

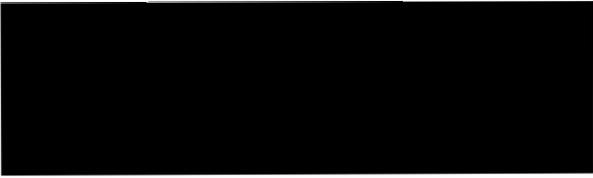
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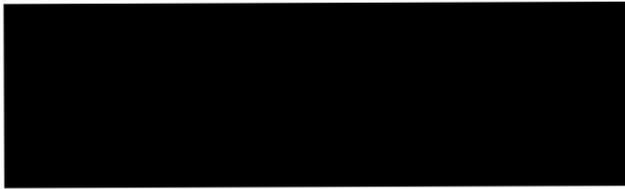
FILE: LIN 06 154 51757 Office: NEBRASKA SERVICE CENTER Date: **JAN 29 2009**

IN RE: Petitioner:
Beneficiary:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the 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 activity is fast food and catering. It seeks to employ the beneficiary permanently in the United States as a dim sum chef. 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. Further, the petitioner failed to establish that the beneficiary had the experience required by the labor certification. 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 January 23, 2007, 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 the beneficiary has the three years of prior experience as required by the labor certification.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification,

accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on June 24, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$17.00 per hour (\$35,360.00 per year).

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.²

Evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 and 1120-A tax returns for 2002,³ 2003 and 2004; a letter from the petitioner dated April 3, 2006; unaudited financial statements which are an income statement for the six months ending January 31, 2006, and a balance sheet dated January 31, 2006;⁴ a declaration dated March 20, 2006 from the petitioner, the owner of the petitioner's passport pages, and the

¹ It has been approximately five 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." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

³ 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 but will be examined generally.

⁴ Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

owner's personal tax return for 2004; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 1988 and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year begins on August 1st and ends on July 31st of each year. The net annual income and gross annual income stated on the petition were \$29,978.63 and \$266,539.53 respectively. On the Form ETA 750, signed by the beneficiary on May 20, 2004, the beneficiary did not claim to have worked for the petitioner.

Ability to Pay the Proffered Wage

On appeal, counsel asserts that the additional evidence submitted, especially evidence of the petitioner's owner's salary, demonstrates the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes the following documents: a letter from the owner and sole shareholder of the petitioner with her W-2 statement from 2006; her own personal assets two-year comparison report⁵ for years 2004 and 2005 and her 2005 Form 1040 tax return; and the petitioner's U.S. Internal Revenue Service Form 1120 for 2005 as well as copies of documentation concerning the beneficiary's qualifications.

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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

⁵ U.S. Citizenship and Immigration Services (USCIS) may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

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 employed or paid the beneficiary any wages.⁶

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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 tax returns⁷ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120-A,⁸ Line 24 stated net income of \$5,109.00.
- In 2004, the Form 1120 Line 28 stated net income of <\$3,232.00>.⁹
- In 2005, the Form 1120 Line 28 stated net income of \$40,364.00.

Since the proffered wage is \$35,360.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2003 and 2004. In 2005 the petitioner did have sufficient net income to pay the proffered wage.

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, USCIS 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

⁶ The Form ETA 750 lists that the beneficiary still resides outside the U.S. in her home country, and therefore is not in the employ of the petitioner.

⁷ 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 but will be reviewed generally. In 2002, the Form 1120-A Line 24 stated net income of \$32,144.00.

⁸ A corporation may file its tax returns on IRS Form 1120-A if its gross receipts (Line 1.a on page one) are under \$500,000.00 and it meets certain other conditions.

⁹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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, USCIS 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.¹⁰ The petitioner's year-end current assets and liabilities are shown on Part III of the return. For Form 1120-A tax returns,¹¹ a corporation's year-end current assets are shown on lines 1 through 6. The petitioner's year-end current liabilities are shown on lines 13 and 14. 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 (Form 1120-A) during 2003 was \$17,827.00.

For Form 1120 tax returns 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 (Form 1120) during 2004 and 2005 were \$6,549.00 and \$31,766.00.

Therefore, for the period for which tax returns 2003 and 2004 were submitted, the petitioner did not have sufficient net income or net current assets to pay the proffered wage. In 2005 the petitioner did have sufficient net income to pay the proffered wage.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets except for tax year 2005.

¹⁰ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹¹ 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. The petitioner's net current assets (Form 1120-A) during 2002 were \$17,130.00.

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 at 8 C.F.R. § 204.5(g)(2), copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

The petitioner stated in her letter dated February 19, 2007, that currently she is the only "person in charge with the preparation and cooking ... for my restaurant." The owner of petitioner stated that she wishes to retire and have the beneficiary take over her duties. Here, the owner is making two different claims, although vaguely stated. She makes a claim that "she wishes to retire and have the beneficiary take over her duties." To consider the beneficiary as a replacement worker, the record would need to demonstrate the owner's wages, verify her full-time employment, or provide evidence that the petitioner will replace the owner with the beneficiary. In general, 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. Moreover, there is no evidence that the owner's position would involve the same duties as those set forth in the Form ETA 750. The certified position is for a chef. The beneficiary could not replace the owner in serving in a management capacity. Further, the petitioner has not documented the owner's wages for 2003.¹²

Second, the petitioner's owner makes an assertion that she can pay from her own salary. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

No proof or evidence of the owner of petitioner's own wages such as a Form 1040 or W-2 statement was submitted for 2003. The petitioner states salaries and wages paid in the Form 1120-A tax return submitted but there is no indication that the petitioner's owner received a salary. The sole shareholder made the statement offering to pay over her salary in February 19, 2007, which is four years after the priority date. In this case, the record contains no documentation or other competent evidence that demonstrates the sole shareholder's willingness to reduce or pay over her own wages as of the priority date (or use her officer's compensation).¹³ Therefore the petitioner's offer to

¹² We note that the owner of the petitioner submitted her W-2 Wage and Tax Statement for 2006, which showed wages of \$30,000. The owner's wages are less than the \$35,000 proffered wage. The petitioner did not submit its tax return for that year. Since no tax return was submitted for 2006, we are unable to determine if the petitioner has the ability to pay the proffered wage.

¹³ The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return.

reduce or pay over her wages is speculation based upon what could have happened in the past (but did not) and what may or may not happen in the future.

The documentation presented here indicates that shows that the owner was the sole shareholder in 2002 and 2003. The 2004 tax return does not list this information. However, the petitioner's 2005 tax return shows that the owner only held 97% ownership and therefore would no longer be the sole shareholder. Related to the owner's claim that she was willing to pay the proffered wage, the petitioner failed to provide the owner's relevant W-2 statements for all years in question or verify that she was willing, or personally able to forgo her wages from the priority date onward. The petitioner failed to submit adequate documentation.

Qualifications of the Beneficiary

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 DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 states that the position requires three years of experience in the proffered position.

The regulation at 8 CFR § 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.

Minimum Education, Training, and Experience Required to Perform the Job Duties

The key to determining the job qualifications is found on Form ETA 750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements

which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position of dim sum chef in this matter, Part A of the labor certification reflects the following requirements in Blocks 14:

Block 14:

Grade School	Blank
High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank
Training No.-Yrs./No. mos.	Blank
Experience	<u>3 Years</u>

The director found that the petitioner has not demonstrated that the beneficiary met the minimum requirements at the time the Application for Alien Employment Certification Form ETA 750 was filed. Specifically, the Form ETA 750, Part A, item 14 required three years of experience in the job of dim sum chef. According to the director, the only evidence submitted was a letter from the beneficiary stating she is the sole proprietor of her own company and certificates of attendance at a culinary arts studio, which failed to show that she had the required three years of experience as a dim sum chef.

On appeal counsel submitted the following documents:

- A letter dated November 20, 2002, from [REDACTED] vice president, of [REDACTED] Manila, Philippines, stating that his sister, the beneficiary, “is running a business in manufacturing Chinese dim sum since 1989.”
- A letter dated May 29, 2003, from [REDACTED], managing director of [REDACTED] of Ermita, Manila, Philippines, stating that she knew the beneficiary “owns [REDACTED]” and that the business has been open for a decade. According to [REDACTED] statement the beneficiary is “hands-on” in the business.
- A letter dated May 30, 2003, from [REDACTED], marketing manager, of [REDACTED] Malabon, Manila, Philippines, stating the beneficiary “is known to me since college years” and that the beneficiary is engaged in the manufacture and marketing of her “Chinese Dimsium and Siopao business.”
- A letter dated May 22, 2003, from [REDACTED] manager, [REDACTED] department, [REDACTED], Makati City, Philippines, stating that the beneficiary is her cousin and has a dim sum making factory since 1992.

- A letter dated June 2, 2003, from [REDACTED] by [REDACTED] stating that she has been a friend of the beneficiary since elementary school days, that the beneficiary has her own dim sum making company and “played an active role in each phase of the operation.”
- A letter dated May 16, 2003, from [REDACTED] of [REDACTED] Resources Corporation, Quezon City, Philippines, stating that [REDACTED] is owned and managed by the beneficiary since 1989 and that “[REDACTED]” makes different varieties of dim sum.
- A letter dated January 5, 2003, from [REDACTED] vice-president, of [REDACTED] Manila, Philippines, stating that the beneficiary manufactures and distributes dim sum products and that the company’s canteen has been receiving them since February 2000.
- A letter dated January 15, 2003, from [REDACTED], administrator, of [REDACTED], Malabon City, Philippines, ordering delivery of “mini siomai.”
- A letter dated February 17, 2003 from [REDACTED] head, Kinder Minds, Quezon City, Philippines, requesting delivery of “Mini Asado Siopaos.”
- A letter dated February 22, 2003, from [REDACTED] manager, Concorde Catering Corporation of Metro Manila, Philippines, requesting samples of “bite-size Asado Siopa.”
- A letter dated May 8, 2003, from [REDACTED], Concorde Catering Corporation of Metro Manila, Philippines, stating that the beneficiary is our “top dim sum supplier” in our catering business and that she is an excellent partner in our catering business.
- A letter dated May 4, 2003, from [REDACTED], office secretary, of [REDACTED] Quezon City, Philippines, stating that she knows the beneficiary as a dim sum maker since 1992 and that she is actively involved in the factory which she owns.
- A letter dated March 18, 2003, from [REDACTED], manager, [REDACTED], stating that [REDACTED] has been getting its dim sum products from the beneficiary since June of 1996.
- A letter dated March 18, 2003, from [REDACTED], of the Center for Urologic Care, Manila, Philippines, stating that the beneficiary turned her dim sum making hobby into a business venture and she is involved in its daily production.
- A letter dated April 27, 2003, from [REDACTED], president of [REDACTED] Manila, Philippines, stating that [REDACTED] owned and managed by the beneficiary “has been our siopao/dimsum concessionaire since 1999.”
- A handwritten letter dated March 25, 2002, from [REDACTED], teacher, stating and thanking the beneficiary for providing a demonstration of the technique to make dim

Along with the above, the petitioner has submitted thirteen other similar statements. None of the letters submitted by the petitioner are notarized and only one includes biographic identification such as a photo identification of the statement maker. Therefore, the statements are not amenable to verification. None of the statements provided are from trainers or employers of the beneficiary giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien as a dim sum chef as required by the regulation at 8 CFR § 204.5(l)(3)(ii).

Further, we note that several of the above reference providers submitted certificate of business registration with their statements to evidence corporate existence and validity. The petitioner did not similarly provide such evidence to establish the validity of the beneficiary's business or submit other independent objective evidence such as corporate tax payments listing the beneficiary as owner to verify her ownership of a dim sum business.

While the totality of the statements that the petitioner submitted should indicate that the beneficiary owns and operates a dim sum making factory, the petitioner should confirm the beneficiary's ownership by independent evidence such as its business registration. The evidence presently submitted, however, is insufficient to show that the beneficiary has the requisite experience as a dim sum chef. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage from the time of the priority date onward. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite three years of experience as a dim sum chef. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.