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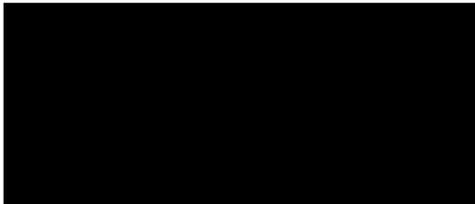
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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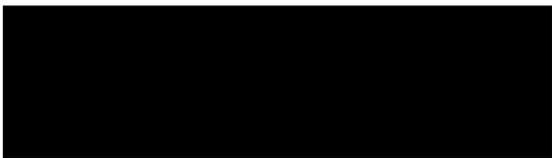
FILE: [Redacted]
WAC-05-107-54480

Office: CALIFORNIA SERVICE CENTER Date: **MAR 29 2007**

IN RE: Petitioner: [Redacted]
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:



INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be withdrawn in part and affirmed in part.

The petitioner operates a residential care facility for the elderly, and seeks to employ the beneficiary permanently in the United States as a cook, institution, cafeteria ("cook"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's September 26, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence. Further, the director questioned the letters submitted to document the beneficiary's experience, and, since the letters were in question, found that the petitioner failed to establish that the beneficiary met the requirements of the certified ETA 750.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.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.

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 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 U.S. Department of Labor. *See* 8 CFR § 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 by the U.S. Department

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

of Labor 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 for processing by the relevant office within the DOL employment system on March 15, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, 40 hours per week, which is equivalent to \$24,024.00 per year. The labor certification was approved on April 15, 2004. The petitioner filed an I-140 Petition for the beneficiary on March 3, 2005. Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: April 2000; gross annual income: "see tax returns;" net annual income: "see tax returns;" and current number of employees: 5.

The director issued a Request for Evidence ("RFE") on June 13, 2005 requesting that the petitioner provide evidence of the petitioner's ability to pay from March 15, 2001 to the present. As the petitioner is structured as a sole proprietorship, the director requested that the petitioner submit a statement of monthly expenses for the petitioner's family, including housing, food, car payments, insurance, utilities, credit cards, loans, clothing, daycare, school, house cleaner, gardener, or other monthly expenses. The RFE further requested secondary evidence to confirm the beneficiary's verified work experience. The petitioner submitted a response, however, following review, the director determined that the petitioner failed to demonstrate its ability to pay the beneficiary from the time of the priority date until the beneficiary obtains permanent residence. Further, the director found that the petitioner failed to demonstrate that the beneficiary met the requirements of the labor certification, and denied the petition. The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel's arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on March 12, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner submitted the following documentation regarding the beneficiary's pay on appeal:²

² In connection with the beneficiary's I-485 Adjustment of Status application, the petitioner's owner provided a letter, dated January 28, 2005, that the beneficiary would start his employment with the petitioner "after being granted his "Work Authorization Document" from the U.S. Citizenship and Immigration Services." We note that the petitioner supplied W-2 statements, which show that the beneficiary has been employed with the petitioner since 2002. Further, the letter from the petitioner lists two facilities, which appear to be related, Villa Residential Care located at [REDACTED] and Villa Guest Home, located at [REDACTED]. We note that the beneficiary's Form G-325 filed with his Adjustment of Status application shows that the beneficiary resided at [REDACTED] Avenue from August 2000 to August 2002, although the beneficiary lists that he was unemployed during this time period. His residence at [REDACTED] he knows the petitioner's owner. Further, we note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See also *Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in *Young Seal* that a close family relationship between the alien and the person having authority, standing alone, establishes, that

<u>Year</u>	<u>W-2 Wages Paid</u>	<u>1099 Wages Paid</u>
2004	\$3,300	\$16,632 ³
2003	\$6,000	\$6,000
2002	\$3,300	

Based on the foregoing, the petitioner cannot establish its ability to pay the proffered wage on wages paid to the beneficiary alone. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and the proffered wage.

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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietor, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports herself, and her husband and resides in Santa Maria, California. Additionally, for the years 2001, and 2004, the sole proprietor supported two dependent children.

the job opportunity is not bona fide or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." It is unclear whether there is a relationship between the two parties, but if there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the bona fides of the job offer may be in question.

³ The petitioner issued a Form 1099 for part of the beneficiary's 2003 and 2004 wages. It is unclear why the petitioner did not issue all of the beneficiary's wages on Form W-2.

For the tax years 2002, and 2003, the sole proprietor supported three dependent children. The tax returns reflect the following information for the following years:

Villa Residential Care	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)
2004	\$37,278	\$182,326	\$36,734	\$36,817
2003	\$40,100	\$156,904	\$26,900	\$28,243
2002	\$42,391	\$149,207	\$18,050	\$26,103
2001	\$30,883	\$72,800	\$15,975	\$10,735

If we reduced the sole proprietor's adjusted gross income (AGI) by \$24,024.00 in 2001, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, and reduced the AGI by the difference between the proffered wage, and the wages paid in 2002, 2003, and 2004, the owner would be left with an adjusted gross income of: 2004: \$33,186 (based on W-2 and 1099 wages of \$19,932); 2003: \$28,076 (based on W-2 and 1099 wages of \$12,000); 2002: \$21,667 (based on wages paid of \$3,300); and 2001: \$6,859 (no wages paid).

To determine whether the sole proprietor could support a family of five, and pay the proffered wage, CIS requested that the petitioner submit an estimate of monthly household expenses. The sole proprietor provided an estimate of monthly expenses, including: mortgage, property tax, property insurance, life insurance, health insurance, food, utilities, car payments, and car insurance, which totaled \$4,017 per month, or \$48,204 on an annual basis. Based on the sole proprietor's estimated household expenses,⁴ and the income remaining after paying the proffered wage, the tax returns would reflect that the petitioner requires the following amounts to meet their budgetary personal expenses and pay the beneficiary the full proffered wage: 2004: \$15,018; 2003: \$20,128; 2002: \$26,537; and 2001: \$41,345, or the petitioner would be deficient a total of: \$103,028, if we were to accept the unverified petitioner's estimate of monthly expenses.

The petitioner additionally submitted bank statements. The statements list multiple accounts on each monthly statement. On appeal, counsel contends that CIS misread the statements and only considered one account, the business checking account, which CIS dismissed based on substantial variations in the checking account, including some months reflecting an end balance of \$0. Since the statements contain multiple accounts on each monthly statement, the information as presented is difficult to ascertain. Counsel provides that each statement includes a "Basic Shares Account," IRA Club Account, a 6-month Certificate Account, and a Business Checking Account. Further, counsel provides that as of July 2005, the accounts contained \$35,546; \$59,467; and \$14,129.

⁴ We note that the petitioner did not provide any supporting documentation to verify the accuracy of the sole proprietor's estimated expenses, such as a mortgage statement, or utility bill(s). 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)). It is unclear from the record that these estimates are accurate. The sole proprietor, for instance, estimates that the monthly mortgage is \$860 per month. Several entries on the bank statements to Wells Fargo Home, labeled mortgage payment, show payments in the amount of \$1560. It is unclear whether the sole proprietor paid an additional amount toward the total mortgage, or whether the sole proprietor's monthly estimate is inaccurate.

We note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." Additionally, in the case of a sole proprietor, cash assets of the business would be reflected on the petitioner's Form 1040 Schedule C, and accordingly already considered above, so that funds from the business checking account would have already been considered. As a sole proprietorship, the owner's personal assets, or personal bank statements would be taken into consideration as additional funds to pay the proffered wage.

The petitioner has not provided information related to the type IRA account held, or whether the sole proprietor could withdraw such funds without substantial penalties. Withdrawals from the IRA would likely be taxed, and reduce the amount available to pay the proffered wage. Assuming the IRA withdrawals would be taxed at a hypothetical rate of 30%, the 2001 IRA account funds of \$56,743, reduced by taxes, would leave approximately \$39,720 in wages available to pay the proffered wage. The entire IRA would be used to cover 2001 wages, and the family's expenses.

This would leave funds remaining from the Basic Shares account, and 6-Month CD accounts. The Basic Shares account similarly showed substantial variations in amounts between the years 2001 to 2005. If we utilized the Basic Shares account of \$26,022, year-end balance as of December 31, 2002, to pay the proffered wage and family expenses for 2002, the entire account would be utilized in that year, and deficient by approximately \$500. The sole proprietor would then need to show that she could pay the proffered wage and family expenses from the remaining CD account in 2003. The sole proprietor's 2003 year-end CD balance was \$12,261, which would be less than the amount required to pay the proffered wage and support the family's expenses. Further, we note that during the year 2003, the CD account showed a joint owner, an individual with a different surname than the sole proprietor, so that it is not clear that the CD account funds would be exclusively available to the sole proprietor.

Having utilized all the funds from the IRA, CD, and Basic Shares accounts, the petitioner is still deficient in its ability to pay the proffered wage and support the sole proprietor's family based on the estimated but undocumented expenses for the years 2003, 2004, and 2005. As noted above, the business checking account reflects substantial variation in amounts, and the petitioner has not shown that the funds are additional amounts to those listed on Form 1040 Schedule C, and were not already considered.

On appeal, counsel further provides that CIS failed to consider depreciation, which in 2004 the petitioner listed \$14,412 in depreciation from a rental unit, as well as the petitioner's business.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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* at 537.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

Based on the foregoing, the petitioner has not demonstrated that the sole proprietor can support herself and her family, and has the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence.

The director also denied the petition based on the petitioner's failure to document that the beneficiary met the requirements of the certified ETA 750. In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a cook, with duties including:

Prepares and cooks meals such as breakfast, lunch, snacks, and dinner for residents and employees of licensed residential care facility for the elderly. Estimates ingredients and weekly consumption of residents and employees. Cooks foodstuffs in quantities according to menu and number of persons to be served. Bakes bread and pastry. Prepares and cooks meals for residents requiring special diet and nutritional meals. Measures and mixes ingredients according to recipe, using a variety of kitchen utensils and equipments. Bakes, broils, and steams fish, vegetables, and other food. Prepares and plans weekly menus. Read menus and estimates food requirements. Order foodstuffs and supplies. Keeps records and accounts. Maintains kitchen area clean.

The petitioner listed that no college degree was required in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed March 12, 2001, the beneficiary listed his prior work experience as: (1) Unemployed, from December 1999 to present (March 2001); (2) House of Representatives, Manila, Philippines, June 1990 to December 1999, Legislative Staff Officer II, 40 hours per week; (3) Mariner's Theme Park Beach Resort, Batangas, Philippines, February 1997 to July 1999, Cook, 40 hours per week, summer time; and (4) Benjarong Restaurant – Clover Food Service, Inc., Metro Manila, Philippines, March 1994 to June 1996, cook, 40 hours, evening shift.

For the individual beneficiary to qualify for the certified labor certification position, the petitioner must demonstrate the beneficiary's prior experience to qualify the individual for that position, and that the beneficiary obtained the experience by the time of the priority date. Evidence must be in accordance with 8 C.F.R. § 204.5(l)(3), which 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.

To document the beneficiary's experience, the petitioner submitted the following statements:

1. Statement dated January 12, 2001, from A [REDACTED] of the law firm De Jesus, [REDACTED] [REDACTED] Makati City, Metro Manila, Philippines, which provided: "This is to certify that [the beneficiary] was employed as a cook (evening shift) from March 1994 until June 1996 by Clover Food Service, Inc., owner of "Benjarong," a restaurant offering Thai cuisine . . . this certification is being issued by undersigned as legal counsel of Clover Food Service, Inc., which closed the establishment in 1996, and which has not operated since."
2. Statement dated February 5, 2001, from [REDACTED], Owner, Mariner's Theme Park Beach Resort, Nasugbu, Batangas, Philippines, which provided: "This is to certify that [the beneficiary] was a part time (summer) employee of Mariner's Beach Resort as a cook in our food service section, Regatta Bar and Restaurant, from February 1997 to July 1999."

The RFE requested more detailed letters in the form of secondary evidence, such as pay stubs to confirm employment since Clover Food Service, Inc. was no longer in business. Additionally, the RFE requested verification that Aleli Manimtim was legal counsel for Clover Food Service, Inc.

In response the petitioner provided:

1. Statement dated June 24, 2005, from [REDACTED] of the law firm De Jesus, Manimtim & Almario, which provided: "We are enclosing a letter from the National Wages Tripartite Board addressed to the undersigned as legal counsel of said corporation . . . Regarding your request for a certification of employment from any manager of the corporation, we regret to inform you that we no longer have any contact with any of the managers, officers or stockholders of the said corporation, particularly since the death of . . . the former general manager . . . We wish to clarify that our firm does not make a practice of issuing certifications of employment on behalf of our clients, even if the corporation or establishment had closed down. We only made an exception in your case because undersigned (sic) has personal knowledge that you were an employee." Attached to the statement was a letter dated February 11, 1994 addressed to [REDACTED] as counsel for Clover Food Service, Inc.

2. Statement dated August 24, 2005, from [REDACTED] Mariner's Theme Park Beach Resort, which provided: "This is to certify that I personally had occasion to verify the previous work experience of [the beneficiary], who was hired as cook at my resort, since . . . the Vice President and General Manager of Clover Food Service, Inc. the owner of the Benjarong Restaurant . . . was a personal friend of mine."

In the decision, the director questioned that the letters did not provide the number of hours worked, and that the petitioner did not provide any secondary evidence in the form of pay records, or confirmation from supervisors.

On appeal, the petitioner provided the following statement to confirm the beneficiary's two years of experience as a cook:

1. Sworn statement from [REDACTED] a certified public accountant, employed by Clover Food Service, Inc. as Chief Accountant from February 1994 to October 1999. The statement provided that Mr. [REDACTED] was responsible for payroll of two restaurants, Benjarong, and Flavors and Spices both owned by Clover. He attested that he was present at the beneficiary's interview for the position of cook. Further, he confirmed that the beneficiary began his employment on March 1, 1994, and that the beneficiary worked for Benjarong until the restaurant closed on June 30, 1996. He confirmed that the beneficiary worked night shift from 5:00 p.m. until 11:30 p.m. six days a week. As Clover Food was no longer in business and records were no longer available, [REDACTED] provided the statement as a sworn statement.

Counsel additionally resubmitted the statement from [REDACTED] regarding his representation of Clover Food.

We are willing to accept the sworn statement, confirmed before a notary as secondary evidence regarding the beneficiary's employment. *See* 8 C.F.R. § 103.2(b)(2)(i). Further, the beneficiary's ETA 750 experience listed is consistent with the letters provided. Accordingly, we conclude that the beneficiary can demonstrate that he has the required two years of experience. Thus, the portion of the director's decision determining that the beneficiary is not qualified for the proffered position is withdrawn. However, as the petitioner has failed to establish its ability to pay the beneficiary the proffered wage, the petition will remain denied, and that portion of the director's decision is affirmed.

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.