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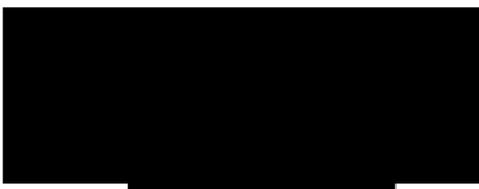
U.S. Department of Homeland Security  
20 Mass Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted]  
SRC 03 162 51321

Office: TEXAS SERVICE CENTER

Date: SEP 20 2007

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) (3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b) (3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further review and investigation.

The petitioner describes itself as a package store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel provides additional evidence and maintains that the petitioner has demonstrated that the beneficiary's work experience meets the requirements of the approved labor certification.

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(l)(3) further 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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 27, 2001.<sup>1</sup> The ETA 750B, signed by the beneficiary on April 25, 2001, lists two positions that he has held. The earliest job was as an assistant manager at the Amoco Food Shop in Jonesboro, Georgia from October 1997 to March 1999. The other

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

job listed was at the Express Shop [REDACTED] where the beneficiary worked full-time as a manager. A notation near this position states that the beneficiary is "not currently employed."

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that no formal education is required, but an applicant must have two years of work experience in the job offered as a night manager or two years in a related occupation described as "assistant manager."

Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed on May 16, 2003, indicates that the petitioner is a liquor store, was established in 1991, and currently employs two workers. The night manager job that the beneficiary would fill is stated as a new position.

Relevant to employment experience gained in the job offered by the priority date of April 27, 2001, the petitioner initially provided two letters. [REDACTED] as owner of the [REDACTED] in Riverdale, Georgia submitted a letter, dated April 4, 2003, affirming that the beneficiary worked as a store manager from April 1999 to December 2000 and performed supervisory duties managing the operation of the store. The other letter, dated April 12, 2003, is signed by [REDACTED] as owner of the Amoco Food Shop at [REDACTED] Georgia. He states that the beneficiary worked as an assistant store manager from October 1997 to March 1999. [REDACTED] described the beneficiary's duties as including the ordering of supplies, supervising and training staff and evaluating employee performance.

On July 19, 2005, the director issued a request for additional evidence and information. The director requested information relating to the following:

- 1.) Copies of the petitioner's income tax returns and corresponding Wage and Tax Statements (W-2s) for 2001 to 2003. The director questioned whether the petitioner intended to hire more than the two employees stated on the I-140.
- 2.) Referencing the biographic form (G-325A), signed by the beneficiary on April 28, 2003 and submitted with the beneficiary's concurrently filed Application to Register Permanent Residence or Adjust Status (I-485), the director asked for an explanation why it could state that the beneficiary began working for the "Petro Food Mart" in Griffin, Georgia in March 2001, when the ETA 750B signed in April 2001 claimed that the beneficiary was not currently employed.
- 3.) Referring to the beneficiary's claimed full-time employment with Express Shop Amoco during the year 2000 as indicated by [REDACTED]'s letter submitted with the I-140 as compared to the beneficiary's individual income tax return, provided with the I-485, showing that his reported wage income during that year was \$7,420 paid by "Little Star Ent. Inc.," the director asked for a copy of the articles of incorporation of Little Star Ent. Inc. as persuasive evidence that it is the same employer as Express Shop Amoco. The director also requested a new employment verification letter or other evidence that the beneficiary was employed full-time since his wages were only \$7,420 per year.

- 4.) The director also requested more information about payment of \$4,800 to either the beneficiary or his spouse, [REDACTED] in 2001.

In response, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003, along with the corresponding W-2s for each year. Four W-2s were issued each year. They were issued to [REDACTED]. In 2001, [REDACTED] was paid \$4,800. [REDACTED] is identified as the owner. According to counsel's transmittal letter, [REDACTED] is the owner's wife and [REDACTED] did not initially refer to himself and his wife as employees. Counsel claims that once the beneficiary receives his green card, [REDACTED] will stop working at the store and that the beneficiary will supervise three workers.

Counsel states in his transmittal letter that the G-325A, submitted with the I-485 contained a typographical error. He states that the correct commencement date of employment for the beneficiary at the Petro Mart was May 2001 and not March 2001.

Counsel states in the transmittal letter that it was impossible to secure a copy of the articles of incorporation for Little Star, Inc. In support of the beneficiary's employment in 2000 with the Express Shop Amoco, the petitioner provides a copy of the beneficiary's W-2 for 2000, which lists both Little Star Enterprises, Inc. with Amoco Express Shop underneath as the issuing employer. A copy of a Georgia state corporations division document also indicates, as pointed out by counsel's transmittal letter, that the address of the registered agent, [REDACTED] for Little Star Enterprises, Inc. is the same as for [REDACTED] as stated on the employment verification letter. As for the modest compensation of \$7,420 paid to the beneficiary in 2000 and questioned by the director as to how it could represent full-time employment at the [REDACTED] the petitioner submits a letter from the beneficiary and a letter from his accountant accompanied by copies of the beneficiary's individual income tax returns for 2001 and 2002 along with the corresponding W-2s. The beneficiary's letter states that he worked full time at the [REDACTED] from April 1999 until December 2000. However, because the business was just beginning, it was not making enough to compensate him accordingly, so he agreed to be compensated later with a share of the business interest. He states that the income tax returns show the receipt of the sale of his interest to [REDACTED]

The accountant, [REDACTED] of Ace Bookkeeping & Tax Service, Inc., explains in his letter that the beneficiary's income tax return for 2002 shows \$22,357 taken as a gain from the sale in that year and the 2001 tax return's gain of \$35,166 is also the proceeds of the beneficiary's sale of his interest in [REDACTED] to [REDACTED]. The accountant also notes that the beneficiary received and reported interest income of \$882 and \$463 from [REDACTED]. It is additionally noted that the beneficiary reported investment interests on Part II of Schedule E on his 2001 and 2002 tax returns in [REDACTED], [REDACTED]' and "A & H [REDACTED]". In 2001, the beneficiary also was issued a W-2 from [REDACTED] for \$17,200 in wages paid. In 2002, [REDACTED] Inc. issued a W-2 to the beneficiary for \$25,400 in wages paid.

The director denied the petition on October 17, 2005. She declined to believe that the beneficiary will actually perform the certified position because of the small number of employees on the payroll. She concluded that it was unlikely that the beneficiary would supervise the owner's wife as a night manager, and that the beneficiary's wife only "worked when needed" according to counsel's transmittal letter. The director also questioned the number of employees as accurate in that Copy A and Copy B of the W-2s issued to the beneficiary's wife in 2001 were not duplicates but prepared with different typeface, different numbers for the wages paid and contained a

correctly spelled name and address of the employer on Copy A and only a misspelled name of the employer on Copy B.

The director also questioned the statement that the beneficiary's commencement date of employment on the G-325A was a typographical error and further questioned why, if the beneficiary could get an experience letter from [REDACTED] of Express Shop Amoco in 2003, why was it impossible to obtain articles of incorporation. She further questioned the large amount of deferred income that the beneficiary had claimed to receive working as a store manager since the sale amount of his interest was shown to be \$163,000 in Part I of Form 6252 Installment Sale Income and the date that the beneficiary acquired this interest was April 30, 1999. The director opined as to why no contract of sale was provided which probably would have shown that the beneficiary was the original owner. The director concluded that the petitioner had failed to establish that the beneficiary had acquired the two full-time years of experience in the job offered or as an assistant manager as required by the terms of the ETA 750B.

The director further observed that the validity of the beneficiary's income tax returns appeared to be in question as she concluded that the beneficiary would not have been permitted under internal revenue regulations to invest in S corporations as a nonresident alien. She additionally questioned the lack of reference to the Petro Food Mart that the beneficiary listed as an employer during 2001 and 2002 on his G 325A submitted with the I-485 as compared to the W-2 issued by [REDACTED] during the same period.

On appeal, counsel asserts that the differences between Copy A and Copy B of the beneficiary's wife's 2001 W-2, the director's observation about nonresident aliens investment in S corporations, as well as the lack of a DBA name of Petro Food Mart are easily explainable. He submits another letter from the beneficiary's accountant, [REDACTED]. As to the W-2s of the beneficiary's wife, [REDACTED] letter states that the copies of the W-2s provided were computer print outs based on tax preparations needs and the data input by the accounting firm. He states that their tax filing software requirement is to round off wages and tax withholding amounts and that is why they are shown as rounded off W-2 copies provided to the beneficiary. The misspellings were simply unintentional typographical errors.

Counsel also cites relevant internal revenue service (IRS) rules as well as a submitted letter from [REDACTED] C.P.A., for the proposition that the beneficiary, for IRS purposes, may be deemed a resident alien for purposes of investing in an S corporation if he either possesses a green card or meets the "substantial presence" test.<sup>2</sup>

In support of the contention that Little Star Enterprises, Inc. is the same employer as Express Shop Amoco, counsel submits copies of county business license documents for 2000 through 2004 showing Express Shop Amoco to be the dba business name of Little Star Enterprises, Inc.<sup>3</sup> He also states that the articles of incorporation have been obtained and provides a copy on appeal. They show that [REDACTED] and the beneficiary were the original incorporators, having formed the corporation on March 16, 1999. Counsel also

<sup>2</sup> Substantial presence defined as physical presence in the U.S. on at least 31 days during the current year, and 183 days during the 3-year period that includes the current year and the 2 years immediately before that, counting a) all the days you were present in the current year, and b) 1/3 of the days you were present in the first year before the current year, and c) 1/8 of the days you were present in the second year before the current year. See *IRS Publication 519*.

<sup>3</sup> An additional letter is provided from [REDACTED], an accountant for Little Star Enterprises, Inc. in which he states that the 2000 W-2 in which the name "Amoco Express Shop" was used was incorrect and that the correct recording should have been Little Star Enterprises, Inc. dba Express Shop Amoco.

provides the original of the W-2 for 2000 showing no overtyping or alteration and which also states \$7,420 paid to the beneficiary as wages, confirmed by the IRS printout also provided. Counsel also states that a purchase agreement relating to the sale of the beneficiary's interest in Little Star was not provided because it was not requested. It is submitted on appeal and shows that the agreement executed between the beneficiary and [REDACTED] on February 8, 2001, shows that they each owned half of the Express Shop Amoco, as well as several other businesses cited in the agreement. The purchase price of \$163,000 represented the purchase of the beneficiary's holdings in these other businesses by [REDACTED]

In addition to these documents, in support of the beneficiary's claimed full-time experience as a manager at Express Shop Amoco, the petitioner submits a letter from a former cashier, [REDACTED]. He states that he worked there from April 1999 until May 2001, and that he confirms that he worked under the beneficiary who was the store manager and handled hiring and training the employees, ordering merchandise and answering customer complaints. Another letter, dated November 29, 2005, from the accountant, [REDACTED] states the beneficiary was responsible for providing the necessary information to prepare sales taxes, payrolls and other accounting related functions for the Express Shop Amoco during the April 1999 to December 2000 period.

Finally counsel provides a municipal business and occupational tax certificate showing that the [REDACTED] Inc., and Petro Food Mart are the same company, as well as a letter, dated December 1, 2005, from the tax and license administrator of the city of Griffin, Georgia stating that the beneficiary served as manager at this location from 2001 to 2004.

Although we find that counsel has adequately addressed the issues relating to the validity of the tax returns and W-2s, as well as the proposed job offer as a night manager with supervisory duties, and the mutual identity of the Express Shop Amoco and Little Star Enterprises, Inc., we find that additional questions need to be finally resolved on remand. The first is whether the petitioner can produce some additional corroboration that the beneficiary was employed full-time during the periods covered by the letters from [REDACTED] and Mr. [REDACTED]

In this case, we note that the director appeared to accurately suggest that the beneficiary's letter was somewhat misleading in describing his reduced compensation from working at Express Shop Amoco as part of some agreement that he would be working for a share of the business, when the facts indicate that he already owned a share of the business dating from April 30, 1999. As the record currently stands, it is not credible to believe that \$7,420 represents one year of full-time compensation as employment as a manager, rather than a lesser period of time. In a case where a petitioner is attempting to use a beneficiary's self-employment in order to satisfy a given criteria for qualifying work experience, it carries a clear burden to prove that such employment was in conformity with the terms of the labor certification requirements and not part of other duties that would typically fall to an owner of a business. In this case, where the record contains an employment verification letter written by the beneficiary's business partner and a cashier who was supervised by the beneficiary, there must be credible, unambiguous corroboration that the work amounted to full-time employment so as to represent the accrual of two full time years of work as a *manager* or *assistant manager*. It is noted that the beneficiary appeared to have multiple business interests in other operations. It is further observed that none of the three letters submitted from [REDACTED] or [REDACTED] actually mention hours or days employed or whether *full-time* employment as a manager or assistant manager had been performed. The case will be remanded to allow the petitioner to show that the beneficiary has cumulatively accrued two years of full-time employment as a manager or assistant manager as of the priority date.

On a related topic, it is noted that this beneficiary has had business interests in at least two of the businesses from which he has claimed wages on W-2s. On remand, the director should clearly request information as to whether the beneficiary has any business or family relationship with the current petitioner or any of the owner's family beyond that as a potential employee of the petitioning corporation. This would include any purchase and sale written or verbal agreement involving the petitioning business or any other business dealings between the two parties. 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).

It is noted that while the I-140 stated that the night manager job was a new position, counsel claimed that the current owner planned to stop working.

Additionally, on remand, the director should request evidence of the petitioner's ability to pay the certified wage of \$36,600 for 2004 and subsequent years pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). This was omitted in the original request for evidence issued on July 19, 2005 and may be solicited on remand.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner consistent with the foregoing. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.