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 and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 23 2010

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IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition. The director denied the petition accordingly. [1]

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 22, 2008 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. The AAO will also examine whether the petitioner has established 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

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[1] The petitioner filed a previous I-140 petition for the beneficiary with the Texas Service Center that was denied on February 4, 2006.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is $36,795 per year. The Form ETA 750 states that the position requires two years of prior work experience in the proffered position.

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.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in March 15, 2001, to have a gross annual income of $955,025, an annual income of $35,586, and to currently employ 7 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, 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, United States Citizenship and Immigration Services (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 submitted W-2 Forms

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[2] 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).

for its employees in tax years 2003 to 2005. None of these documents indicated any wages for the beneficiary. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. It has to establish its ability to pay the entire proffered wage as of the priority date and until the beneficiary obtains legal permanent resident status.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on September 6, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was due, although the director did not request it in his RFE. The petitioner, on appeal, submits the petitioner's 2006 Form 1120S. The petitioner's tax returns demonstrate its net income for tax years 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income[3] of $20,398.
- In 2002, the Form 1120S stated net income of $20,362.
- In 2003, the Form 1120S stated net income of $1,876.
- In 2004, the Form 1120S stated net income of $7,866.
- In 2005, the Form 1120S stated net income of $33,436.
- In 2006, the Form 1120S stated net income of $38,659.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the proffered wage. Only in tax year 2006, did the petitioner have sufficient net income to pay the proffered wage of $36,795.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K, line 17e, of its tax return. For tax years 2001 through 2003, 2005, and 2006, the petitioner's net income is found on line 21.

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for tax years 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -$87,777.
- In 2002, the Form 1120S stated net current assets of -$54,534.
- In 2003, the Form 1120S stated net current assets of -$54,047.
- In 2004, the Form 1120S stated net current assets of -$59,870.
- In 2005, the Form 1120S stated net current assets of -$65,352.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2006.

On appeal, counsel reiterates that the petitioner's sole shareholder, by personally guaranteeing to pay the beneficiary the proffered wage, can break the corporate veil and assume personal liability for the proffered wage. Counsel states that in the instant matter, the petitioner's shareholder is the "promisor," the petitioner is considered the "debtor," and the USCIS is considered the "creditor." Counsel described the personal guarantee as creating a binding legal obligation that the USCIS may enforce against the petitioner's primary shareholder. Counsel asserts that the personal guarantee is analogous to an affidavit of support filed in relation to a family-based petition.

The AAO does not view counsel's assertions on appeal as persuasive. As the director correctly noted in his decision, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft, 2003 WL 22203713* (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The wages to be paid to the beneficiary have been defined and certified during the labor certification process, and are to be paid by the petitioner. The AAO will examine the use of a sole shareholder/officer's officer compensation or adjusted gross income to pay the proffered wage, when it examines the petitioner's totality of circumstances.

Counsel also misconstrues the use of a guarantee or an 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 USCIS 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. At the I-140 immigrant visa filing stage of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Cor*p., 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

With the initial petition, the petitioner submitted a signed letter from [redacted], who stated that he was the petitioner's primary shareholder.[5] [redacted] stated that the petitioner had the ability to pay

[5]Based on the petitioner's Schedules K submitted with its tax returns, [redacted] is the petitioner's sole shareholder during tax years 2001 to 2005.

the proffered wage and that he wanted to break the corporate veil and guarantee the beneficiary's wages. He also submitted copies of his Forms 1040 for tax years 2001 to 2005. Although [redacted] does not explicitly state so, he appears to base the petitioner's ability to pay the proffered wage on his own assets as established in his personal tax returns.

If the petitioner were structured as a sole proprietorship, USCIS would then look at the sole proprietorship's adjusted gross income, and his or her household expenses to determine whether the sole proprietor can both pay a proffered wage and pay for his or her annual household expenses. USCIS may look at the sole proprietor's additional financial assets, such as savings accounts, stock portfolio or other financial instruments that are readily available to pay an entire proffered wage or any difference between actual wages paid to a beneficiary and the proffered wage.

The petitioner is not structured as a sole proprietor; however, the AAO notes that as an S Corporation, a sole shareholder has authority to allocate expenses of the corporation for various legitimate business purposes, including reducing the corporation's taxable income. One method of reducing the income is through officer compensation. In examining the officer compensation provided by the petitioner, the AAO is not examining the petitioner's owner's assets, but rather his flexibility to reduce or increase officer compensation which is a discretionary expense.

In the instant matter, the AAO notes that in the priority year 2001, there was no officer compensation paid, while in tax years 2002 to 2005, the petitioner indicates officer compensation of $25,500, $52,000, $48,000, and $48,000. The petitioner's W-2 Forms for tax years 2004 and 2005 indicate that the petitioner paid [redacted] and his spouse both wages of $24,000. The AAO notes that the combined $48,000 in wages is identical to the officer compensation identified in the petitioner's 2004 and 2005 corporate tax returns.

Thus the record is not clear as to whether [redacted] is the sole officer in tax years 2004 and 2005, and whether the petitioner's officer compensation, if also considered wages, a non-discretionary expense item, can be utilized in these years to establish the petitioner's ability to pay the proffered wage of $36,795.

Further, in examining the petitioner's owner's ability to forego his officer compensation in tax years 2002 to 2005, [redacted] Form 1040 for tax year 2003 indicates six dependents including [redacted], while for 2003, the tax returns reflect four dependents, including [redacted] In tax years 2004 and 2005, the tax returns reflect five dependents, including [redacted]. [redacted] adjusted gross income for tax years 2001 to 2005 is as follows: $44,052 in tax year 2001; $80,362 in tax years 2002; $53,915 in tax years 2003; $53,859 in tax year 2004; and $83,641 in 2005. While the record does not reflect [redacted] household expenses, in tax year 2002,[6] as reflected on Schedules A and B, [redacted] itemized expenses for taxes and mortgage interest payments total more than $18,000 and do not include food, clothing, or transportation for six persons. It does not appear feasible that [redacted] could forego officer compensation of $25,500 in tax year 2002.[7] In tax years 2003 and

[6] The petitioner's officer's tax return for 2001 does not contain Schedules A and B.

[7] More than half of the petitioner's owner's 2002 adjusted gross income, minus the expenses noted

2004, while the petitioner's owner's expenses are less, his adjusted gross income is not significant. In these two years tax years 2003 and 2004, over half of the petitioner's owner's adjusted gross income would have to be utilized to pay the entire proffered wage. With regard to tax year 2005, although the petitioner's owner's adjusted gross income increased, it does not appear feasible that the petitioner's sole shareholder could pay his household yearly expenses for five dependents, and pay the entire proffered wage of $36,795. The record contains no further evidence of the petitioner's sole shareholder's assets. The AAO finds that in tax year 2001, the petitioner did not provide officer compensation, and thus in the priority year, the use of officer compensation to pay the proffered wage is moot. With regard to the other tax years, the record is not clear as to the number of officers and whether all would be willing and able to forego any officer compensation. Further, counsel's assertion with regard to the totality of the petitioner's circumstances including an examination of the petitioner's shareholder's assets because the sole shareholder has declared he wishes to guarantee the proffered wage is not persuasive.

In the instant case, the petitioner was in business for four months before it filed the instant ETA Form 750 on April 20, 2001.[8] The record based on the previous I-140 indicates that the petitioner employed contracted employees initially and that by 2003 was paying wages to an increasing number of employees. In 2003, the petitioner filed six W-2 Forms, in 2004, it filed seven W-2 Forms, and in 2005, it filed nine W-2 Forms. With regard to the scale of wages, based on its tax returns, the petitioner paid the following wages and salaries in tax years 2001 to 2006: $21,962 in 2001; $73,276 in 2002; $31,679 in 3003; $56,741 in 2004; $92,717 in 2005; and $122,993 in 2006. The record also indicates that [redacted] received varying amounts of officer compensation throughout the relevant period of time, except for tax year 2001, in addition to wages identified on the W-2 Forms previously submitted to the record on a prior appeal. The record contains no evidence as to the petitioner's profile within the convenience store industry, or in its geographic area that would provide any further documentation on the petitioner's business viability. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO finds that the petitioner has not provided credible evidence in the record of proceeding that the beneficiary has acquired the requisite two years of work experience in the proffered position. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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by the AAO, would have to be utilized to pay the proffered wage of $36,795.

[8] It filed the first I-140 petition for the beneficiary on November 5, 2005, more than four years after its establishment.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

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.

The job qualifications for the certified position of store manager are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed, as follows:

> Formulate pricing policies on merchandise according to requirements for profitability of the store operations. Verify and post details of business transactions to subsidiary accounts in journals. Compute and record changes, refunds, cost of lost or damaged goods. Type vouchers, invoices, checks, reports and other records using typewriter. Store merchandise identifying style, size or type of material,. Examine stocks to verify conformance to specification. Maintain inventory of stock manually and adjust inventory counts and stocks records, spoilage of or damage to stocks. Lock and secure the store. Drop night deposit at bank.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

> Block 14:
>
> Education (number of years)
>
> | | |
> |---|---|
> | Grade school | (Blank) |
> | High school | X |

College	(Blank)[9]
College Degree Required	(Blank)
Major Field of Study	(Blank)

Experience:

Job Offered	2 years
(or)	
Related Occupation	0 (zero)

Block 15:

Other Special Requirements	(Blank)

Based on this information, the petition is for a skilled worker and the job requires two years of experience in the proffered position.

On Part B, the beneficiary describes five jobs that he has held from October 1992 to the date he signed the ETA Form 750, Part B, namely, April 21, 2001. The jobs identified in descending chronological order are for a store coordinator in an unidentified convenience store; a manager for an Italian restaurant in Manhattan Beach, California; a manager for a liquor store in Manhattan Beach, California; a manager for a convenience store in Illinois; and a manager for a convenience store in Hyderabad, India. The text describing the job duties for each position is identical.

The record of proceedings contains two letters of work verification provided by [redacted] The first letter of work verification dated April 15, 2005, and submitted with the petitioner's first I-140 petition filed on behalf of the beneficiary, states that the beneficiary worked for the company from October 5, 1992 to August 10, 1997 as a budget analyst, and describes the beneficiary's budget responsibilities. The petitioner submitted a second letter with its second I-140 petition also from [redacted] This letter is undated, and provides an extensive list of the beneficiary's responsibilities as a store manager from October 1992 to August 1997. The AAO notes that the first letter from [redacted] is inconsistent with the job described on the ETA Form 750, and also with the second letter provided by [redacted] that attests to the beneficiary's work experience as a store manager. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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[9] The AAO notes that the record of proceedings contains a copy of the beneficiary's diploma from Osmania University with transcripts for a three-year program in cost accountancy and income tax. The beneficiary did not list this academic credential in Item 11, Part B. He only described his graduation from St. Peter's Junior College in 1992. The copy of the beneficiary's high school Pass Certificate is dated June 25, 1989, while the Osmania University diploma and transcripts are dated 1992.

> 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.

Further, the job duties for the proffered position identified at Item 13 of Part A of the ETA Form 750 are identical to all the duties of all the jobs listed on Part B except that the first three sentences have been omitted at Item 13. This fact adds to the lack of credibility with regard to both the proffered position and the beneficiary's claimed work experience. The AAO finds that the petitioner has not established that the beneficiary has the requisite two years of work experience as a store manager prior to the 2001 priority date, and would question the veracity of the information contained on the ETA Form 750 with regard to the beneficiary's previous jobs and academic credentials.

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.

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.