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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 29 2008
EAC-02-038-52321

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, Vermont Service Center. In connection with results of the beneficiary's application to adjust status to lawful permanent resident, 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 West Indian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (West Indian 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 director determined that the petitioner had not refuted the reasons for intent to revoke the approval of the petition detailed in the director's NOIR with any actual verifiable documentation and revoked the previous approval of the petition accordingly.

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.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ However, on appeal counsel submits a brief without any additional evidence or supporting documents.

On appeal, counsel submits a brief and asserts that the director's NOR was erroneous as a matter of law and fact because the law does not require that the beneficiary work in the occupation prior to the adjustment of status, and that the beneficiary's husband had a home cleaning business, not the beneficiary.

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The issue to be discussed in this case is whether or not the petitioner offered a bona fide job offer to the beneficiary and the beneficiary would be permanently employed by the petitioner as a foreign food specialty cook.

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, Citizenship and Immigration Services (CIS) requires that the position be available and the job opportunity be open to any qualified U.S. workers as required by 20 C.F.R. § 656.20(c) at the time the labor certification application was filed, and that the position is a full time and of a permanent nature, for which qualified workers are not available in the United States.

Form I-140 indicates that the position is a new position. However, the petitioner did not explain why its business needed a new West Indian cook at that time. The record of proceeding does not contain any documentary evidence showing that the petitioner had a new job opening at the time of filing the labor certification, and that the petitioner opened the job opportunity to any qualified U.S. workers. Instead, the record shows that the petitioner has never employed the beneficiary, even after the beneficiary had the legal employment authorization document (EAD) 19 months before the interview for adjustment of status to lawful permanent resident.

On appeal, counsel asserts that the regulation does not require that the beneficiary work in the proffered position prior to adjustment of status. While the AAO concurs that under current immigration law, the petitioner does not have an obligation to employ the beneficiary in the proffered position before the beneficiary is adjusted to lawful permanent residence status, counsel's assertion is misplaced in the instant case. The director revoked the approval of the petition not because the beneficiary did not work for the petitioner in the proffered position, but because the petitioner failed to establish that its job offer to the beneficiary was and has been a bona fide one. If the petitioner establishes by documentary evidence that it actually employed the beneficiary, CIS considers the evidence as prima facie proof of the petitioner's bona fide job offer and intent to employ the beneficiary in the proffered position permanently. In the instant case, the record does not contain any documentary evidence to demonstrate that the petitioner's job offer was and has been a bona fide and realistic one except the petitioner's statement dated March 22, 2002 which confirmed its continued offer of full time, permanent employment to the beneficiary. 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). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and

credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

In addition, the record contains information inconsistent with the petitioner's statement. The beneficiary did not work and the petitioner did not employ the beneficiary in the proffered position even after the beneficiary obtained her employment authorization document. The labor certification application was filed on January 14, 1998, the beneficiary obtained EAD on February 26, 2003² and the interview occurred on September 27, 2004. That raises a doubt that the job offer ever existed, and that the labor certification and the petition are just a vehicle for the petitioner to obtain lawful permanent residence for the beneficiary because it is unlikely that an employer would continue to keep a job open after it had already waited more than six years and eight months for the beneficiary. On appeal counsel asserts that at the interview the beneficiary's husband admitted that he had a home cleaning business, but not the **beneficiary herself. The record contains a copy of the beneficiary's income tax returns. Although** Schedule Cs to the Form 1040 U.S. Individual Income Tax Returns list her husband as the proprietor for cleaning business, the tax returns were filed by the beneficiary and her husband jointly and all the income for the family in 1999, 2000 and 2001 was from the home cleaning business. The tax returns do not show any income from the beneficiary's employment with other employer(s). Therefore, it is probable that the beneficiary and her husband own and run a home cleaning business jointly. That also raises a doubt that the beneficiary will be permanently employed in the proffered position as a West Indian cook with the petitioner after her adjustment of status application is approved.

On appeal, counsel submits a brief without any supporting evidence or documents. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *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." Counsel does not submit any independent objective evidence to resolve the inconsistencies mentioned in the director's NOIR and NOR. Counsel's assertions on appeal cannot overcome the grounds of revocation in the NOIR and NOR. The AAO concurs that the director approved the petition in error.

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). The AAO finds that the director had good and sufficient cause to revoke the approval of this petition had good and sufficient cause to revoke the petition's approval based on the insufficient evidence in the record of proceeding and multiple

² The beneficiary's Form I-765, Application for Employment Authorization Document, (EAC-03-098-50814) was approved on February 26, 2003.

inconsistencies in factual assertions presented by the petitioner concerning the validating of its job offer and intent to employ the beneficiary permanently in the proffered position.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional errors in previously approving the petition and thus additional grounds of ineligibility and additional good and sufficient causes to revoke the approval of the petition. 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).

The first ground of ineligibility beyond the director's decision and counsel's assertions on appeal is whether the petitioner demonstrated that the beneficiary possessed the requisite two years of experience as a West Indian cook prior to the priority date with the regulatory-prescribed evidence.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of West Indian cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. EDUCATION	no formal education required
EXPERIENCE	
Job Offered	2 [years]
Related Occupation	blank

Item 13 describes the duties as follows: "Preparation, seasoning, cooking of all types of West Indian specialty dishes including channa, curry chicken, curry goat, oxtail stew, roti, beef pies, sweet breads, fruit cakes." Item 15 does not reflect any other special requirements.

The beneficiary set forth her credentials on Form ETA-750B and signed her name on August 25, 1997 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, she indicated that she was employed by Sylmat Services, Inc. in Bronx, New York as a cleaner from September 1996 to the present; that she was a self-employed cleaner from December 1992 to September 1996; and that she worked for Home Style Curry

Cuisine in Trinidad as a West Indian cook from February 1985 to December 1987. Her job duties at Home Style Curry Cuisine in Trinidad were the same as the duties for the proffered position.

The regulation at 8 C.F.R. § 204.5(1)(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 regulation at 8 C.F.R. § 204.5(g)(1) also 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.

The record of proceeding contains a letter notarized on July 10, 1997 from [REDACTED] as the owner of Home Styles Curry Cuisine (Cuisine July 10, 1997 letter). The letter in the record was written in English. However, the record does not contain any evidence to explain, nor did the petitioner provide any explanation whether the author was fluent in English and wrote the original letter herself in English, and if not, why the letter in original foreign language was not submitted, who translated the letter from the foreign language into English and why the translator's certificate was not submitted.

The letter was signed [REDACTED] as the owner of the restaurant. In the NOR, the director pointed out that the letter was from the beneficiary's mother. On appeal, counsel did not express any disagreement with the director's statement. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000). Similarly an experience letter from the beneficiary's mother alone without any independent objective evidence may not be considered as primary evidence to establish the

beneficiary's requisite qualifying experience. Therefore, the Cuisine July 10, 1997 letter cannot be given full evidentiary weight in the proceedings.

The copy of the Cuisine July 10, 1997 letter in the record is a photocopy with an ineligible seal of the notary public. The letter does not include information on the name of the notary public, the state and/or country the notary public is appointed and the notary public's commission expiration date. Therefore, this letter cannot be accepted as a properly notarized affidavit.

In addition, the Cuisine July 10, 1997 letter did not confirm the beneficiary's full-time employment and the months of starting and ending employment. Therefore, the letter would fail to establish that the beneficiary had two full-time years (24 months) of experience as required for the proffered position even if it had otherwise met the requirements as set forth by the regulation. The letter did not include a specific description of the duties performed by the beneficiary during the period of her employment with Home Style Curry Cuisine as required by the regulation at 8 C.F.R. § 204.5(g)(1). Without such a description, the AAO cannot determine whether the beneficiary's experience with Home Style Curry Cuisine qualifies her to perform the duties described in item 13 of the Form ETA 750A and thus the beneficiary possessed the requisite two years of experience for the proffered position.

Therefore, for the reasons above, the Cuisine July 10, 1997 letter does not meet the requirement set forth by the regulation at 8 C.F.R. § 204.5(g)(1), and thus the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience as a West Indian cook prior to the priority date with a regulatory-prescribed evidence.

The second ground of ineligibility beyond the director's decision and counsel's assertions on appeal is whether the petitioner established its ability to pay the proffered wage beginning on the priority date and continuing to the present.

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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$755.60 per week (\$39,291.20 per year). Both the petitioner and the beneficiary did not

claim that the beneficiary worked for the petitioner. On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$250,000, to have a net annual income of \$76,205, and to currently employ 2 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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 beginning on the priority date until the beneficiary obtains lawful permanent residence, 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 petitioner did not submit W-2 forms, 1099 forms or any other documents showing that the petitioner paid the beneficiary any compensation during the relevant years, and thus, the petitioner has not established that it employed and paid the beneficiary the proffered wage from the priority date in 1998 onwards.

The evidence in the record 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 (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 (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 33,³ Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record contains a copy of the Form 1040 U.S. Individual Income Tax Return of the sole proprietor for 1998 through 2000. The sole proprietor's tax returns demonstrated the following financial information concerning the

³ The line for adjusted gross income on Form 1040 is Line 33 for 1998, 1999 and 2000.

petitioner's ability to pay the proffered wage of \$39,291.20 beginning in 1998, the year of the priority date:

In 1998, the Form 1040 stated adjusted gross income of \$61,191.

In 1999, the Form 1040 stated adjusted gross income of \$67,699.

In 2000, the Form 1040 stated adjusted gross income of \$71,918.

The sole proprietor's adjusted gross income on Form 1040 for each year of 1998, 1999 or 2000 was more than the beneficiary's proffered wage and thus appeared that the petitioner had sufficient adjusted gross income to pay the beneficiary the proffered wage for 1998, 1999 and 2000. However, 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. The petitioner did not submit a statement of monthly expenses for the sole proprietor's household. Without the sole proprietor's living expenses, the AAO cannot determine whether the sole proprietor had sufficient funds to pay the beneficiary the proffered wage of \$39,291.20 after deducting his living expenses from the adjusted gross income. If the proffered wage for the beneficiary was paid from the adjusted gross income first, then the sole proprietor would have the balance of \$21,899.80 in 1998, \$28,407.80 in 1999 and \$32,626.80 in 2000. Without the sole proprietor's statement of monthly expenses, it is not clear whether the sole proprietor could meet his living expenses with the figures each year respectively. Therefore, the petitioner failed to establish that it had the ability to pay the proffered wage and cover his personal living expenses in 1998, 1999 and 2000.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the instant petitioner filed another immigrant petition filed on June 13, 2002 with the priority date of November 17, 1995.⁴ The petition was approved on April 1, 2004 and the beneficiary of the approved petition obtained lawful permanent residence on December 7, 2006.⁵ The petitioner was responsible to pay that beneficiary his proffered wage for 1995 to 2006. Therefore, the petitioner must establish its ability to pay two proffered wages including wages for the instant beneficiary from 1998 to 2000. The record does not contain any evidence showing that the petitioner had already paid the beneficiary of the approved petition the proffered wage. Assuming that the petitioner offered the beneficiary of the approved petition the same proffered wage, as previously

⁴ The receipt number for the petition is EAC-02-217-51120.

⁵ The beneficiary's Form I-1485, Application for Adjustment of Status (EAC-03-132-51381), was filed on March 8, 2003 based on the approved immigrant petition and approved on December 7, 2006.

discussed, the sole proprietor's adjusted gross income was not sufficient to pay two proffered wages in 1998, 1999 or 2000 even without consideration of the sole proprietor's living expenses.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay all the beneficiaries the proffered wages and meet its personal expenses as of the priority date with the sole proprietor's adjusted gross income.

The AAO finds that the director approved the petition in error for the above stated reasons, with each considered as independent and alternative good and sufficient cause for the director to revoke his previous approval of the petition. 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 December 6, 2006 is affirmed. The approval of the petition remains revoked.