etitioner and [the] [b]eneficiary produce documents from a foreign country that are similar to those of the [United States]. Further, it is unfair to demand that a company maintain[s] records that are 15 – 25 years old.” Even though counsel does not specify why the demands are unreasonable, the AAO agrees that the director did limit the types of acceptable evidence without alternatives notwithstanding that 8 C.F.R. § 204.5(g)(1) allows evidence in the forms of letter from employers or trainers. Moreover, as stated above, the letter from ██████████ does explain why demanding records that are 15 to 25 years old are unfair. Thus, in this case, letters from different individuals attesting to how they know the beneficiary and how they know of the beneficiary’s past employment experience can be corroborating evidence.

Thus, the AAO finds that based on the director’s reasoning for revoking the approval as stated in the record, the director did not have good and sufficient cause to revoke the approval of this petition because evidence submitted to rebut the NOIR does corroborate the beneficiary’s past job experience, and the evidence does provide a reasonable explanation for the result of the investigation report.

However, the AAO has identified two additional issues that the Service Center did not address in its NOIR and NOR and that warrant examination. 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 or revocation in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 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).

First, there is the issue of the underlying reason an overseas investigation regarding the beneficiary's past work experience was requested. According to a memorandum from the Los Angeles District Office to the American Consulate in Colombo, Sri Lanka dated December 27, 2002, the investigation was requested because "[s]ubject's Sri Lankan passport indicated Landed Proprietor and Businessman was his profession when he applied for his B-2 Visa in 1990. Subject and his wife and two children are now attempting to adjust their status under employment based E-36 category." Thus, the investigation stems from what appears to be an inconsistency between the beneficiary's profession as listed on his passport and his claim throughout his I-140 petition that he is a cook. The record does not contain any evidence that addresses this issue, and *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.

This inconsistency, if unresolved, can be good and sufficient cause to revoke the approval of this petition because just as the investigation report calls into question whether the beneficiary has met the qualifications as listed on the Form ETA 750, this inconsistency likewise raises the question whether the beneficiary possessed at least four years of experience as a cook for specialty Sri Lankan food. Even though the evidence submitted has overcome the director's reasoning for revocation, the same evidence is silent on this inconsistency.

Second, there is the issue of the petitioner's ability to pay the proffered wage. According to the Form ETA 750, the proffered wage is \$11.55 per hour, which amounts to \$24,024.00 annually. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B, and the evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 1997, 1998, and 1999. The record before the director closed on October 20, 2000 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the federal tax return of the petitioner's owner for 2000 was not yet due. Therefore the owner's tax return for 1999 is the most recent return available.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income

of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and her husband. Those returns show one dependent daughter in 1997 and 1998, and no dependents in 1999. Therefore the household size of the petitioner's owner is three persons in 1997 and 1998, and two persons in 1999.

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. The owner's tax returns show the following amounts for adjusted gross income.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$17,210.00	No Information	\$24,024.00*	-\$6,814.00
1998	\$18,664.00	No Information	\$24,024.00*	-\$5,360.00
1999	\$26,529.00	No Information	\$24,024.00*	\$2,505.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 1997, 1998, and 1999.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage and pay its owner's living expenses in 1997, 1998, and 1999 because the petitioner's owner had a deficit in 1997 and 1998 even before household expenses are taken into consideration, and the AAO finds that it is unlikely that \$2,505.00 is sufficient to support a household of three persons in 1999.

The record includes an undated letter from the petitioner stating that it had a profit of \$73,066.13 in 1997 based on an income of \$127,658.50 and expenses of \$54,592.37. The figures used by the petitioner were not corroborated by the evidence in the record and does not match any of the figures on the Schedule C from the owner's 1997 tax return. The assertions of the petitioner 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).

Based on the foregoing, the petition will be remanded to the director for further deliberation on whether there is good and sufficient cause to revoke the approval based on the inconsistencies regarding the beneficiary's profession and whether the petitioner has the ability to pay the proffered wage for the years in question. The director may issue a request for evidence (RFE) or take any other required actions or actions deemed necessary. If, after further deliberation, the director denies the petition, the decision will be certified to the AAO.

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 director's decision to revoke the approval is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.