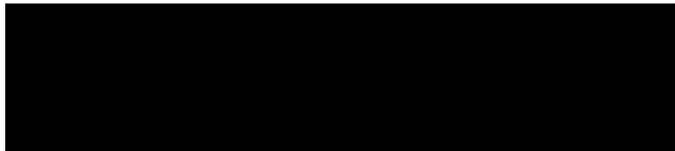




U.S. Citizenship
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Services

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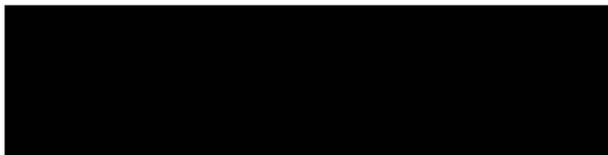
Office: VERMONT SERVICE CENTER

Date: MAY 26 2006

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Michael Valada", written over a redacted area.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a retail convenience store/mini market. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 22, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which 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 priority date in the instant petition is July 29, 2002. The proffered wage as stated on the Form ETA 750 is \$745.00 per week, which amounts to \$38,740.00 annually.

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 appeal¹. Relevant evidence submitted on appeal includes a copy of *Matter of Ranchito Coletero*, a copy of a CIS memorandum signed by William Yates on May 4, 2004, and a copy of an unpublished AAO decision. Other relevant evidence in the record includes the petitioner's cash flow statements, a letter from the petitioner's certified public accountant dated June 15, 2004, copies of the Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner for 2001, 2002, and 2003, copies of the Form W-2 Wage and Tax Statements for the owner's wife for 2001, 2002, and 2003, the petitioner's financial statements, the owner's mortgage payment information, the owner's retirement statement including Roth IRAs and money market fund information, the owner's car payoff information, the owner's available line of credit information, information regarding 7-Eleven franchising, the owner's bank accounts information, and a copy of a summary of *Matter of Ranchito Coletero*. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

Counsel states on appeal that the petitioner's overall financial circumstances should be considered, including the owner's personal assets, profit/loss statements, cash flow statements, net current assets, line of credit, and payments made to the beneficiary's predecessor. Counsel also states that *Matter of Sonogawa* applies with respect to the petitioner's 2002 reported loss because the petitioner expanded in 2002 and because the petitioner experienced a substantial increase in business. Counsel likewise states that this case warrants humanitarian consideration.

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, CIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 20, 2002, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex.

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).

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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a sole proprietorship. The record contains copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner for 2001, 2002, and 2003. The record before the director closed on June 23, 2004 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the federal tax return of the petitioner's owner for 2004 was not yet due. Therefore the owner's tax return for 2003 is the most recent return available.²

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income 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 returns 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. A sole proprietor must show the ability to cover his or her existing business expenses as well as to pay the proffered wage. In addition, the sole proprietor must show sufficient resources for his or her own support and for that of any 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 the owner, his spouse and five dependents on a gross income of slightly more than \$20,000.00 where the beneficiary's proposed salary was \$6,000.00, a figure which was approximately thirty percent (30%) of the petitioner's gross income.

In the instant petition, the tax returns of the petitioner's owner are joint returns of the owner and his spouse. Those returns show one dependent son. Therefore the household size of the petitioner's owner is 3 persons.

For a sole proprietorship, CIS considers net income to be the figure shown on line 35, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return.³ The owner's tax returns show the following amounts for adjusted gross income.

Tax year	Adjusted gross income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or deficit
2002	-\$2,043.00	No Information	\$38,740.00*	-\$40,783.00
2003	\$21,309.00	No Information	\$38,740.00*	-\$17,431.00

² Even though the owner's Form 1040 U.S. Individual Income Tax Return for 2001 appears in the record, it is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is July 29, 2002.

³ For the Form 1040 U.S. Individual Income Tax Return for 2003, the Adjusted Gross Income is listed on line 34.

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 2002 and 2003.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage and pay its owner's living expenses in 2002 and 2003.

Counsel states on appeal that "the law requires that 'overall fiscal circumstances['] of the owner of a sole proprietorship should be considered when assessing its ability to pay wages" and cites to *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA). Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Nevertheless, the AAO does take into consideration the overall financial circumstances of the owner of a sole proprietorship, and the AAO will look at each piece of relevant evidence in the record.

Counsel states that "[t]he Service's reliance on *K.C.P. Food Co. Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985) is misplaced in light of the fact that the immediate petitioner is a sole proprietorship." As stated above, 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. Tex. 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). Regardless, the AAO will look at other evidence in the record regarding the owner's overall financial circumstances.

Counsel states that "the timing of payments from sales impacts the profit/loss figures for tax return purposes." Counsel, in talking about timing of payments, seems to be asserting that even though the petitioner's tax returns were prepared pursuant to the cash method, the petitioner's profits and losses should be recognized in a different manner. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the petitioner wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the petitioner's accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Counsel states that “[i]ndicia of [the] petitioner’s ability to pay is further seen in the [c]ash [f]low [s]tatements, identifying [the] beneficiary’s predecessor’s salar[ies].” The record includes the petitioner’s cash flow statements.

The petitioner’s cash flow statements are essentially unaudited financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to counsel’s statement indicating that the beneficiary has replaced or will replace the owner’s wife, the record also contains copies of the Form W-2 Wage and Tax Statements for the owner’s wife for 2001, 2002, and 2003. The record does not, however, verify her full-time employment, or provide evidence that the petitioner has replaced or will replace her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the owner’s wife involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If the owner’s wife performed other kinds of work, then the beneficiary could not have replaced her.

Counsel states that “[t]he Roth IRA when valued in combination with [the] petitioner’s other assets, more than demonstrates [the] petitioner’s ability to pay the proffered wage.” The record contains the owner’s retirement statement for April 2004 for the owner’s Roth IRA, which includes time deposits and money market funds, of \$9,873.84. The record also includes bank accounts information dated June 9, 2004 regarding the owner’s money market funds and Roth IRAs. While Roth IRAs do represent a form of liquid assets available to pay the wage, the market value of \$9,873.84 cannot be considered because it does not take into account penalties that will be assessed if money is withdrawn prior to the owner meeting all the qualifications for a Roth IRA withdrawal, and the record does not contain information regarding the amount the owner will actually have after penalties have been assessed. Moreover, \$9,873.84 is not enough to cover the difference between the proffered wage and the petitioner’s adjusted gross income for 2003. Furthermore, the AAO cannot determine the amount of money the owner had in his Roth IRAs in 2002 and 2003 as the retirement statement is for April 2004 and the other bank accounts information were dated June 9, 2004.

Counsel states that the owner’s other assets include its checking account balance, money market and individual retirement accounts, home equity, and net worth of franchise, and the amounts for those assets for 2002 and 2004 are indicated on the petitioner’s cash flow statements. The record also contains information regarding the owner’s mortgage payment. The AAO, as shown above, has already addressed the owner’s cash flow statements, where information regarding the owner’s checking account is listed, and retirement accounts. Moreover, home equity and net worth of franchise are not liquid assets. Thus, they cannot be considered as available cash for the sole proprietor to pay the proffered wage and/or personal expenses. Additionally, using the home’s equity would involve obtaining a loan and creating a debt. Similarly, the net worth of the franchise would only be valued if the petitioner sought a loan or sold the business.

Counsel states that “[the owner] has paid off his BMW,” and the record contains the owner’s car payoff information. However, the car payoff information does not indicate the amount the owner paid. Additionally, the fact that the owner paid off his car on June 4, 2003 is irrelevant to the petitioner’s ability to pay the proffered wage because it does not show that the amount of cash used for payment was available in 2002 and

that amount was definitely not available in 2003 to pay the proffered wage because it was used to pay for the car.

Counsel states that “[t]he Service erred as a matter of law when it failed to make a positive ability to pay determination based on net current assets.” Counsel also states that “the record demonstrates that the petitioner’s current net assets as judge by the funding source or franchise owner’s current net assets, were valued at \$85,343.00 . . . as of December 31, 2002 . . . and \$222,602.00 . . . as of June 14, 2004.” The record contains a copy of the Yates memorandum regarding net current assets.

Net current assets are the difference between the petitioner’s current assets and current liabilities, and CIS may review the petitioner’s net current assets as an alternative means of determining the petitioner’s ability to pay the proffered wage. However, unlike corporate tax returns, the Form 1040 U.S. Individual Income Tax Return does not have a Schedule L listing a petitioner’s assets and liabilities. Thus, absent an audited statement, CIS generally does not look at a sole proprietorship’s net current assets. Moreover, counsel fails to indicate where the figure for the petitioner’s net current assets come from as they do not appear in the cash flow statements or the balance summary. Even if the figures are from the cash flow statements or the balance summary, both documents are unaudited and thus are not persuasive evidence.

The record includes a copy of the petitioner’s financial statements, titled “balance summary.” This financial statements is unaudited, and as stated earlier, unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel points to the owner’s available line of credit, and the record contains the owner’s available line of credit information. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner’s net income or net current assets by adding in credit limits, bank lines, or lines of credit. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron’s Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, 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). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and states that *Matter of Sonogawa* applies with respect to the petitioner’s 2002 reported loss because the petitioner expanded in 2002 and experienced a substantial increase in business after the expansion. The record includes information regarding 7-Eleven

franchising. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Nothing in the record, aside from counsel's assertion, indicates that the petitioner underwent expansion in 2002, and the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner did not have an adjusted gross income that covered the annual proffered wage in 2002 and 2003. The petitioner's adjusted gross income in 2001 was \$40,238.00, and it is unlikely that the petitioner could have paid the expenses of a household of 3 in 2001 with \$1,498.00, which is the amount left over after subtracting the proffered wage. Thus, unlike the petitioner in *Sonogawa* with one uncharacteristically unprofitable or difficult year but only in a framework of profitable or successful years, the record indicates that all three of the years the AAO reviewed were unprofitable years.

Counsel also states that "the fact this franchise has been in operation since 1997, supports seven (7) employees, and has increased its revenues from \$867,771.00 to \$1,865,423.00 in just two years, there should be no question that this petitioner both had a reasonable expectation of paying the proffered wage, and the ability to pay and continue to pay the proffered wage." The facts that the petitioner has been in operation for 9 years and employs 7 employees are not in and of themselves unique factors. Moreover, the petitioner's certified public accountant's assertion that the petitioner was listing the money used to buy the franchise in its 2001 and 2002 tax returns calls into question when the current owner acquired the franchise and how long has he personally been the owner. The fact that the petitioner increased its revenues in 2 years is likewise not a unique factor, especially since the AAO cannot determine the profitability of the petitioner for the years before 2001 and/or after 2003 based on the evidence in the record. As stated earlier, the petitioner in this case is distinct from the petitioner in *Sonogawa*, and the totality of the circumstances in this case do not show that the petitioner has the ability to pay the proffered wage.

Counsel cites to an unpublished AAO decision in stating that the reasonable expectation of increased business can be considered. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The Form 1040 U.S. Individual Income Tax Returns for 2001 and 2002 include "7-Eleven charges" under the Schedule C, Part V as other expenses. A letter from the petitioner's certified public accountant dated June 15, 2004 states that the charges were paid prior to operation of the franchise and thus should not be included. The AAO would consider not looking at the 7-Eleven charges if it was a one-time expense and the record contains documents showing that the charges were in fact money used to buy the franchise. However, the charges appear on two different tax returns, in 2001 and 2002, and nothing in the record aside from the certified

public accountant's statement indicate that the charges were in fact the cost of the franchise and/or not recurring annual fees. 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)).

Counsel states that "[t]his case is an exceptional case warranting humanitarian consideration." This is not a legal argument, which counsel concedes, and thus is irrelevant to whether the petitioner has the ability to pay.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

[note re potentially 2 full-time jobs??]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.