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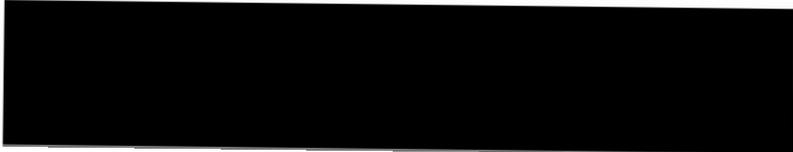


FILE: LIN 06 108 51911 Office: NEBRASKA SERVICE CENTER Date: FEB 25 2008

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.

*Robert P. Wiemann for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese style food specialist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and the director determined that the beneficiary did not perform the duties stated on the labor certification for the required three years. Specifically, the director determined that the evidence submitted by the petitioner did not enumerate the duties of the position of Chinese style food specialist, and that the petitioner had not established the beneficiary's actual employment experience. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated June 23, 2006, the issues in this case are 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, and whether or not the petitioner had established that the beneficiary is qualified as a Chinese style food specialist with three years of job experience.

*Ability to Pay - the Regulation at 8 C.F.R. § 204.5(g)(2)*

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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).

Here, the Form ETA 750 was accepted on July 25, 2003.<sup>1</sup> The proffered wage as stated on the Form ETA 750 is \$11.00 per hour (\$22,880.00 per year). The Form ETA 750 states that the position requires three years of experience in the proffered position.

Relevant evidence in the record on this issue includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the State of Missouri, Division of Employment Security, Quarterly Contribution and Wage Report, for the first quarter of 2005 with a list of employees; an Employers Quarterly Federal Tax Form (Form-941) for the 4<sup>th</sup> quarter of 2005; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2002, 2003, 2004 and 2005; and approximately 64 pages of the petitioner's commercial checking account statements for 2005 and for the period from January 2006 to June 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1986 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year begins on April 1<sup>st</sup> and ends March 31<sup>st</sup> of each year. The petitioner's gross annual income stated on the petition was \$974,795.00. On the Form ETA 750, signed by the beneficiary on June 23, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director did not consider the petitioner's bank account and personnel records, gross income, wages and the "average \$25,000.00" in the petitioner's checking account.

Counsel stated that the director failed to provide the petitioner the opportunity to submit additional evidence. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

Counsel contends that the director failed to consider that in 2004 the "petitioner has suffered a loss due to increased costs of food materials and labor and shortage of good and qualified cooks."

Accompanying the appeal, counsel submits a legal brief and additional relevant evidence that includes the following documents: the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2003, 2004

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<sup>1</sup> It has been approximately four years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

and 2005; approximately 46 pages of the petitioner's commercial checking account statements from January 2006 to June 2006; approximately 64 pages of the petitioner's commercial checking account statements for 2005; approximately 51 pages of the petitioner's commercial checking account statements for 2004; and approximately 37 pages of the petitioner's commercial checking account statement for 2003.

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 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 (BIA 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's Form 1120 tax returns<sup>3</sup> demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120 stated net income (line 28) of \$4,698.00.

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<sup>3</sup> Since the petitioner's fiscal year begins on April 1<sup>st</sup> and ends March 31<sup>st</sup> of each year, the 2002 tax return submitted does not cover the priority date that commenced on July 25, 2003. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In 2002, the Form 1120 stated net income (line 28) of \$18,024.00. The petitioner's net current assets during 2002 were <\$15,236.00>.

- In 2004, the Form 1120 stated net income (line 28) of <\$20,710.00><sup>4</sup>.
- In 2005, the Form 1120 stated net income (line 28) of \$33,658.00.

Since the proffered wage is \$22,880.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for fiscal years 2003 and 2004, but did have sufficient net income to pay the proffered wage in fiscal year 2005.

If the net income the petitioner demonstrates it had available during the 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.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2003 were <\$18,512.00>, and in 2004 were <\$32,556.00>.

Therefore, for fiscal years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for fiscal year 2005.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

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<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>5</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.

<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

Counsel contends by implication (i.e. a shortage of cooks), with the permanent employment of the beneficiary as a Chinese style food specialist, its business income will increase. 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). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a Chinese style food specialist will increase profits. The petitioner's assertion is erroneous. Proof of ability to pay begins on the priority date, July 25, 2003, that is when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel has submitted the petitioner's checking account statements asserting that they demonstrate an average balance of \$25,000.00. Counsel's reliance on the balances in the petitioner's commercial checking account 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 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. 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel asserts that the director did not consider the petitioner's wages paid to its employees. Counsel submitted the petitioner's tax returns for 2002, 2003, 2004 and 2005, as well as the State of Missouri, Division of Employment Security, Quarterly Contribution and Wage Report, for the first quarter of 2005 and an Employers Quarterly Federal Tax Form (Form-941) for the 4<sup>th</sup> quarter of 2005. The suggestion that wage expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages are payroll expenses in those tax returns. Wages paid to employees are not discretionary expenditures. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, according to the petition, the offered job is a new position. Moreover, there is no evidence that the position of Chinese style food specialist involves the same duties as of those employees listed on the State of Missouri, Division of Employment Security, Quarterly Contribution and Wage Report, for the first quarter of 2005. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position if counsel is implying that the beneficiary will replace him or her. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel asserts without substantiation that there is a labor and shortage of good and qualified cooks. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel contends that the director failed to consider that in 2004 the "petitioner has suffered a loss due to ... [one factor among others cited] increased costs of food materials ...." The petitioner's has not submitted any information specifically related to the costs of food materials. There is no evidence that the food material

costs expended in 2004 were extraordinary amounts. Therefore the AAO is unable to determine if in fact there was an increase in the costs of food materials in 2004.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date through 2004.

*Qualifications of the Beneficiary - Skilled Worker Classification - section 203(b)(3)(A)(i) of the Act*

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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 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 Chinese style food specialist. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education .....
- Grade School N/A
- High School N/A
- College N/A
- College Degree Required N/A

Major Field of Study

N/A

The applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A entitled "Other special requirements" stated "N/A."

The beneficiary set forth her credentials on Form ETA-750B and signed her 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, she represented that she is employed by the Bee Research Institute of Chinese Agricultural Academy located at Xianghan, Beijing, the Peoples Republic of China.

The beneficiary does not provide any additional information concerning her employment background on that form. The beneficiary stated on the Form that she attended middle and high school from September 1977 to July 1982.

Upon review of the petition, the director determined that the beneficiary did not perform the duties stated on the labor certification for the required three years. Specifically, the director determined that the employment verification letter in the record of proceeding did not enumerate the duties of the position, and that the petitioner had not established the beneficiary's actual employment experience.

The I-140 petition was denied by the acting director on June 23, 2006. The Form ETA 750 states that the position requires three years of experience in the proffered position. 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).

Relevant evidence in the record on this issue includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a page from a DOL publication that provides the occupation code and job description of "313.361-030, Cook, Specialty, Foreign Food (hotel & rest.);" counsel's letter dated February 21, 2006; a letter from the petitioner dated January 25, 2006; an English language statement by the beneficiary signed and dated June 23, 2003, describing her work experience and education; an undated English language document entitled "Certificate of Midium [sic] Skill Level Professionals, (Translation), Ministry of Labor - People's Republic of China" made by counsel without a copy of the Chinese language document;<sup>7</sup> three photocopies of a Chinese language document without translation that purports to be copies of the beneficiary's P.R. China passport pages; and an English language document entitled "Bee Research Institute of Chinese Agricultural Scientific Academy, (Translation), Employment Certification" dated November 7, 2002, with a foreign language document with a translation made by counsel with a copy of the Chinese language document.

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<sup>7</sup> The document did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

On appeal, counsel asserts that the acting director erred in his decision that the beneficiary “fails to qualify for the minimum requirements only because the employment verification letter in [the] file does not enumerate the duties of the position,” and that the director failed to consider the statement of qualifications in the labor certification (Form ETA 750, Part B).

Counsel opines on appeal that the job title “Chinese style food specialist” is a non-technical description of the job of cook, and “that the job title cook is almost a universal job title, which means almost all the restaurant cooks are performing mostly the same job duties except those who are supervisors or managers, especially in China, therefore Chinese reference letters do not have to list detailed job duties of a cook.”

Based upon the preceding two paragraphs, counsel is stating that an employment verification letter in the record of proceeding does not list the detailed job duties of a cook.

Counsel asserts further that the occupation codes of DOL provide the “basic job duties” of a Chinese style food specialist also known as a cook. Counsel contends that the petitioner’s job duties requirement are included within this description.

An English language document entitled “Bee Research Institute of Chinese Agricultural Scientific Academy, (Translation), Employment Certification” dated November 7, 2002, stated the following:

\* \* \*

To Whom It May Concern:

This is to certify that \_\_\_\_\_ born November 29, 1964, has been working for our Institute as a Chinese Styled Food Specialist since December 1, 1990. She is an excellent worker.

The employment verification letter in the record of proceeding does not list the detailed job duties of a cook. The regulation at 8 C.F.R. § 204.5(l)(3) requires in pertinent part that “any requirements of training or experience for skilled 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* [emphasis added].”

Since this issue had been raised by the director in his decision dated June 23, 2006, after reviewing the above reference, counsel has had ample opportunity to respond but instead has provided his own opinion about the duties of a Chinese Styled Food Specialist with evidence of the beneficiary’s qualifications at the Bee Research Institute of Chinese Agricultural Academy. This is speculation and not objective independent evidence of the qualifications of the beneficiary under the labor certification. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Further, counsel, the director and this office all agree that the employment verification letter in the record of proceeding does not list the detailed job duties of a cook. The regulation above recited requires a description of the training received or the experience of the alien. The employment verification letter dated November 7, 2002, submitted by the petitioner does not enumerate the duties of the position of Chinese style food specialist, and therefore the petitioner had not established the beneficiary’s actual employment experience by means of the employment verification letter from the Bee Research Institute of Chinese Agricultural Academy.

The only other documentary evidence of the beneficiary's qualifications is an undated English language document entitled "Certificate of Medium [sic] Skill Level Professionals, (Translation), Ministry of Labor - People's Republic of China" made by counsel without a copy of the Chinese language document. Since the Chinese language document is not in the record, the document does not comply with the terms of 8 C.F.R. § 103.2(b)(3) and it is not independent objective evidence of the original certificate. Further, the petitioner has not provided any information as to why such a certificate is relevant to the beneficiary's qualifications as a Chinese style food specialist to be employed in a restaurant. Since all of the beneficiary's employment experience is with the Bee Research Institute of Chinese Agricultural Academy and there is no description of the training received or the experience of the beneficiary while there, this office is unable to make a determination of the beneficiary's qualifications.

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience as a Chinese style food specialist from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Additionally, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date through 2004.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.