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U.S. Citizenship
and Immigration
Services

B6



FILE:

SRC-06-800-09185

Office: TEXAS SERVICE CENTER

Date: **AUG 25 2008**

IN RE:

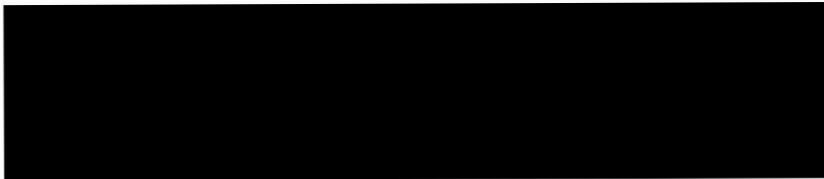
Petitioner:

Beneficiary:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was remanded to the director by the Administrative Appeals Office (AAO). The matter is certified to the AAO for review. The director's new decision will be affirmed and the petition will be denied.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a retail manager (evening manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security (DHS). *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

As set forth in the director's new decision on October 1, 2007, the single issue in this case is whether or not the petitioner has established its 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 nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established **and continuing until the beneficiary obtains lawful permanent residence**. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Bold emphasis added.)

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 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 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date in the instant case is April 28, 2001. The proffered wage as stated on the Form ETA 750 is \$20.50 per hour (\$42,640 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in a related occupation of retail management. On the petition, the petitioner claimed to have been established on July 15, 2004, to have a gross annual income of \$200,000, and to currently employ one (1) worker.

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 in response to the director's notice of certification. In response to the certification counsel submits a brief. Other relevant evidence in the record includes Form 1120 U.S. Corporation Income Tax Returns filed by [REDACTED] for 2001 through 2004, the beneficiary's Form W-2 Wage and Tax Statement for 2004, and Form 1120-A U.S. Corporation Short-Form Tax Return filed by the petitioner for 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

It is noted that [REDACTED] c. filed the original labor certification application on April 28, 2001 and the ETA 750 was certified by DOL to [REDACTED] c. On February 16, 2006, the petitioner filed the instant immigrant petition based on the certified ETA 750. The record contains a letter dated January 16, 2006 from [REDACTED] the president of the petitioner ([REDACTED] January 6, 2006 letter) claiming that the petitioner "purchased the assets and goodwill of [REDACTED] [REDACTED]." In response to the director's notice of intent to deny (NOID) dated March 17, 2006,

counsel stated that the petitioner is a successor-in-interest of the original sponsoring corporation of the ETA 750 because it purchased all assets and goodwill of E [REDACTED]. However, none of letters from counsel and the petitioner was submitted with supporting evidence. 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)). The record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Therefore, the petitioner failed to establish its successor-in-interest status to [REDACTED] and thus failed to support its petition with certified individual labor certification from DOL. The petition cannot be approved without establishment of its successor status or its valid individual labor certification.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the record contains [REDACTED]'s corporate tax return for 2001 through 2004 and the petitioner's corporate tax return for 2004. Counsel implicitly claimed that the petitioner became the successor-in-interest to [REDACTED] by stating that 2004 tax return of [REDACTED] was filed for a period from January 1 to July 29 that year and the petitioner's tax return for 2004 was filed for a period from July 29 to December 31 that year.¹ The assertions of counsel are not evidence and the Boulevard [REDACTED]'s tax return for 2004 is not marked as final return.

Nevertheless, the AAO will examine all the financial materials of both [REDACTED] and the petitioner based on counsel's assumption that the successor status in the instant case had been established on July 29, 2004 to determine whether the petitioner could establish its continuing ability to pay the proffered wage beginning on the priority date until the date the beneficiary obtains lawful permanent residence if the petitioner had established the successor-in-interest relationship between the petitioner and [REDACTED]. Even if the petitioner had properly documented its successor-in-interest status and its willingness to continue pursuing the instant petition as a successor-in-interest to [REDACTED], the petitioner would have to have demonstrated that [REDACTED] had the ability to pay the proffered wage from 2001, the year of the priority date, to July 29, 2004 and the petitioner had the ability to pay the proffered wage on July 29, 2004 and continue to have it since then. Despite the director's implication, noted by counsel on certification, that the petitioner need not demonstrate

¹ It is noted that [REDACTED] 2004 tax return does not indicate that it is for a period January 1 to July 29 and that it is a final return. The Schedule L of the Form 1120 shows the company continued to hold assets at the end of the year.

ability to pay after 2001, the regulation at 8 C.F.R. 204.5(g)(2) states that a petitioner must show its ability to pay the proffered wage from the priority date continuing until the beneficiary adjusts status.

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, Citizenship and Immigration Services (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 during a given period, CIS 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 record contains the beneficiary's W-2 form for 2004 showing that [REDACTED] paid the beneficiary compensation of \$15,000 in 2004. Although counsel stated in response to the director's NOID that [REDACTED] paid the beneficiary \$5,000 in 2003, he did not submit the beneficiary's W-2 form for 2003 to support his assertion. The petitioner failed to establish the ability to pay of the petitioner or the alleged predecessor through the examination of wages actually paid to the beneficiary for 2001 through 2004. The petitioner is obligated to demonstrate that it and its predecessor could pay the full proffered wage of \$42,640 per year from 2001, the year of the priority date to 2003 and the difference of \$27,640 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *See 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). Counsel's reliance on the petitioner's or the predecessor's gross income and expenses is misplaced. Showing that the petitioning company's gross income 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 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. Counsel's reliance on the petitioner's

and the predecessor's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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* 719 F. Supp. at 537.

The record contains copies of Form 1120 U.S. Corporation Income Tax Return filed by [REDACTED] for 2001 through 2004, and Form 1120-A U.S. Corporation Short-Form Tax Return filed by the petitioner for 2004. These tax returns demonstrate the following financial information concerning the ability to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage from the year of the priority date:

- In 2001, the Form 1120 stated a net income² of \$2,898.
- In 2002, the Form 1120 stated a net income of \$10,436.
- In 2003, the Form 1120 stated a net income of \$6,236.
- In 2004,³ the Form 1120 stated a net income of \$30,993.
- In 2004,⁴ the Form 1120-A stated a net income⁵ of \$4,599.

For the years 2001 through 2003, [REDACTED] as the predecessor did not have sufficient net income to pay the proffered wage of \$42,640. For the first seven months in 2004, the predecessor was responsible to pay the beneficiary the pertinent part of the proffered wage for the period from January 1 to July 29, that would be \$24,873.33.⁶ The alleged predecessor paid the beneficiary \$15,000 in the seven months in 2004. Therefore, [REDACTED] c. had sufficient net income to pay the beneficiary the difference of \$9,873.33, and thus, the petitioner established that the predecessor had the ability to pay the proffered wage in the seven months of 2004. For the later five months in 2004, the petitioner as the

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

³ The tax form does not indicate any specific period [REDACTED] filed it for, however, counsel claimed that it was filed for a period from January 1, 2004 to July 29, 2004.

⁴ Counsel claimed that the petitioner filed its 2004 tax return for a period from July 29, 2004 to December 31, 2004.

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 24 of the Form 1120-A.

⁶ Based on \$3,553.33 per month (\$42,640 per year / 12 months) for seven months.

successor-in-interest from July 29, 2004 was responsible to pay the beneficiary the proffered wage for a period from July 29, 2004 to December 31, 2004, that would be \$17,766.66.⁷ The petitioner did not have sufficient net income to pay the prorated proffered wage in 2004 and thus, failed to establish its ability to pay the proffered wage in 2004. Therefore, the petitioner failed to establish its predecessor's ability to pay the proffered wage in 2001 through 2003 and its ability to pay the proffered wage in 2004 with wages paid and net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown 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 predecessor's net current assets during 2001 were \$29,314.
- The predecessor's net current assets during 2002 were \$28,428.
- The predecessor's net current assets during 2003 were \$27,989.
- The petitioner's net current assets during 2004 were \$9,420.

For the years 2001 and 2003, the predecessor did not have sufficient net current assets to pay the proffered wage of \$42,640 and thus, the petitioner failed to establish the predecessor's ability to pay the proffered wage for these years with net current assets. The petitioner did not have sufficient net current assets to pay its prorated portion of the proffered wage in 2004.

In response to the director's certification to the AAO, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. Counsel asserts that the petitioner or the predecessor was only responsible to pay the proffered wage for the portion of the year after April, 28, that was \$28,971.36 for 2001 and therefore, the predecessor would have sufficient net current assets to pay that amount in 2001 and would establish its ability to pay. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of

⁷ Based on \$3,553.33 per month (\$42,640 per year / 12 months) for five months.

⁸ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. In addition, prorating the proffered wage for 2001 could not establish the predecessor's ability to pay the proffered wage for 2002 and 2003 or the petitioner's ability to pay the proffered wage in 2004. The petitioner must establish its ability to pay the proffered wage as of the priority date and continue that ability each year thereafter, until the beneficiary obtains lawful permanent residence.

The record before the director closed on April 14, 2006 with the receipt by the director of the petitioner's submissions in response to the NOID. As of that date the petitioner's federal tax return for 2005 should have been available. However, the petitioner did not submit its 2005 tax return, nor did counsel explain why the tax return was not submitted. 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 failed to establish its ability to pay the proffered wage for 2005 because it failed to submit its corporate tax return, annual report or audited financial statements for 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner has not established that the predecessor had the ability to pay the beneficiary the proffered wage in 2001 through 2003 and that the petitioner had the ability to pay the proffered wage in 2004 and 2005 through an examination of wages paid to the beneficiary, the net income or the net current assets even if the successor-in-interest relationship between [REDACTED] and the petitioner had been properly documented.

Counsel urged the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. However, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an evening manager will significantly increase profits for a convenience store. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Regarding the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states: "I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal."

Counsel also suggested consideration of totality of circumstances citing *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *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. 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.

No unusual circumstances has been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 through 2003 for the predecessor and 2004 through 2005 for the petitioner were uncharacteristically unprofitable years in a framework of profitable or successful years.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612. The petitioner was incorporated in 2004 and employs one employee. The gross income of [REDACTED], [REDACTED], and the petitioner has always been less than \$1 million for most years and they never paid salaries and wages each year more than the proffered wage. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner and [REDACTED] have not proven their financial strength and viability and have not established the ability to pay the proffered wage.

Counsel's assertions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that [REDACTED] could not pay the proffered wage in 2001 through 2003 and the petitioner could not pay the proffered wage in 2004 and 2005 even if it had been established that the petitioner was a successor-in-interest to [REDACTED] at the end of July 2004. Therefore, the director's ground of denial that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date to the present must be affirmed.

Beyond the director's new decision, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience in the job offered or related occupation of retail management and thus qualified for 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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).

In the instant case, the Form ETA-750A, item 14, sets forth the minimum experience that an applicant must have for the position of evening manager. Item 14 describes that the proffered position requires two years of experience in the job offered or in related occupation of retail management. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a full-time jewelry sales person for [REDACTED] in Plano, Texas since September 2002. Prior to that, he worked as a full-time evening manager for A [REDACTED] in Melissa, TX from October 2000 to August 2002 and as a full-time manager for [REDACTED] in Corsicana, TX from September 1998 to April 2000. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In corroboration of the Form ETA-750B, the petitioner submitted two experience letters: one dated January 7, 2003 from [REDACTED] President of [REDACTED] (January 7, 2003 letter) and the other dated January 8, 2003 from [REDACTED] Management of [REDACTED] Beverage (January 8, 2003 letter). The [REDACTED] January 7, 2003 letter verifies the beneficiary's employment with them as a full-time manager for seventeen months from September 1998 to April 2000 prior to the priority date and the [REDACTED] January 8, 2003 letter confirms the beneficiary's six months of experience as a full time (35-40 hours a week) evening manager at [REDACTED] prior to the priority date beginning in October 2000.⁹ The two letters together appear to demonstrate that the beneficiary possessed at least twenty-four months of qualifying experience prior to the priority date. The record also contains the beneficiary's W-2 forms for relevant years as evidence to support the two letters. However, the AAO finds there are inconsistencies between the [REDACTED] January 7, 2003 letter and the beneficiary's W-2 forms. The petitioner did not submit the beneficiary's W-2 form issued by [REDACTED] for 1998, therefore, the beneficiary's employment with [REDACTED] from September to December 1998 stated in the [REDACTED] January 7, 2003 letter is not supported by any objective evidence. The beneficiary's W-2 form for 1999 shows that [REDACTED] hired and paid the beneficiary \$4,200 in 1999. This W-2 form provides inconsistent information with the [REDACTED] January 7, 2003 letter. According to the [REDACTED] January 7, 2003 letter the beneficiary worked as a full-time manager for the whole year, however, the \$4,200 reflected on the W-2 form cannot be considered as a manager's

⁹ The letter verifies the beneficiary's nineteen months of experience as an evening manager from October 2000 to May 2002, however, the experience after the priority date of April 28, 2001 in the instant case cannot be considered as qualifying experience for the proffered position.

compensation for a whole year in any circumstances. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. at 582. Because of the defects, the AAO cannot give the Akym January 7, 2003 letter a full evidentiary weight in this proceeding and cannot consider this letter as primary evidence to establish the beneficiary's qualifying experience for the proffered position. Without verification of the beneficiary's full-time employment as a manager with Akym, the petitioner failed to establish that the beneficiary qualifies for the proffered position. Therefore, the petition must be denied.

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 director's October 1, 2007 decision is affirmed. The petition remains denied.