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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 03 2007

EAC 05 152 51607

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Vermont Service Center, denied the preference visa petition. The petitioner then submitted an untimely appeal that the director rejected. The director then accepted the appeal materials as a motion to reopen/reconsider and subsequently affirmed the original decision to deny the petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as the chief cook.[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.[2] 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. 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 December 15, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also examine the issue of successor in interest 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.

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 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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[1] The Form ETA 750 indicates the actual title of the proffered position is assistant cook. The Form I-140 lists the job title as chief cook.

[2] The Form ETA 750 was previously submitted with a prior I-140 petition EAC 04 013 52582 filed by the previous owner of the petitioner identified as Nicolas Arcila. The Vermont Service Center denied the previous I-140 petition on June 9, 2004, based on the previous petitioner's inability to pay the proffered wage.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 an hour, or $24,689.60 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job or two years of kitchen experience.

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.[3]

Relevant evidence submitted on appeal includes counsel's brief, and copies of the beneficiary's earnings statements from January 1, 2006 to May 15, 2006.[4] The record also contains the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 to 2004; W-2 Wage and Tax Statements for employees of the petitioner for tax years 2001 to 2004; bank statements for the petitioner's SunTrust Bank bank account in Orlando, Florida from August to December 2003; a letter from [redacted] dated October 4, 2005 that identifies [redacted] as the petitioner's manager and also states that [redacted] will continue the beneficiary's employment with the petitioner as assistant cook; and pay statements for the beneficiary from July 2005 to October 2005. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that beneficiary presently works 40 hours a week and earns $11.87 an hour, that the petitioner was established in 1999, and that the current owner [redacted] bought the restaurant from [redacted] in March 2005. Counsel states that the new owner of the petitioner filed an I-140 petition supported by the original Form ETA 750 on May 2, 2005. Counsel also states that the petitioner received limited financial documentation from the petitioner's previous owners, and as a consequence does not have extensive evidence of the petitioner's ability to pay the proffered wage from the period between April 30, 2001 and June 30, 2005. Counsel states that the petitioner has submitted persuasive evidence that it is able to pay the beneficiary the proffered wages, having submitted copies of the petitioner's 2001, 2002, 2003 and 2004 federal income tax returns and corresponding financial statements, copies of the petitioner's 2001 to 2004 wage and tax statements for other restaurant staff, and some bank statements from 2003.

Counsel notes that the petitioner's previous owner paid salaries and wages of $70,535, $109,565, and $96,682 for tax years 2001, 2002, and 2003, respectively. Counsel states that these wages and salaries included the salaries paid to employees working as cooks. Counsel notes that the petitioner's previous owner employed three cooks in 2001 and paid a total of $41,256.29 in salaries to cooks. Counsel states that the petitioner employed four cooks in 2002 and 2003, and that he paid them the aggregate salary of $52,218.97 and $70,815.93 respectively. Counsel states that the proffered wage for the beneficiary is $24,689 per year.

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[3] 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).

[4] The earnings statements indicate a biweekly salary of $949.60, or an annual wage of $24,269.60.

Counsel notes that since July 2005 the petitioner has paid the proffered wage of $11.87 an hour, and that this level of wages has been sustained by the petitioner while paying salaries for the rest of its staff. Counsel finally notes that, given the unavailability of additional evidence, the record contains substantial evidence that the petitioner is able to pay the proffered wage to the beneficiary.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on November 1999, to have a gross annual income of $463,314, a net annual income of $280,584, and to currently have nine employees. On the Form ETA 750, signed by the beneficiary on March 14, 2001, she did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § **204.5(g)(2).** In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The AAO notes that both counsel and the petitioner's present owner indicate that the petitioner was sold from the original owner to [redacted] Such a change in ownership raises the issue of successor-in-interest status. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner's new owner is doing business at the same location as the petitioner's predecessor owner does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, the record contains no evidentiary documentation as to the claimed sale of the petitioner to [redacted] Further, the previous owner of the petitioner filed a I-140 petition for the beneficiary that the Vermont Service Center denied on June 9, 2004 following a review of the petitioner's tax returns for 2001 to 2003, unaudited financial statements for 2001 to 2003, and the petitioner's SunTrust bank statements for 2001 through 2003. The director determined that the petitioner's federal income tax returns did not establish that the petitioner had sufficient net income or net current assets to pay the proffered wage, and that the unaudited financial statements and bank statements were not dispositive of any further financial resources available to the petitioner to pay the proffered wage.

Thus, the record indicates that even if the present owner of the petitioner submits documentation as to the petitioner's claimed change of ownership in 2005, the present owner still has to establish the petitioner's ability to pay the proffered wage as of the April 2001 priority date to the date of the sale of the petitioner in tax year 2005.

The AAO notes that the petitioner submitted SunTrust bank statements with the initial petition. The petitioner's reliance on the balances in the petitioner's bank 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 return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner's net current assets.

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. Based on the record as presently constituted, 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 2001priority date through tax year 2004. While both the prior owner and the present owner of the petitioner submitted W-2 Forms to the record, they appear to document the wages of other employees, and not the beneficiary's wages.

In the instant petition, the petitioner did submit the beneficiary's earnings statements for July 1, 2005 to December 31, 2005. Based on these earnings statements, the petitioner was paying the beneficiary the proffered hourly rate, and thus, the proffered wage in this period of time. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, although the record indicates that the petitioner paid the beneficiary the proffered wage as of July 2005, the record does not establish that the petitioner under previous ownership paid the proffered wage as of the April 2001 priority date and until the claimed change in ownership in 2005.[5] Therefore the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority date, and through tax year 2004 and the difference between the beneficiary's actual wages in tax year 2005 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, 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 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.

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[5] The AAO notes that the record of proceedings closed as of October 20, 2005, the date of the petitioner's response to the director's request for further evidence. The petitioner's tax return for 2005 should not have been available at this date, and counsel does not submit it on appeal. Therefore the AAO cannot examine whether the petitioner had sufficient net income or net current assets in tax year 2005 to pay the difference between the beneficiary's claimed actual wages and the proffered wage.

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* at 537

The petitioner's tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $24,689.60 from the priority date:

- In 2001, the Form 1120S stated a net income[6] of $10,719.
- In 2002, the Form 1120S stated a net income of -$55,321.
- In 2003, the Form 1120S stated a net income of -$7,719.
  In 2004, the Form 1120 stated a net income[7] of -$4,356.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the proffered wage.

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

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[6] 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 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) and 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 no additional income, deductions, credits noted on Schedule K, the AAO will use the petitioner's net income identified on line 21.

[7] The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were $3,347.
- The petitioner's net current assets during 2002 were -$265,316.
- The petitioner's net current assets during 2003 were -$304,710.
- The petitioner's net current assets during 2004 were -$302,683.

Thus, the petitioner did not establish its ability to pay the proffered wage based on its net current assets in tax years 2001 to 2004. Therefore, from the date the Form ETA 750 was filed with CIS, the petitioner identified on the instant I-140 petition, under previous or current ownership, 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.[9]

On appeal, counsel asserts that the wages and salaries paid to other employees is evidence that the petitioner had the ability to pay the proffered wage as of the filing date. However, the fact that the petitioner paid other employees does not establish that it has the ability to pay the beneficiary's wages as of the 2001 priority date and to the present. As the director correctly noted, Part 6 of the I-140 petition indicates the position being offered the beneficiary is a new position. Therefore the petitioner would have to establish its ability to pay its current employees and to pay an additional salary. In addition, the AAO notes that although counsel identifies specific wages paid to cooks employed by the petitioner, the record does not contain any further evidentiary document to further substantiate counsel's assertions. 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).

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. The evidence submitted does not resolve any questions with regard to the actual ownership of the petitioner and does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

[9] The AAO also notes that the Maryland Department of Assessments and Taxation, Taxpayer Services Division website indicates that the petitioner's corporate status in the state of Maryland is forfeited as of November 12, 2007.

Beyond the decision of the director, the AAO notes that the petitioner has not established that the beneficiary has the requisite two years of previous work experience as a chief cook. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 chief cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must have 2 years of experience in the job offered, or two years of kitchen experience. The job duties of the proffered position 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 indicates that the petitioner requires verifiable employment references.

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 11, eliciting information on schools, colleges and universities attended, the beneficiary represented that she had attended the [redacted] Bogota, Colombia for grade school and high school, from February 1968 to November 1978 and that she received a high school diploma. The beneficiary also represented that she had attended a technical school identified as [redacted] Colombia, from February 1979 to June 1979 and that she received a certificate.

On Part 15, eliciting information of the beneficiary's work experience, she represented that she had worked as a restaurant owner and proprietor of [redacted] Colombia from February 1994 to September 1999, with the following job duties: "Cooked food for breakfast and lunch; baked pastries for customers. Ran all other aspects of restaurant. Employed assistant cook and cashier." The beneficiary does not provide any additional information concerning his employment background on that form.

In a request for further evidence dated January 15, 2004, the director requested that the petitioner provide evidence that the beneficiary possessed the required two years of experience as a cook prior to the April 30, 2001 priority date. In response the petitioner submitted letters with certified translations, written in January 2004 by [redacted] both of Bogota, Colombia. Both men stated that the beneficiary had been the proprietor of the Bachue coffee shop in Bogota, Colombia. [redacted] stated more specifically that the beneficiary had been the proprietor from 1993 to July 1999. The petitioner also submitted a report from the District Director of Taxation for the Bogota City Hall that indicated the Bachue coffee shop was run and owned by the beneficiary from January 1, 1993 to July 22, 1999 when it was closed. A final document, with certified translation, from the Colombian Taxation Information Registry, indicated that the beneficiary was the designated taxpayer for the Bachue coffee shop as of the date of its closing on July 22, 1999.

The AAO notes that the letters of work experience submitted in response to the director's request for further evidence dated January 15, 2004 indicated that the beneficiary owned a coffee shop in Bogota, Colombia. One letter writer indicated that the beneficiary was the proprietor of the coffee shop from 1993 to 1999. However, neither the letters of work verification nor the other tax documents submitted to the record stated the job duties of the beneficiary with regard to the coffee shop, or that she had worked there as a cook in addition to being the owner of the coffee shop. As such, the letters of work experience submitted to the record are not sufficient to establish the beneficiary's qualifications to perform the duties of the proffered position. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.