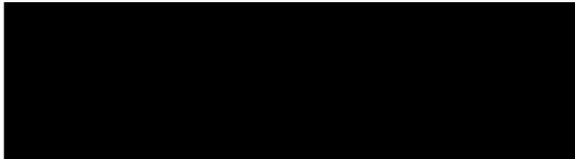




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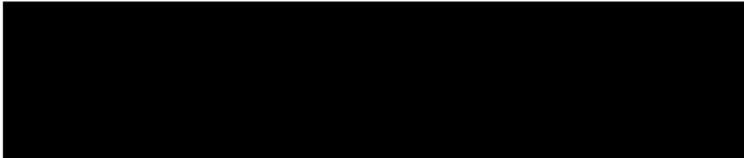


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 13 2006
WAC 02 236 53754

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further consideration of the matter.

The petitioner states that it is an adult residential facility. 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, accompanied the petition. The director determined that the petitioner created the proffered position for the beneficiary for the sole purpose of immigrating to the United States and denied the petition accordingly.

On appeal, counsel states that the director's decision is based on unsubstantiated assumptions lacking both legal and factual support. Counsel submits additional documentation.

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 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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$14.88 per hour, which amounts to \$30,950.40 annually.

The petitioner is structured as a sole proprietorship. The petitioner stated that it was established in November 9, 1990, has seven employees, and has a gross annual income of \$1,234,130. With the petition, the petitioner submitted a letter of employment verification dated March 11, 2001, written by [REDACTED] owner, Aling Delia's Restaurant, Artesia, California. In his letter, [REDACTED] stated that the beneficiary had been a cook at his oriental fast food restaurant from April 7, 1993 to December 31, 2001. The petitioner also submitted its Form 1040, U.S. Individual Income Tax Return for 2000. This document indicated the sole proprietor supported two dependents, including the petitioner, and the Schedules C submitted with the return indicated the petitioner had two distinct businesses. The first Schedule C in the return identified EJS, Ton-Ton, MG & MG2 Family homes at 4901 Hamilton Avenue, Oxnard, California, while the second Schedule C identified EJS2 Family Home at 1210 Nelson Place, Oxnard, California. The first Schedule C indicated a profit of \$173,327, while the second Schedule C reflected a profit of \$18,334. The sole proprietor's adjusted gross income for tax year 2000 is shown as \$191,135.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 19, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested

that the petitioner provide copies of its 1998, 1999, 2000 and 2001 tax returns, with all attachments, and schedules as well as appropriate signatures, or audited financial statements. The director also requested state of California Form DE-6, Quarterly Wage reports for all employees for the last three quarters that were accepted by the state of California. The director stated that the forms should include the names, social security numbers and number of weeks worked for all employees. The director also requested the petitioner's job offer letter, as well as the petitioner's W-3 Forms for the years 1998, 1999, 2000, and 2001.

The director then stated that in order for Citizenship and Immigration Services (CIS) to reaffirm the validity of the initiation I-140 petition, the petitioner had to show that he or she was a successor in interest. The director requested documentation to show how the change of ownership of EJS, Ton-Ton, and MG occurred, whether by buyout, merger, or another method.

In response, the petitioner submitted a letter of employment offer dated November 3, 2002, signed by [REDACTED], Licensee/Administrator, MG-2 Family Home. In the letter, [REDACTED] stated that the sole proprietor's offer of employment was still valid, and that she was offered employment as a cook on a fulltime permanent basis and that the beneficiary's duties included preparing and cooking food according to diets prescribed for residents. The petitioner also submitted its Form 1040 tax returns for 1998, 1999, 2000, and 2001. These documents indicate that the sole proprietor had adjusted gross income of \$81,431 in 1998, \$103,424 in 1999, \$191,135 in 2000, and \$160,557 in 2001.

Although counsel indicated in a cover letter, that the petitioner had submitted copies of its Forms DE-6 for the last four quarters, the petitioner submitted Forms DE-6 Quarterly Wage Report for the EJS2 Family Home for the first three quarters of 2002. These forms indicated that the sole proprietor had between six and eight employees in this business during this period of time, and their quarterly aggregate salaries ranged from \$33,191.77 to \$25,054.11. The petitioner submitted Forms DE-6 for EJ's Family Home for the first three quarters of 2002. These documents indicated that sole proprietor's second business employed between 25 and 27 individuals during this quarter and their aggregate quarterly wages ranged from \$90,377.57 to \$129,040.96. Counsel noted that the petitioner was unable to provide its W-3 documents as the petitioner's accountant was unable to locate them presently, but that the petitioner would submit these as soon as possible.

Subsequently, in June 2003, the petitioner submitted Forms W-3 for tax years 1999, 2000, and 2001 for EJS Homes. These two forms indicated the petitioner had paid wages, tips, and other remuneration of \$391,938.35 in tax year 2001, \$355,974.21 in tax year 2000, and \$297,659.69 in tax year 1999.¹ Two additional W-3 forms indicated that EJ2 Family Home paid wages of \$70,324.18 in tax year 1999, and \$75,368.25 in tax year 2000.

With regard to the director's request for documentation evidencing change of ownership, counsel stated that the evidence did not exist because ownership had not changed since the sole proprietorship was established in 1990. Counsel stated that [REDACTED] currently has four family homes, each with a different name, namely, EJS, Ton-Ton, MG, and MG2 Family Homes. Counsel stated that the Profit and Loss statements list each entity and list the petitioner as the proprietor of each entity.²

¹ The photocopies submitted and the numbers listed on the documents are partially illegible.

² The record is not clear as to which profit and loss statements counsel referred. The record does not reflect any profit and loss statements, although the petitioner's 1998 tax returns in the federal depreciation schedules do list five buildings identified as "Building Residence-Ton-Ton, Bldg. Residence-EJ, Bldg. Residence-MG, and Bldg. Residence-MG2." The depreciation schedule also identifies the acquiring of the buildings over a period of time from January 1991 to January 1997. A fifth building under a separate Schedule C is identified as Bldg. Residence-Nelson, acquired January 15, 1996, on page three of the 1998 Federal Depreciation Schedule.

Because the evidence submitted was deemed insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 6, 2004, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. In particular, the director requested that the petitioner submit original computer printouts from the IRS, date stamped by the IRS, of filed tax returns for the years 1998 to 2003. The director also requested that the petitioner submit copies of the petitioner's current valid city, county, state, and federal business licenses.

In a response dated February 2005, counsel stated that the petitioner had not yet filed their 2003 income tax return. Counsel resubmitted the petitioner's income tax returns for 1998, 1999, 2000, and 2001 along with state of California tax returns for tax years 1998, 1999, and 2000. No IRS stamped IRS computer printouts for these tax years were submitted to the record, nor did counsel or the petitioner provide any explanation for why these documents were not submitted. The petitioner did submit for the first time its 2002 tax return. This tax return indicated that the sole proprietor had adjusted gross income of \$133,596 in 2002. The petitioner also submitted one business license for MG2 Family Home, 5031 Halsey Way, Oxnard, California from the State of California Department of Social Services. The license is effective as of June 1, 1995 for an adult residential facility for six developmentally disabled clients, one of which may be nonambulatory.

On March 8, 2005, the director issued a third request for further evidence. The director stated that the letter provided as to the beneficiary's previous work experience as a cook lacked the specific duties and hours worked by the beneficiary. The director also requested any W-2 forms and tax records as evidence of previous work experience.

In response, on March 28, 2005, the petitioner submitted a Xerox copy of another letter from [REDACTED] manager of Aling Delia's Restaurant, Artesia, California. In this letter with typewritten letterhead [REDACTED] stated that the beneficiary worked as a cook at the "original" fast food restaurant forty hours a week from April 7, 1993 to December 31, 2001. He described her basic job duties as "prepare, season, and cook authentic specialty foods as offered on restaurant's menu."

The petitioner also submitted a letter from the beneficiary dated March 28, 2005 that stated the beneficiary did not receive any W-2 in 1993 and in 1996 she misplaced her copy of her income tax returns. The beneficiary continued that the Social Security Administration records showed 1996 income tax earnings of \$12,313. An accompanying Social Security Administration statement indicates the beneficiary's taxed social Security earnings from 1994 to 2002. The document indicates the beneficiary earned \$12,313 in tax year 1996. The petitioner also submitted the beneficiary's certified IRS tax returns from 1998, with accompanying W-2 that indicates the beneficiary earned \$11,475 from Aling Delia's Restaurant. The beneficiary's 1999 tax return indicates she was paid \$7,656.36 by Narcisa Gaba, and also \$1,300 by TSE Foods, Inc, and \$13,065 by Artesia Food Services, Inc., both in Artesia, California. During tax year 2000, the beneficiary's certified tax return indicates she earned \$3,250 from TSE Food, Inc. Artesia, California, as well as \$17,394 non-employee compensation from Personalized Mailing, Inc. In tax year 2001, the beneficiary's non-certified tax return indicates the beneficiary as a sole proprietor had an adjusted gross income of \$13,902. The accompanying Schedule C indicates her principal business was the distribution and delivery of newspapers. Finally the beneficiary's IRS certified tax return for 2002 indicates she earned \$3,645 from Valerio's City Bakery, Bonita, California, and her IRS certified tax return for 2003 indicates she earned \$10,530 from Valerio's City Bakery. The beneficiary's uncertified tax return for 2004 indicates that she earned \$10,530 from Valerio's City Bakery.

On January 13, 2006, the director denied the petition. In his decision, the director stated that the petitioner was creating a new job for the beneficiary. The director then reviewed the history of the beneficiary's presence in the United States since 1992, her application for asylum with subsequent denial,³ her application for

³ The record suggests that the application was denied for failure to appear at an interview and an Order to

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, based on her claimed need to take care of her LPR mother; and a subsequent interview at the Los Angeles District Office on April 28, 2005 with regard to the I-140 petition.

With regard to the April interview, the director stated that the beneficiary said that she heard about the proffered job in the classified ads, and she also stated that she was told about the job by the petitioner, whom she met through a teacher in the Philippines. The director also stated that the beneficiary explained that the petitioner already had a cook who is also a care provider, and that she could not tell the officer whether she would move to Oxnard to live in the petitioner's place of business or whether she would be getting an apartment.

The director noted that the beneficiary had an employment authorization card but had yet to work for the petitioner. The director concluded that the instant position was created for the beneficiary, for the sole purpose of immigrating to the United States, and denied the I-140 petition.

On appeal, counsel states that the director's decision was based on unsubstantiated assumptions that lacked both legal and factual support. Counsel states that the director's comments on the asylum application filed by the beneficiary had no bearing on the validity of the instant labor certification or the existence of a bona fide job offer. Counsel notes that the director also made reference to a conversation held with the beneficiary for which there is no written transcript. Counsel states that section 205 of the Act provided that visa petitions may only be revoked upon a showing of good and sufficient cause, and that the director is basing his denial on facts that are irrelevant to an I-140 petition determination. Counsel also states that comments made by the director as to the beneficiary's Cancellation of Removal and Adjustment of Status interview were also irrelevant to the determination of the validity of the I-140 petition filed by the petitioner. Counsel then states that the CIS role in the employment-based visa petitions is to determine whether the petitioner has an ongoing, viable business, whether the petitioner has the ability to pay the beneficiary the prevailing wage, and whether the alien is qualified for the position as advertised. Counsel states that the director discussed none of these factors in his decision.

With regard to the April 2005 interview at the Los Angeles District Office, counsel states that because the beneficiary learned about the job from the owner who was a teacher in the Philippines does not mean the position was created for her. Counsel states there is a big difference between a beneficiary who is being recruited for a position as a result of being related to the petitioner, and a beneficiary who is recruited after learning of an available position through a friend. Counsel states that the second scenario should not raise suspicions as to whether or not an actual job offer exists. Counsel further states that the fact that the beneficiary was unsure of whether she would move to Oxnard to live in the petitioner's place of business or get an apartment is of no consequence. Counsel also states that the fact that the beneficiary has a work permit but is not yet working for the petitioner is not a valid basis for denial of the I-140 petition, and that a CIS memo confirms that there is no statutory or regulatory guidance that requires the beneficiary of an I-140 petition to work for a prospective employer before the beneficiary obtains her permanent residency.

It is noted that on appeal counsel refers to the standard of proof utilized in the revocation of petitions, namely, a "good and sufficient cause." See *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, 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. However, the present proceedings do not concern the revocation of the approval of the instant petition, but rather its denial. In administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought. See *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). Although the determination will turn on the factual circumstances of each individual case, the “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true” or “more likely than not.” *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The standard of proof of preponderance of the evidence will be followed in these proceedings.

Upon review of the director’s decision, it is noted that the director does not address any factors with regard to the petitioner’s ability to pay the proffered wage, or the beneficiary’s qualifications to perform the proffered position, or whether a bona fide position actually exists. The director summarily determined that the proffered position was created for the beneficiary. Although not explicitly stated by the director, his determination appears to be based on the fact that the beneficiary had unsuccessfully applied for asylum, and then subsequently applied for an employment-based visa and a cancellation of removal and change of status petition. While any evidence in the record with regard to these proceedings can be utilized to test such factors as the consistency of the evidence with regard to the petitioner’s viability as a business, the beneficiary’s prior employment or her qualifications for the proffered position in the context of an I-140 visa petition determination, the mere fact that the beneficiary applied for other immigration benefits would not be dispositive of the validity of the instant petition. In addition, the conflicting testimony provided by the beneficiary with regard to her entry into the United States would be an admissibility issue during adjustment of status proceedings, not an I-140 eligibility issue, unless the dates of entry rendered her employment history inconsistent.

In a review of the record, the AAO acknowledges that questions remain to be answered by the sole proprietor. It is noted that the two letters of work verification appear to contain divergent signatures, with the later letter containing no telephone number and a typewritten letterhead. Thus, the question of whether the beneficiary did work as a cook for Aling Delia’s restaurant in Artesia, California, for the requisite two years prior to the 1998 priority date is not resolved. With regard to the petitioner’s business viability, it is noted that the petitioner only submitted one license to establish the business viability of what appears to be five residential homes. It is also noted that the petitioner did not submit certified tax returns and all business licenses when requested to do so by the director, and that the petition could have been dismissed based on this non-responsiveness, which precluded a line of material enquiry.

Furthermore, the petitioner is a sole proprietor. 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 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary’s proposed salary was \$6,000 (or approximately thirty percent of the petitioner’s gross income). In the instant petition, the director in his requests for further evidence did not ask for an itemized list of monthly reoccurring expenses, nor did the petitioner provide any information on monthly household expenses. Nevertheless the sole proprietor’s monthly household expenses are an issue to be examined when establishing whether the sole proprietor has the ability to both pay the proffered wage and pay her monthly household expenses.

It is further noted that the sole proprietor has provided no information on current cooks that it employs and their wages, and/or whether the beneficiary will replace a current employee. Thus, the AAO views the record of proceedings as incomplete both in terms of evidence provided by the petitioner, and in terms of the director's discussion of the I-140 petition. Therefore the AAO remands the decision to the director for a complete discussion of the merits of the I-140 visa petition.

Order: The director's decision dated January 13, 2006 is withdrawn. The matter is remanded to the director for complete consideration of the instant I-140 petition.