U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 27

WAC 04 238 51816

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

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary[1] permanently in the United States as a cook, Chinese specialty (Cantonese-style). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. As set forth in the director's denial dated May 20, 2005, the director determined that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and found that the beneficiary was a "casual worker, driver and salesman at Hing Lan Cigarettes Company in Hong Kong" from 1983 through 1988. This work experience was not stated by the beneficiary on the Form ETA 750, Part B filed initially with the U.S. Department of Labor (DOL), and it is inconsistent with the beneficiary's statements in the labor certification as discussed below. The director denied the petition accordingly.

On appeal, counsel submitted additional evidence.

The record shows that the appeal is properly filed and 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.[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 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 March 1, 1994. The proffered wage as stated on the Form ETA 750 is $2,000.00 per month ($24,000.00 per year). The Form ETA 750 states that the position requires four years experience in the offered job of cook, Chinese Specialty (Cantonese-style) or four years of job experience in the related occupation of Cook, Chinese Specialty (Mandarin-style).

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.,*

[1] The beneficiary is also called [redacted]

[2] The I-140 petition was filed on August 14, 2004; the director denied the preference visa petition on May 20, 2005; the petitioner filed his appeal of the director's decision on June 21, 2005; and, counsel submitted a brief in the matter and additional evidence on July 20, 2005. Consolidated with the present case is a prior case involving the same petitioner and beneficiary for the same job accompanied by the same labor certification. This prior case is identified in the records of Citizenship and Immigration Services (CIS) as WAC 097 137 50368. That prior petition was denied by the director. As stated elsewhere in this discussion, the AAO takes a *de novo* look at the issue raised in the denial of this subject petition but it will examine all relevant evidence in the two cases as consolidated.

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.[3]

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

> (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.

With the petition, counsel submitted the following relevant documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; a cover letter from counsel dated August 18, 2004; an explanatory letter from counsel dated August 30, 1994; a letter from the petitioner dated August 15, 2004; a (un-notarized) job reference on plain paper without letterhead dated October 28, 1993, from [redacted], general manager of King Fung Restaurant, Hong Kong Special Administrative Region, the People's Republic of China ("Hong Kong'), stating that the beneficiary was employed there as a "Chinese Specialty Cook" from February 1982 through February 1993; a (un-notarized) job reference on letterhead from [redacted], personnel manager of Maxim's Caterers Limited, Hong Kong dated May 29, 1978, stating that the beneficiary was employed as a junior baker in its bakery, Ocean Terminal, Kowloon, from September 4, 1976 to April 30, 1978; and the beneficiary's CIS Form I-94 Departure Record stating that the beneficiary was admitted into the United States on August 5, 1993 in B-2 status.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the 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 cook, Chinese specialty (Cantonese-style). In the instant case, item 14 describes the requirements of the proffered position as follows:

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[3] 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).

14.	Education	
	Grade School	6
	High School	6
	College	0
	College Degree Required	N/A
	Major Field of Study	N/A

According to the application, the applicant must also have four years of experience in the job offered (or four years of job experience in the related occupation of cook, Chinese specialty (Mandarin-style)) 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 relating to "Other special requirements" stated the following: "Required experience must be in table service restaurant (s). Must speak, read, and write Cantonese language."

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, the beneficiary represented that he has been employed by King Fung Restaurant, Hong Kong, stating that he was employed there as a junior cook from February 1982 to January 1986, and as a chef (Cantonese-style) from February 1986 to February 1993.[4] According to the beneficiary the business there was a Chinese restaurant. According to the beneficiary he was in charge of the kitchen department "including cooking, seasoning, ordering food supplies, supervising and training other kitchen assistants, and planning the work schedule."

The only other employment stated on the labor certification was job experience the beneficiary represented he obtained at Maxim's Caterers Limited, Hong Kong. The beneficiary stated he was employed as a junior baker in the business of a Chinese catering shop from September 1976 to April 1978. According to the beneficiary his duties were making Chinese bakery products and mixing and baking bakery products according to recipes. Since the offered job is cook, Chinese Specialty (Cantonese-style) or four years of job experience in the related occupation of Cook, Chinese Specialty (Mandarin-style) this information relating to the beneficiary's employment as a junior baker is not probative evidence of the beneficiary's qualifications to perform the offered job.

No other employment experience was stated by the beneficiary on Form ETA 750, Part B. However, on Form ETA, Part B, Section 12, the beneficiary represented under the subject heading "Special Qualifications and Skills" that he possesses fluency in the Cantonese and Mandarin languages, and that he is familiar will all Chinese cooking and baking utensils with 11 years of Chinese specialty cook experience.

The beneficiary also prepared, signed on August 10, 2004, and submitted a Form G-325 A related to his adjustment application. Since submission of the Form took place in the context of the beneficiary's application for adjustment of status, the proper venue for consideration of the evidence presented is with the CIS official with jurisdiction over the application for adjustment. The AAO has no jurisdictional authority to determine or review adjustment of status matters.

[4] These experiences were interlineated into one "box" on the Form and their rendition here appears to be a fair representation of what was stated in that section as it is the same information on a Form G-325 in the record prepared by the beneficiary.

In order to reflect the record of proceeding and for what evidence the information in the Form G-325 A may provide in the determination of the issue of this case relating only to the I-140 petition, the AAO notes that the beneficiary confirmed the information stated in the labor certification and added under the section of the Form "Applicant's Employment Last Five Years" that he had been employed as a baker[5] for the Kee Wah Bakery Corp. (no address stated) from November 1998 to present time (i.e. August 10, 2004) or for five years and nine months.

As already stated, as set forth in the director's denial dated May 20, 2005, the director found that the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience and found that the beneficiary was a casual worker, driver and salesman at Hing Lan Cigarettes Company in Hong Kong from 1983 through 1988. This work experience was not stated by the beneficiary on the form ETA 750, Part B filed initially with the DOL.

As noted above as found in the subject decision denying the petition, and in the prior revocation of the approval of the preference visa petition dated December 20, 2002, the director references an investigatory report made to examine the beneficiary's prior job experiences as stated on the labor certification (which is the same certification in both cases).

The director in the prior case (i.e. WAC 097 137 50368) requested on November 30, 1995, that an investigation be undertaken of the beneficiary's claimed work experience. According to that report the beneficiary was a casual worker, driver and salesman at the Hing Lan Cigarettes Company, and also according to the report, the Lotus Cigarettes Company in Hong Kong from 1983 through 1988. According to the report, on May 12, 1999, an on-site investigation was conducted at [redacted], West, Hong Kong that revealed that the King Fung Restaurant was no longer in business. Additionally the investigator reported that at the site was a business called Nice Restaurant. A female staff worker of the Nice Restaurant stated that the King Fung Restaurant ceased business at that Queen's Road location in 1998 and that she did not know the beneficiary or [redacted] the former manager of the King Fung Restaurant.

The director in the present case recounted the contents of the above report in his decision. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

On appeal of the director's decision dated May 20, 2005, counsel asserts that the decision was based upon the finding that the beneficiary's "claimed work experience had not been proven to be authentic" and that confidential information obtained by CIS did not "indicate that the beneficiary worked for his claimed employer (King Fung Restaurant, Hong Kong) during the period in question."

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[5] In pertinent part, in the case *Matter of Semerjian*, 11 I&N 751 (Reg. Com. 1966), the court stated that in resolving the question of intent to accept employment in the stated job of the labor certification consideration may be given to factors such as whether the alien is presently employed, (and in that case, his/her profession) and, if not, the length of time he/she has not been so employed and the reasons therefore. As will be discussed, there is no evidence in the record of proceeding that the beneficiary is presently employed as a cook, Chinese specialty (Cantonese-style) or cook, Chinese specialty (Mandarin-style).

Counsel's assertion is incomplete. As set forth above, according to the above report stated the beneficiary was a casual worker, driver and salesman at the Hing Lan Cigarettes Company and also the Lotus Cigarettes Company in Hong Kong from 1983 through 1988. Therefore there is a positive assertion of the beneficiary's employment from 1983 through 1988 in the record of proceeding that differs from the beneficiary's statements of his work experience in the labor certification.

In support of the appeal, counsel has submitted a legal brief dated July 19, 2005, and the following documents: a letter date stamped June 27, 2005, from Ms. [redacted], may, of the Hong Kong Inland Revenue Department stating that " ... records [of the beneficiary] prior to year of assessment cannot be provided;" two of the beneficiary's statements of salaries tax for the assessment years 1992/1993 and 1993/1994 from the Hong Kong Inland Revenue Department; a (un-notarized) job reference on plain paper without letterhead dated October 28, 1993, from [redacted], general manager of [redacted] Restaurant, Hong Kong, stating that the beneficiary was employed there as a "Chinese Specialty Cook" from February 1982 through February 1993; a letter from Dr. [redacted] dated January 12, 2003, stating that he was a regular customer at the [redacted] Restaurant, Hong Kong, until 1993 and knew the beneficiary as a cook at that restaurant; and a business registration document[6] stating in pertinent part that the [redacted] Restaurant, Hong Kong, commenced business at the above mentioned Queen's Road location on September 9, 1981.

The beneficiary's qualifications

The first statement submitted to substantiate the beneficiary's employment experience was a (un-notarized) job reference on plain paper without letterhead dated October 28, 1993, from [redacted], general manager of [redacted] Restaurant, Hong Kong Special Administrative Region, the People's Republic of China ("Hong Kong'), stating that the beneficiary was employed there as a "Chinese Specialty Cook" and a chef[7] since 1986, from February 1982 through February 1993. According to the letter the restaurant in 1993 accommodated 350 customers (up from an 80-seat operation) and Mr. [redacted] stated there were two cooks working on each of the two shifts, the beneficiary being one of them. Mr. [redacted] statement of the beneficiary's duties while working there matches the job duties listed on the labor certification.

Since the letter is not notarized, it was submitted as an English language document (not as translated) in English signed by a Hong Kong resident [redacted] it is not on King Fung Restaurant, Hong Kong, business stationary, there is no statement of the number of hours the beneficiary worked each week, and it is not substantiated by independent objective evidence with Hong Kong Inland Revenue Department salary tax assessment statements, and other commonly obtainable indicia of the beneficiary's reputed decade long employment experience as a junior cook then chef at the King Fung Restaurant, the job verification letter's authenticity is an issue in the case. Under the circumstances, the AAO does not accept Mr. [redacted] letter as credible or acceptable evidence of the beneficiary's qualifications. Since this is the same letter

[6] The existence of the restaurant is not in dispute.

[7] If the beneficiary was a chef supervisor and not a cook in the King Fung Restaurant, then the letter of [redacted] is not evidence of the beneficiary's experience as a cook, Chinese Specialty (Cantonese – style) or job experience in the related occupation of Cook, Chinese Specialty (Mandarin-style), but as a supervising chef whose duties are to supervise individuals who cook and run the kitchen according to a plain reading of the labor certification. There is no independent objective evidence submitted in the record that the beneficiary received culinary training to prepare Cantonese -style or Mandarin-style cuisine.

submitted by the petitioner in this and the prior case, there has been ample time since 1997 for the petitioner to secure additional substantiating evidence.

Counsel submitted on appeal a letter from Dr. [redacted] ated January 12, 2003, stating that he was a regular customer at the King Fung Restaurant, Hong Kong, until 1993 and knew the beneficiary as a cook at that restaurant. Since the letter is not notarized, Dr. [redacted] is neither an employer or trainer, and there is no specific description of the duties performed by the beneficiary or of the training he received in the King Fung Restaurant, this letter has no probative value under the regulation at 8 C.F.R. § 204.5 (l)(3)(ii).

Counsel also submitted a letter date stamped June 27, 2005, from Ms. [redacted], may, of the Hong Kong Inland Revenue Department stating that "records [of the beneficiary] prior to year of assessment cannot be provided," as well as two of the beneficiary's statements of salary tax for the assessment years 1992/1993 and 1993/1994 from the Hong Kong Inland Revenue Department. According to counsel the lack of evidence of the Hong Kong Inland Revenue Department salary tax assessment statements is excusable since records prior to 1999 are not available. However counsel's assertion does not substantiate the beneficiary's employment experience as a junior cook then chef (Cantonese-style) at the King Fung Restaurant, Hong Kong. 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).

Further, the two beneficiary's statements of salary tax for the assessment years 1992/1993 and 1993/1994 from the Hong Kong Inland Revenue Department submitted have no identification of employer or occupation information. There is no explanation in the record why these two documents were submitted to demonstrate the beneficiary's employment experience.

Further as stated in the pertinent regulation, 8 CFR § 204.5(l)(3)(ii), "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." Each of the above mentioned statements is deficient for the reasons stated above. The petitioner did not submit probative trainers or employer's affidavits, documents, letters, or pay stubs that would be independent, objective evidence of the beneficiary's experience. The statements submitted are not credible.

Counsel cites an unpublished case in support of his contention that secondary documentation may be obtained and submitted if a required document cannot be obtained. Counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further there is no evidence of any kind submitted in this case that the beneficiary was employed by the King Fung Restaurant, Hong Kong as a junior cook from February 1982 to January 1986, and as a chef (Cantonese-style) from February 1986 to February 1993 with the exception of two letters, one from Mr. [redacted], and from Dr. [redacted] The AAO has not found those letters credible evidence. Two of the beneficiary's statements of salary tax for the assessment years 1992/1993 and 1993/1994 from the Hong Kong Inland Revenue Department submitted have no identification of employer or occupation information on them. Neither the beneficiary nor the petitioner has submitted independent objective evidence of the beneficiary's employment with the King Fung Restaurant, Hong Kong, as noted above. The burden of proof in these proceedings rests solely with the petitioner.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The evidence submitted does not demonstrate credibly that the beneficiary had the requisite four years of experience either a cook, Chinese specialty (Cantonese-style) or job experience in the related occupation of cook, Chinese specialty (Mandarin-style). Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Ability to pay

Beyond decision of the director,[8] an 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 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 March 1, 1994.[9] The proffered wage as stated on the Form ETA 750 is $2,000.00 per month ($24,000.00 per year) without consideration of over-time.

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[8] 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*, 229 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).

[9] It has been over 13 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."

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; letters from the petitioner dated August 30, 1994 and August 15, 2004; and two IRS Form 1040, Schedule C statements for the petitioner's business for tax years 2001 and 2002; and the petitioner's financial statements for January 1, 2003 to November 30, 2003.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 32 workers. Complete tax returns were not submitted. On the Form ETA 750, signed by the beneficiary on January 20, 1994, the beneficiary did not claim to have worked for the petitioner.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The sole proprietor's yearly personal expenses total $27,785.00 according to the evidence submitted.

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

Counsel has submitted an accountant's compilation report for the petitioner for the period January 1, 2003 to November 30, 2003. 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.

The petitioner has not submitted complete tax returns that would demonstrate the financial information concerning the petitioner's ability to pay in any relevant year from 1994 to 2003. The petitioner according to the 2001 and 2002 Schedule C statements submitted into evidence grossed over $1,000,000.00 in receipts each year. The petitioner is responsible to submit financial evidence to demonstrate that it has the ability to pay the proffered wage from the priority date in 1994 and continuing until the beneficiary obtains lawful permanent residence according to the regulation at 8 C.F.R. § 204.5(g)(2). The petitioner has not done so.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Further, the evidence submitted does not demonstrate credibly that the beneficiary had the requisite four years of experience either a cook, Chinese specialty (Cantonese-style) or job experience in the related occupation of cook, Chinese specialty (Mandarin-style). Therefore, the petitioner has not established that the beneficiary is eligible for 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.

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.