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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAY 20 2009

IN RE:

Petitioner:

Beneficiary:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's March 15, 2007 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 17, 2001.

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 On appeal, counsel submits a brief and a letter dated March 27, 2007 from [REDACTED] President of Pioneer MK Corporation dba Korner Food Mart. Other relevant evidence in the record includes a letter dated June 26, 2006 regarding his prior

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).

employment experience; an affidavit from the beneficiary dated January 16, 2007; and IRS Forms W-2, Wage and Tax Statements, issued by Chevron Stations, Inc. to the beneficiary for 1998, 1999, 2000, and 2001. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the director's denial of the petition because the beneficiary had not been paid the proffered wage by the petitioner was contrary to the law and regulations, because there is no requirement "that the beneficiary must have been earning the [proffered wage] before his prior experience can be counted towards meeting the minimum 2 years of training or experience." Counsel also asserts that the director's rejection of the beneficiary's letter confirming his prior employment was unreasonable. Counsel states that the beneficiary's W-2 Forms issued by Chevron corroborate the beneficiary's statement that he was employed full-time as a store manager for more than two years. Counsel further asserts that the letter submitted by Korner Food Mart on appeal establishes that the beneficiary has the requisite two years of experience in the proffered job.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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 retail store manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-------|
| 14. Education | |
| Grade School | blank |
| High School | blank |
| College | blank |
| College Degree Required | blank |
| Major Field of Study | blank |

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Since this is a public record, the duties of the proffered job will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he was employed as a Manager

for Chevron in Woodlands, Texas from January 1998 to the date he signed the Form ETA 750B on April 28, 2003. He also asserts that he worked as a Manager for Korner Food Mart in Houston, Texas from April 1995 to December 1997. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(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.

With the petition, the petitioner submitted a letter dated June 26, 2006 from the beneficiary regarding his prior employment experience. In the letter, the beneficiary confirms that he worked full-time as a manager for Chevron in Woodlands, Texas from January 1998 to July 2004. In response to the director's request for evidence dated November 2, 2006, the petitioner submitted an affidavit from the beneficiary dated January 16, 2007, and IRS Forms W-2, Wage and Tax Statement, issued by Chevron Stations, Inc. to the beneficiary for 1998, 1999, 2000, and 2001. The beneficiary's affidavit restates the terms of his employment with Chevron and indicates that because Chevron Stations, Inc. has restructured and the Houston locations are now operated by franchisees, the beneficiary is unable to obtain a letter from Chevron verifying his employment.² The director noted that the beneficiary's affidavit was self-serving and insufficient evidence of his prior employment. The Forms W-2 indicate that Chevron Stations, Inc. paid the beneficiary \$10,981.17; \$14,368.23; \$6,653.80 and \$40,985.87 in 1998, 1999, 2000, and 2001, respectively. Therefore, while it appears that the beneficiary was employed on a full-time basis in 2001, it does not appear that he was employed on a full-time basis in 1998, 1999 or 2000. Counsel is correct that the petitioner does not have to establish that it paid the beneficiary the proffered wage in 1998, 1999, 2000 or 2002.³ However, the petitioner is seeking to utilize the beneficiary's Forms W-2 to verify his two years of full-time employment as a manager with Chevron Stations, Inc. The Forms W-2 do

² The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

³ The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. See 8 C.F.R. § 204.5(d).

not verify such employment.

However, on appeal, the petitioner submits a letter dated March 27, 2007 from ██████████ President of Pioneer MK Corporation dba Korner Food Mart. The letter indicates that the beneficiary was employed in a full-time position as manager of Korner Food Mart in Houston, Texas from April 1, 1995 through December 31, 1997. The letter also describes the beneficiary's job duties as required by 8 C.F.R. § 204.5(l)(3). Thus, the letter indicates that the beneficiary acquired two years of experience in the proffered job from the evidence submitted into this record of proceeding. Thus, the petitioner has established that the beneficiary is more likely than not qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date. 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

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 either 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 April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$56,442.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in May 1991 and to currently employ 3 workers. On the Form ETA 750B, signed by the beneficiary on April 28, 2003, the beneficiary did not claim to have worked for the petitioner.

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, USCIS

requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 proprietorship, 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 supported a family of four in 2001, 2002, and 2005. The sole proprietor supported a family of six in 2003 and 2004. The proprietor's tax returns reflect the following information for the following years:

| | <u>2001</u> | <u>2002</u> | <u>2003</u> | <u>2004</u> | <u>2005</u> |
|---|-------------|-------------|-------------|-------------|-------------|
| Proprietor's adjusted gross income ⁴ | \$53,931 | \$59,222 | \$72,864 | \$69,974 | \$49,572 |

In 2001 and 2005, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$56,442.00. It is improbable that the sole proprietor could support himself, his wife and his two children on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. The AAO is unable to determine if the sole proprietor could pay the proffered wage and his monthly recurring expenses in 2002, 2003, and 2004 from the sole proprietor's adjusted gross income, as the petitioner did not submit a list of his monthly expenses. Thus, without a detailed listing of the petitioner's assets and personal liabilities for each relevant year, the petitioner cannot establish its continuing ability to pay the proffered wage.⁵

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner indicated on Form I-140 that it has been doing business since May 1991. The petitioner's gross receipts were \$625,041, \$758,926, \$790,973, \$850,636, and \$934,026

⁴ IRS Form 1040, U.S. Individual Income Tax Return, Line 33 (2001); Line 35 (2002); Line 34 (2003); Line 36 (2004); and Line 37 (2005).

⁵ 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).

in 2001, 2002, 2003, 2004 and 2005, respectively. However, the petitioner did not submit tax returns or other financial documentation to establish its growth since 1991. The petitioner paid wages of \$21,500, \$24,000, \$24,000, \$19,000 and \$32,000 in 2001, 2002, 2003, 2004 and 2005, respectively, indicating a small number of employees. Finally, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. 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 in accordance with the foregoing and entry of a new decision.