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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 20 2008**
EAC 06 115 51969

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

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

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, due to abandonment. The petitioner filed a motion to reopen, the motion to reopen was granted, the director issued a request for evidence (RFE), and the director denied the visa petition after receiving documentation in response to the request for evidence. The visa petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. A copy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹ 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 that the petitioner had not established that the beneficiary met the experience requirements of the labor certification.² The director 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 May 9, 2007 denial, the issues in this case are whether or not the petitioner established its continuing ability to pay the proffered wage beginning on the priority date of the visa petition and whether or not the beneficiary met the experience requirements of the labor certification as of the priority date of March 1, 1996.

Section 203(b)(3)(A)(i) of 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

¹ The record lacks an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of Section 203(b)(3) of the Immigration and Nationality Act (the Act) be accompanied by a labor certification. The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [Citizenship and Immigration Services (CIS)].

(emphasis added). The regulation at 8 C.F.R. § 204.5(g) provides: "In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval." (emphasis added). Counsel has not provided any authority permitting CIS to accept a photocopy of the ETA 750. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer. The record contains no evidence that the petitioner has obtained an official duplicate labor certification or requested the director to do so. Therefore, even if the petitioner's evidence had established the petitioner's ability to pay the proffered wage during the relevant period and the beneficiary's qualifications for the proffered job, the evidence would not support an approval of the Form I-140 petition unless a duplicate original of the Form ETA 750 labor certification had first been obtained.

² It is noted that the petitioner wishes to substitute the current beneficiary for the previous beneficiary listed on the Form ETA 750.

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.

The regulation at 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. 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 [CIS].

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 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 March 1, 1996. The proffered wage as stated on the Form ETA 750 is \$8.90 per hour or \$18,512 annually.³

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 appeal⁴. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's equity line of credit statement, noting an available credit of \$297,170.71, a copy of the 2007 Poverty Guidelines, and a letter, dated July 19, 2007, from [REDACTED] Director, of Kairali Hyper Market, stating that the beneficiary was employed as a Chief Supervisor by Kairali Hyper Market from January 1991 to March 1996. Other relevant evidence includes a copy of a letter, dated December 5, 2005, from [REDACTED] Managing Partner, of Kairali Hyper Market, stating that the beneficiary was employed as an assistant manager from July 1998 to the present (December 5, 2005), copies of the 2001 through 2005 Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] and [REDACTED] including Schedule C, Profit or Loss from Business, for 2002 through 2005, copies of 7-Eleven Franchise System consolidated reports for January 2005 through November 2005, and copies of 7-Eleven Franchise System consolidated reports as of December 2006 and January 2007. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2001 Form 1040 for [REDACTED] and [REDACTED] reflects an adjusted gross income of \$51,539.

³ It is noted that on Form I-140, Immigrant Petition for Alien Worker, under Part 6, the petitioner indicates the weekly wage would be \$12.00 per hour or \$24,960 annually.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The 2002 through 2005 Forms 1040 for [REDACTED] and [REDACTED] reflect adjusted gross incomes of \$63,628, \$50,166, \$51,978, and \$75,055, respectively. The petitioner's 2002 through 2005 Schedule Cs reflect gross receipts of \$642,774, \$1,093,654, \$1,159,270, and \$1,131,197, respectively; wages paid of \$15,141, \$29,691, \$25,144, and \$35,222, respectively; and net profit of \$34,045, \$43,047, \$39,379, and \$38,924, respectively.⁵

On appeal, counsel states:

The employer, in this case, as the record demonstrated, developed his business continuously since the priority date to the present. The business has continued to grow based on the availability of qualified help. With additional help, the business would have grown more. As noted in *Masonry Masters v. Thornberg*, 875 F.2d., 898 (D.C. Cir. 1989), the viability of a visa petition is measured not only from tax returns but also from the effect that adding a skilled person to a business would have had on the business. Indeed, *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) took the same position. In *Sonegawa*, the Service held that:

The fact that petitioner was able to show only a net profit of \$280 for the calendar year 1996 [the priority date] does not itself preclude...the beneficiary from establishing that she will be able to meet the conditions [offered wage] of the certification in the job offer.

Sonegawa remains controlling precedent. 8 C.F.R. § 103.3(c).

The record contains substantial proof of ability to pay as that concept has been interpreted in *Sonegawa*. In measuring proof, the standard in this case, as in any civil case, is simply "preponderance of evidence," that it is more probable than not that the petitioner can pay the offered wage. See *Vance vs. Terrazas*, 444 US 252 (1980). The burden of proof is discussed in detail in *Addington vs. Texas*, 441 US 418 at 425 (1979). The proof that is required of ability to pay, as in any other civil issues, is more likely not a higher standard, such as clear and convincing, requires a Congressional enactment, which is not the case for this issue. In this case, the very growth and development of the petitioner's business is a major factor and must be considered dominant.⁶

⁵ It is also noted that in 2003, the Schedule C reflected cost of labor of \$632,746.

⁶ In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Nothing in the record of proceeding contains any type of notice from the director or any other CIS representative that would have misled counsel into his assertion that CIS requires "convincing" or "persuading" beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably

Although it is difficult to establish a standardized amount of expenses for a family of four people, like in the petitioner's, in family-based petitions the USCIS uses 125% of the poverty guidelines as the minimum amount of income required for a petitioner to support a beneficiary's application. See 8 C.F.R. § 213(a).2(c)(2)(iii)(b)(3). According to the 2007 Poverty Guidelines (copy attached), a family of four becomes ineligible to obtain means-tested benefits when their combined income is \$20,650 (125% if that amount is \$25,812). This amount is the gross income and therefore the expenses should be less than that. Applying a similar standard in this case, the sole proprietor would have the following excess income for the relevant years:

Adjusted Gross Income	125% of Poverty Line for a Household Size of Four	Difference
2001 \$51,539	\$25,812	\$25,727
2002 \$63,628	\$25,812	\$37,816
2003 \$50,166	\$25,812	\$24,354
2004 \$51,978	\$25,812	\$26,166
2005 \$75,055	\$25,812	\$49,243

Every single one of these years, the sole proprietor had excess income over the offered wage when deducting 125% of the poverty guidelines for his family. Please note that a more accurate assessment would have deducted the Poverty Guidelines amount for each given year which would have resulted in additional excess income.

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 February 16, 2007, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of

true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

the beneficiary to show that it employed the beneficiary in the pertinent years, 1996 through 2005. Therefore, the petitioner has not established it employed the beneficiary in 1996 through 2005. The AAO must, therefore, evaluate the petitioner's continuing ability to pay the entire proffered wage of \$18,512.

As an alternative 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, 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. 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 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 CIS 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. The court in *Chi-Feng Chang* noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537

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 unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

There is no evidence in the record of proceeding of the petitioner's ability to pay the proffered wage from the priority date of March 1, 1996 through 2001. Counsel merely states:

Please note that [the sole proprietor] acquired this business in 2002. [The sole proprietor] asked the previous owner for tax returns from 1996 through 2001 so that he could fulfill your request. The previous owner refused to give out the information. The IRS will not release the information without the signed consent of the previous owner.

The petitioner claims that he is a successor in interest to the employer listed on Form ETA 750. Therefore, the petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger, evidence that the predecessor company had the ability to pay the wage at the time the application for labor certification was filed, and evidence that the successor company continues to have that ability. There is no evidence of the sale of the original employer to that of the current petitioner or that the current petitioner assumed all the rights, duties, obligations, and assets of the previous employer. The fact that the current petitioner is doing business at the same location as the predecessor does not establish that it is a successor-in-interest. The financial ability of the predecessor enterprise to pay the proffered wage at the priority date must be established. Moreover, as a successor in interest, the current petitioner is required to establish that it had the continuing financial ability to have paid the certified wage from the purchase date, merger, etc. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). 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). 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 instant case, the sole proprietor supported a family of four in 2001 through 2005. The sole proprietor's adjusted gross incomes in 2001 through 2005 were \$51,539, \$63,628, \$50,166, \$51,978 and \$75,055, respectively. As the sole proprietor failed to provide a list of his personal monthly expenses, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage of \$18,512 to the beneficiary in those years and support a family of four.⁷

On appeal, counsel claims that the sole proprietor has established its ability to pay the proffered wage of \$18,512 based on the poverty guidelines, its line of credit, the effect that adding a skilled person to the business would have had on the business, and on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel has also previously stated that the statement of monthly expenses for the petitioner's family is not necessary due to the relationship between the petitioner and the 7-Eleven franchise system which provides for payrolls through the franchise system based on the stores sales.

In the instant case, however, counsel has not submitted any agreements between the 7-Eleven franchise system and the petitioner that states that if the petitioner lacks funding to pay the proffered wage, then the franchise system would make up the difference. In fact, there are no agreements between the petitioner and the franchise system at all in the record of proceeding. 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). Going on record without supporting documentary evidence is not sufficient for purposes of

⁷ It is noted that the director requested the petitioner's monthly expenses in a RFE dated January 17, 2007. The petitioner declined to submit those monthly expenses. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a list of monthly personal expenses of the sole proprietor and his family. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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)).

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a retail store manager will significantly increase profits for a convenience store. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel contends that the petitioner's line of credit should be considered when determining the petitioner's ability to pay the proffered wage of \$18,512. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income by adding in the sole proprietor's 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). 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 petitioner'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).

With regard to counsel's reference to the poverty guidelines, the AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to a petitioner's reasonable living expenses as they are not geographically specific, and, therefore, we will not consider them when determining the petitioner's ability to pay the proffered wage. Further, the poverty guidelines are used for administrative purposes — for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The only time CIS uses the poverty guidelines is in connection with Form I-864, Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the Act as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. In addition, as discussed above, the record of proceeding does not contain the sole proprietor's personal monthly recurring expenses, and, therefore, it is unclear if the sole proprietor had sufficient funds to pay the proffered wage and to support a family of four in any relevant year.

Finally, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's adjusted gross income. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided tax returns for the years 2001 through 2005. However, the sole proprietor has not submitted a list of his monthly personal recurring expenses; therefore, the AAO is unable to determine if the sole proprietor had sufficient funds to pay the proffered wage of \$18,512 and support a family of four during those years. In addition, there is not enough evidence in the record of proceeding to establish that the business has met all of its obligations in the past or to establish its historical growth from 1996 to the present. There is also no evidence of the petitioner's reputation throughout the industry. Furthermore, there is no evidence in the record that the current petitioner is a successor in interest to the employer who filed the ETA 750, that the previous employer had the ability to pay the proffered wage from the priority date of March 1, 1996 until the current petitioner acquired the business in 2002, or that the current petitioner has assumed all the rights, duties and obligations of the previous employer. 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.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the experience requirements of the labor certification application at the time of filing of the application.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 1, 1996.

CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess four years of experience in the job offered or possess four years of supervisory/management experience. Block 15 states that the beneficiary must be a non-smoker at work.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of retail store manager must have four years of experience in the job offered or four years of supervisory/management experience, and must be a non-smoker at work.

In the instant case, counsel submitted a letter, dated December 5, 2005, from [REDACTED], managing partner of Kairali Hyper Market, Kerala, India, that states that the beneficiary was employed as an assistant manager by Kairali Hyper Market from July 1998 to the present (December 5, 2005). The letter states:

In this position he is responsible for assisting the manager in the placing of various merchandise to ensure that the product is available for customers to purchase. He also assists in the preparing of orders to suppliers for merchandise to be replaced in the store. Under the supervision of the Manager, [the beneficiary] assists in the preparation of work schedules for other employees. [The beneficiary] also functions as Store Manager when the Manager is absent. [The beneficiary] works more than 40 hours per week, as is the custom in India. He has been a loyal employee and we will be sorry to see him go but we wish him the best of luck in his future endeavor.

In response to a request for evidence, counsel submitted a letter, dated July 19, 2007, from [REDACTED] Director of Kairali Hyper Market, Kerala, India, that states that the beneficiary was employed as a Chief Supervisor by Kairali Hyper Market from January 1991 to March 1996. The remainder of the letter is identical to the letter dated December 5, 2005.

The AAO will not accept the letter, dated July 19, 2007, from Aby Abraham as evidence of the beneficiary's experience for the following reasons. First, the letter is inconsistent with the information presented on the ETA 750B, which lists only the beneficiary's employment as Assistant Manager of Kairali Hyper Market from July 1998 to the date he signed the ETA 750B on February 16, 2007. The ETA 750B does not list the beneficiary's employment as Chief Supervisor of Kairali Hyper Market from January 1991 to March 1996. Second, the letter does not explain why the beneficiary went from "Chief Supervisor" from 1991 to 1996 to "Assistant Manager" from 1998 to 2005. While the duties of the positions are listed as identical, the job title indicates that the beneficiary was demoted. Next, the letter does not indicate why this previous employment from 1991 to 1996 was

not mentioned in the letter dated December 5, 2005, and it does not indicate why different individuals signed on behalf of the employer.⁸ *Matter of Ho*, 19 I&N Dec. 582, 591- 592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

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 appeal is dismissed.

⁸ The AAO notes that the petitioner has filed another Form I-140 for a manager that was approved on October 29, 2007. The Form I-140, Immigrant Petition for Alien Worker, listed only five employees when it was filed with CIS on March 10, 2006 (the same date the approved petition was filed with CIS). In addition, the Form ETA 750 indicates that the beneficiary will report to the Manager of the company, and under item 17, identifying the number of employees the beneficiary will supervise, the space indicates the beneficiary would manage 2/3 employees (out of a total of five) on the Form ETA 750. Furthermore, it is noted that the petitioner paid salaries ranging from \$15,141 to \$35,222 in 2002 through 2005 for five employees (approximately \$3,028.20 to \$7,044.40 each annually) indicating that the petitioner did not require the services of two retail store managers as of the date of filing the visa petition with CIS. If the petitioner pursues this matter further, it must address this issue.