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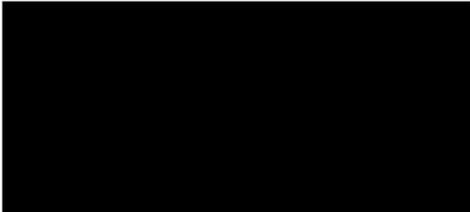
U.S. Department of Homeland Security  
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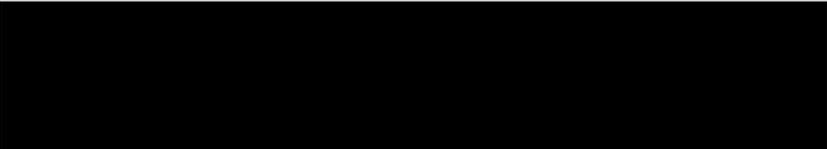


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 25 2008**  
SRC 06 156 51249

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 "Robt P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a café and catering business. It seeks to employ the beneficiary permanently in the United States as a grill cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary was qualified to perform the duties of the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 13, 2006 denial,<sup>1</sup> 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. While the director stated in her decision that the petitioner had not submitted any evidence with regard to the beneficiary's work experience, she did not further address this issue in her decision. The AAO will examine the issue of whether the petitioner established that the beneficiary is qualified to perform the duties of the proffered position more fully further in these proceedings.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

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 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 by the U.S. Department

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<sup>1</sup> The decision was dated November 9, 2006 but counsel submitted the envelope in which it was mailed establishing that the decision was actually served November 13, 2006. See 8 C.F.R. § 103.5a(a)(1).

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 on February 10, 2004. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position or two years of work experience in a related cooking 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 relevant evidence in the record, including new evidence properly submitted on appeal.<sup>2</sup> Relevant evidence submitted on appeal includes counsel's brief. With the initial I-140 petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2005. In response to the director's request for further evidence dated August 2, 2006, the petitioner submitted the following evidence:

The petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2004;

A copy of a one-page document dated March 13, 2006 that briefly described the petitioner's current business location and operation in Lansing, Illinois, the petitioner's relocation considerations, and a proposed relocation opportunity in Munster, Indiana;

A document prepared by [REDACTED], Certified Public Accountants and Consultants, Homewood, Illinois, entitled "[REDACTED] Projected Financial Statement and Supplemental Information (compiled) December 31, 2007, 2008 and 2009." The accountants in their statement dated April 28, 2006 stated that the document is a compiled report prepared for the purpose of obtaining financing to construct a new building and operating capital;

Two other financial statements compiled by [REDACTED] for the petitioner for the periods of time ending December 31, 2005 and February 28, 2006;

Copies of the petitioner's monthly statements for its checking account with Calumet Bank for the months December 31, 2005 to June 30, 2006; and

A one-page online bank statement dated July 26, 2006 that indicates a current balance of \$12,899.60 in the Calumet account.

The record contains no further evidence of the petitioner's ability to pay the proffered wage. The AAO notes that the director in her Request for Further Evidence requested that the petitioner submit further evidence of its ability to pay the proffered wage, noting also that the petitioner had submitted additional I-140 petitions. The director specifically referenced copies of IRS Form 941, Employer's Quarterly Tax Report for tax year 2005; W-2 Wage and Tax Statements for the instant beneficiary and any other beneficiaries with pending I-140 petitions; or pay

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<sup>2</sup> 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).

stubs and other evidence that could be submitted to establish the petitioner's ability to pay the proffered wages. In response, counsel stated that the petitioner had established its ability to pay the proffered wage based on its 2005 tax return. Counsel also noted that the petitioner did not provide the beneficiary with W-2 Forms for tax years 2004 and 2005, because the beneficiary was paid in cash.

On the I-290B, counsel states that the director erroneously concluded that the petitioner did not demonstrate its ability to pay the proffered wage and that CIS failed to take into consideration all the evidence submitted to the record. In her brief, counsel states that the petitioner submitted its tax returns for 2004 and 2005, financial statements, and bank statements that demonstrated the petitioner has been and continues to be able to pay the proffered wage. Counsel states that this documentation also established the petitioner's ability to pay the wages of the beneficiaries of three other petitions, along with the beneficiary of one approved I-140 petition, for which the original beneficiary had been substituted. Counsel states that the instant beneficiary and the additional four beneficiaries would all earn an hourly wage of \$10.50.<sup>3</sup> Counsel also notes that the petitioner's tax returns, in particular the sums for wages and salaries indicated on these documents, show wages paid out in an amount sufficient to cover the beneficiary's wages. Counsel states that the petitioner has been a successful restaurant since it was established in 1986, and the petitioner has outgrown its current facility and is relocating to new premises. Counsel notes that the profit forecast for the new restaurant location demonstrates that the petitioner will require more new hires than the five beneficiaries for which the petitioner is presently petitioning.<sup>4</sup>

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1986, to have a gross annual income of \$649,044, and to currently employ eight workers. On the Form ETA 750, signed by the beneficiary on February 9, 2004, the beneficiary claimed he had worked for the petitioner since January 2004.

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).

Counsel's reliance on the balances in the petitioner's checking account with Calumet Bank in tax years 2005 or 2006 is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows

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<sup>3</sup> The AAO has reviewed three I-140 petitions submitted by the petitioner, including the instant petition, and the previously approved I-140 petition with the substituted beneficiary. Both the instant beneficiary and the beneficiary in petition SRC 06 156 51222 would be paid an hourly wage of \$10.50, while the Form ETA 750 in the third petition indicates an hourly wage of \$10. In all three petitions, the petitioner did not establish that it had paid any wages to any of the three beneficiaries.

<sup>4</sup> The petitioner's compiled financial projection document for tax years 2007, 2008, and 2009 estimated the petitioner would grow from eight employees to 28 employees by 2009.

additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage in this matter because any funds used to pay the proffered wage in one month would no longer be available in subsequent months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner’s cash specified on Schedule L that will be considered below in determining the petitioner’s net current assets. Finally, the petitioner’s bank statements for tax years 2005 or 2006 provide no further information or evidence as to the petitioner’s financial resources as of the 2004 priority date.

As previously stated, counsel on appeal asserts that the petitioner’s tax returns, in particular the sums for wages and salaries indicated on these documents, show wages paid out in an amount sufficient to cover the beneficiary’s wages. Counsel’s assertion is not persuasive. The aggregate amounts of wages and salaries identified on the petitioner’s tax returns in no way establish that the petitioner paid any wages or the proffered wage to the beneficiary.

On appeal, counsel also states that the director did not consider the petitioner’s financial statements in her denial of the instant petition. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant’s report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant’s report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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, although the beneficiary indicated he began working for the petitioner in January 2004, the petitioner has not submitted any further evidentiary documentation to further establish its employment of the beneficiary during tax years 2004 and 2005. 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 2004 and through tax year 2005. Further, in response that the director’s RFE, counsel indicated that the petitioner had four pending I-140 petitions, with another previously approved I-140 petition being submitted with a substituted beneficiary. Counsel also stated that all beneficiaries would receive the same \$10.50 hourly wage.

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job

offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Thus, if the proffered wages of both the instant beneficiary and the claimed additional four beneficiaries of four other I-140 petitions were considered, the petitioner has to establish its ability to pay five proffered wages in tax years 2004 and 2005. As previously stated, the two Forms ETA 750 submitted with two additional petitions that were reviewed by the AAO did not indicate similar hourly wages, but rather either \$10 an hour or \$10.50 an hour. Further in the two other petitions reviewed by the AAO, the petitioner did not establish that it had paid either beneficiary any wages during the period of time in question. Based on these two additional petitions and the instant petition, the petitioner has to establish its ability to pay at a minimum \$64,480 in wages based on its net income or net current assets in tax years 2004 and 2005. If the two other petitions referenced by counsel were reviewed and were found to have similar hourly wages and no evidence of wages paid to the respective beneficiary, the petitioner would have to establish any even higher level of net income and 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). 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 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. The court 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,840 per year from the priority date:

- In 2004, the Form 1120 stated a net income<sup>5</sup> of \$1,670.

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<sup>5</sup>Where an S corporation's income is exclusively from a trade or business, CIS 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

- In 2005, the Form 1120 stated a net income of \$20,231.

Therefore, for the 2004 priority year and during tax year 2005, the petitioner did not have sufficient net income to pay the instant beneficiary's proffered wage of \$21,840, or the combined annual wages of other beneficiaries of the petitioner's pending I-140 petitions.

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, including real property that counsel asserts should be considered. 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.<sup>6</sup> 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 petitioner's net current assets during 2004 were -\$52,173.
- The petitioner's net current assets during 2005 were -\$27,414.

Thus, the petitioner does not have sufficient net current assets to pay either the instant beneficiary's proffered wage of \$21,840 in tax years 2004 and 2005, or the combined wages for all the petitioner's beneficiaries with pending I-140 petitions. Therefore, from the date the Form ETA 750 was filed with CIS, the petitioner has 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.

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 Department of Labor. Counsel on appeal states that the

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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> (accessed March 22, 2007) (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 tax years 2004 and 2005, the petitioner's net income is found on Schedule K of its tax returns.

<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

petitioner has been successful since its establishment in 1986 and that the new location will provide even further profits and the hiring of more employees. The AAO notes that the record contains no information as to the petitioner's profitability or business operations prior to 2004 to further substantiate counsel's assertions with regard to the petitioner's previous success. Counsel further states that the petitioner's financial statements submitted to the record also establish the petitioner's ability to pay the proffered wage. However, as previously stated, the statements made by the petitioner's management and incorporated into the petitioner's accountant's compiled report on future projections are unaudited and are the representation of management with the aim of securing financing for the petitioner's construction of a new restaurant at a new site. Further, against 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.

Thus, the AAO concurs with the director's decision with regard to the petitioner's ability to pay the proffered wage to all beneficiaries with pending applications during the priority year 2004 and through 2005.

With regard to the second issue raised by the director in her decision, namely, the beneficiary's qualifications to perform the duties of the proffered job, the petitioner must 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 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 on February 10, 2004. Therefore the petitioner must demonstrate that the beneficiary had two years of experience as of that date.

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).

The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of printing machine operator. In the instant case, item 14 describes no educational or training requirements for the proffered position; however, item 14 does require that the beneficiary have two years of work experience in the proffered position, or in a cooking-related position. 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 worked for the petitioner from January 2004 to the time he signed the Form ETA 750, Part B. He also indicated that he had worked for [REDACTED], located in Chesterton, Indiana, as a cook from December 2001 to December 2003. He does not provide any additional information concerning his employment background on that form.

With the petition, the petitioner submitted no further evidentiary documentation to further substantiate the beneficiary's prior work experience as a cook. In response to the director's RFE, as previously stated, counsel asserts that the petitioner had no proof of its employment of the beneficiary, because the beneficiary was paid in cash. Counsel also stated that the beneficiary had worked for [REDACTED], which she described as a Chicago restaurant from December 2001 to December 2003, but for reasons beyond the petitioner's and beneficiary's control, verification of this prior employment was not available. Counsel noted that the beneficiary was also paid in cash by his former employer, and that no Forms W-2, pay stub or payroll checks were available to establish the beneficiary's prior work experience as a cook..

On appeal, counsel submits no further documentation on the beneficiary's employment as a cook prior to the 2004 priority date. Counsel states that the beneficiary has over five years of work experience as a cook, and that prior to coming to the United States, the beneficiary had worked for a restaurant in Mexico. Counsel asserts that due to the length of time that passed since the beneficiary's employment in Mexico, the beneficiary was unable to obtain verification of his prior employment as a cook in Mexico. Counsel reiterates that the beneficiary worked for two years at [REDACTED], a Chicago restaurant.

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.

Moreover, the regulation at 8 C.F.R. § 103.2(b)(2) provides: "The non-existence or other unavailability of required evidence creates a presumption of ineligibility." The petitioner has not provided the necessary evidence demonstrating that the required evidence of experience is unavailable or does not exist and has not provided secondary evidence or demonstrated that secondary evidence is also unavailable or does not exist combined with qualifying affidavits pursuant to 8 C.F.R. § 103.2(b)(2)(i), (ii).

In the instant matter, the petitioner's Form ETA 750 explicitly required two years of work experience as a grill cook or in a cooking-related position prior to the 2004 priority date, as stipulated by the Form ETA 750. The petitioner has submitted no letter of work experience from any claimed former employer giving the name, address, title of the employer and a description of the beneficiary's experience as a cook prior to the 2004 priority date.

In the petitioner's response to the director's request for further evidence, and on appeal, counsel asserts that the beneficiary has worked both in Mexico and in Chicago as a cook prior to his 2004 employment with the petitioner. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19

I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO also notes that counsel's assertion with regard to the beneficiary's previous employment at a Chicago restaurant contradicts the beneficiary's statement on the Form ETA 750, Part B, that he worked in a restaurant in Indiana. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." The petitioner has not provided any evidentiary documentation to further substantiate the beneficiary's claimed prior employment, and has submitted contradictory information with regard to the same employment. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

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.