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**U.S. Citizenship
and Immigration
Services**

B6



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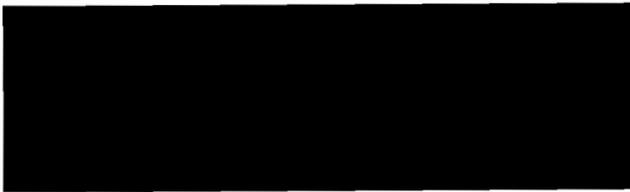
Office: TEXAS SERVICE CENTER

Date: NOV 25 2008

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 "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director) denied the employment-based preference visa petition. The director denied the petition and certified the decision to the AAO for review. The director's decision will be affirmed.

The petitioner is a gas station and food store, and seeks to employ the beneficiary permanently in the United States as a manager, store retail ("Store Manager"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). The director denied the petition as the petitioner, a sole proprietor and an alien, did not fit the definition of an "employer" under 20 C.F.R. § 656.3 in order to validly file a labor certification on the beneficiary's behalf.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. See DHS Delegation No. 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

...

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed

based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 16, 2001.¹ The Form ETA 750 was certified on April 11, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on September 19, 2005.

On September 26, 2005, the director issued a Notice of Intent to Deny ("NOID"). The director questioned the beneficiary's experience to document that he qualified for the certified labor certification. The beneficiary's experience was obtained after he entered the country without inspection ("EWI") and nothing showed that the beneficiary was authorized to work in the U.S. The director cited *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137, 122 S.Ct 1275 (2002) for the premise that the Supreme Court had determined that the Immigration Reform and Control Act ("IRCA") "was enacted to 'forcefully combat the employment of illegal aliens, and that under the IRCA, an illegal alien cannot obtain employment without someone directly contravening explicit federal law.'" *Id.* at 1282-83. The director requested that the petitioner submit the following documentation to overcome the potential basis for denial: a copy of all Citizenship & Immigration Services ("CIS") approval notices for the beneficiary; copies of all Forms W-2 for the time period of 2000 to 2004; copies of the beneficiary's paychecks for the prior employer that submitted the experience letter; any supplemental documentation to establish an employer-employee relationship existed between 2000 and 2004; and if the petitioner was a sole proprietorship or partnership, to provide documentary evidence of the owner's U.S. citizenship or that he/she was a U.S. national.

The petitioner responded and provided the beneficiary's W-2 documentation for the time period specified. The petitioner also provided a copy of the company owner's Employment Authorization Document ("EAD") that CIS had issued, which represented that the owner was not a U.S. citizen or U.S. national.

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

On October 31, 2005, the director issued a Notice of Certification wherein she denied the petition as the record demonstrated that the petitioner, a sole proprietorship, was not owned by a U.S. citizen. As a sole proprietorship is not an "entity apart from its owner," the director looked to 20 C.F.R. § 656.3 under Department of Labor regulations for the definition of a U.S. employer. The director determined that an individual temporarily in the United States cannot be an employer for purposes of obtaining a labor certification, and as the petitioner's owner was not a permanent resident at the time of the labor certification, that he could not petition for the beneficiary.

The issue on certification is: whether an alien who entered without inspection can be an employer within the definition of 8 C.F.R. § 204.5(c) to file a labor certification under 20 C.F.R. § 656.3. Further, upon review, the AAO finds that the petition should have been denied as the petitioner also failed to establish that the beneficiary had the required work experience to meet the terms of the certified labor certification, and that the petitioner failed to establish its ability to pay the proffered wage. We will address each issue in turn.

Under 20 C.F.R. § 656.3, the Code of Federal Regulations pertaining to the Employment and Training Administration, DOL, specifically under the section related to the labor certification process for permanent employment of aliens in the United States, employer means:

(1) A person, association, firm or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

(2) Persons who are temporarily in the United States, including but not limited to, foreign diplomats, intra-company transferees, students, and exchange visitors, visitors for business or pleasure, and representatives of foreign information media can not be employers for the purpose of obtaining a labor certification for permanent employment.

The director requested in her NOID that the petitioner submit evidence that the sole proprietor was a U.S. citizen, or U.S. national, and not "temporarily in the United States" in order to meet the valid definition of an employer. The petitioner submitted a copy of the sole proprietor's EAD card, which evidenced temporary status and temporary employment. In the director's certification, she identified that CIS records showed the sole proprietor entered the U.S. without inspection in February 1991; that he was placed in removal proceedings pursuant to Section 240 of the Act in March 1998; in April 2001, he applied for permanent labor certification; and in June 2001, the Executive Office of Immigration Review granted him relief under a non-removal order. The director specifically notes that at the time the sole proprietor filed the labor certification on the beneficiary's behalf, he was not a United States citizen or permanent resident. Unlike a corporation, a sole proprietorship is not legally separate from its owner. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Reg. Comm. 1984).

Based on the definition of 20 C.F.R. § 656.3, the sole proprietor, as an alien with only temporary work authorization at the time of the priority date, would not qualify as a U.S. employer in order to properly file a labor certification to sponsor another alien. A petitioner must establish eligibility at the time of filing; a petition

cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner did not provide any documentation in response to the Notice of Certification, and has not overcome the basis for denial. Accordingly, the Form I-140 is not supported by a valid labor certification, and the petition was properly denied.

Further, although not raised in the director's denial, we find that the petitioner also failed to establish its ability to pay the beneficiary the proffered wage. 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*, 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). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal, motion, or certification.

The proffered wage as stated on the Form ETA 750 is \$36,442 per year based on a 40 hour work week.² The petitioner listed the following information on the petition: date established: 1991; gross annual income: \$1,646,433.00; net annual income: \$77,679.00 and current number of employees: 3.

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 CFR § 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).

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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.

On Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not assert that it employed the beneficiary. W-2 forms that

² The petitioner initially listed a wage of \$30,000, but DOL required that the wage be increased prior to certification.

the petitioner submitted on the beneficiary's behalf showed that he was employed from 2000 to 2004 with 20th Century Enterprises.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietor, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of four, including himself, and his wife, and two children in Austin, Texas. The tax returns reflect the following information for the following years:

Tax Year	Sole Proprietor's AGI (1040)	Gross Receipts (Schedule C)	Wages Paid (Schedule C)	Net profit from business (Schedule C)
2004	\$76,188	\$1,646,433	\$26,000	\$21,101
2003	\$57,604	\$1,143,265	\$24,000	\$17,507
2002	\$43,684	\$791,690	\$24,000	\$20,812
2001	\$39,553	\$346,665	\$24,000	\$21,043

If we reduced the owner's adjusted gross income (AGI) by the amount of wages that the sole proprietor would need to pay the beneficiary (\$36,442.00) to meet the proffered wage, the owner would be left with an adjusted gross income of \$39,746 in 2004; \$21,162 in 2003; \$7,242 in 2002, and \$3,111 in 2001.

Additionally, CIS records reflect that the petitioner filed for an additional beneficiary. The sole proprietor would need to demonstrate that it could pay both sponsored workers the proffered wage, and support his

family. Based on the amounts remaining after payment of the proffered wages, the information would not support a finding that the sole proprietor could support himself and his family and pay both sponsored workers.

The sole proprietor did provide a “personal financial statement” dated August 31, 2005. The form lists that the sole proprietor had a little over \$8,000 in cash, \$18,000 in personal property, and \$84,000 in “other income,” and \$440,000 in “other assets” defined as assets connected to the instant business as well as three other businesses. The sole proprietor’s statement did not attach any documents to evidence the claims, or valuations of assets. Further, the sole proprietor did not provide any estimate of his family’s regular and ongoing expenses to determine the amount he would need to support himself and his family. 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)). In the absence of specific expenses and documentation, we conclude that the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Accordingly, the petition should additionally have been denied for the petitioner’s failure to demonstrate its ability to pay the proffered wage.

Further, the petitioner failed to document that the beneficiary had the required experience by the time of the priority date and the petition should have been denied on this basis as well.

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the alien 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). 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 beneficiary must demonstrate that he had the required skills by the priority date, April 16, 2001. On the Form ETA 750A, the “job offer” states that the position requires two years of experience in the job offered, as a Store Manager with job duties including:

Hire, train, and schedule sales staff. Coordinate sales promotions, pricing, and marketing activities. Sell inventory to retail customers. Secure store. Plan and develop procedures for security, inventory control and reordering merchandise.

The petitioner did not require any training in section 14, and did not list that the experience could be gained in any related occupation. Further, the petitioner did not list any other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed his prior experience as: Shell, Houston, Texas, Manager, from August 2000 to the present (date of signature August 15, 2005), 40 hours per week. The beneficiary did not list any other experience.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3):

(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.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letters:

Letter from [REDACTED], Shell 20th Century Enterprises, Inc., dated September 6, 2005;
Dates of employment: "since August 2000;"
Title: Manager;

Job Duties: "He is responsible for overseeing the store operations. [The beneficiary] also assists in staffing, sales promotions, pricing, and marketing activities. In addition, [the beneficiary] assists in security, selling merchandise, inventory control, and customer service function."

As the priority date is April 2001, the petitioner would need to demonstrate that the beneficiary had the two years of experience by that date. The beneficiary would only have had eight or so months of documented experience by that date. The beneficiary did not list any other work experience on Form ETA 750, and the petitioner did not submit any other documentation related to the beneficiary's work experience. Accordingly, the petitioner failed to demonstrate that the beneficiary had the two years of prior experience required for the position by the time of the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 director's decision is affirmed. The petition is denied.