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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 07 178 51576

Office: TEXAS SERVICE CENTER Date: **MAR 19 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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).

Petry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and 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 permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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. Therefore, the director denied the petition.

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.

According to the director's February 21, 2008 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. 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 ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the petitioner's ETA Form 9089 on January 24, 2007.¹ The proffered wage as stated on the ETA Form 9089 is \$13.50 per hour (\$28,080 per year). The ETA Form 9089 states that the position requires 36 months of experience in the job offered.

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 on appeal.²

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1992, to currently employ 28 workers, and to have a gross annual income of \$1,366,000. According to the tax return in the record, the petitioner's fiscal year coincides with the calendar year. On the ETA Form 9089, signed by the beneficiary on May 12, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must demonstrate that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that form, the petitioner must show 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, 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 petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal

¹ U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner has filed a second ETA Form 9089 for an additional beneficiary, who is also living in Taishan, Guangdong, China. This second beneficiary has a priority date of January 31, 2007. The Form I-140, Immigrant Petition for Alien Worker, filed on behalf of this additional beneficiary was approved on November 28, 2007. There is no indication in USCIS records that this beneficiary has already adjusted to lawful permanent residence. Thus, the petitioner has the continuing obligation to show an ability to pay the wage in that matter as well. USCIS records currently before this office do not specify what the proffered job and the proffered wage are in this additional petition filed by the petitioner.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

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. Here, there is no evidence or even an assertion in the record that the petitioner employed the beneficiary during the relevant period of analysis.

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 returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages or had labor costs in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 assertion that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on November 19, 2007 with the receipt of the petitioner’s submissions in response to the request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due.³ Therefore, the petitioner’s income tax return for 2006 is the most recent return available. This return provides information regarding the petitioner’s financial position in 2006, the year before the priority date year. This is not part of the relevant period of analysis. The petitioner indicated that it wanted USCIS to consider this information in lieu of the 2007 tax return, when examining the petitioner’s ability to pay the wage. The AAO will consider the information on this return when analyzing the totality of the circumstances in this matter. The language in the February 21, 2008 notice of decision suggests that if the petitioner had demonstrated an ability to pay the wage in 2006, through its 2006 tax return, the petitioner would have established an ability to pay the wage from the priority date onwards. The AAO withdraws this point in the notice of decision.

This office will however note here that, as the director stated in his notice of decision, the 2006 tax return does not demonstrate an ability to pay the wage through net income or net current assets.

In specific, for a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The 2006 Form 1120 states net income of \$17,935.77. Therefore, even if we considered the petitioner’s 2006 return, the petitioner did not have sufficient net income to pay the proffered wage of \$28,080. Moreover, as the petitioner is requesting that USCIS use the 2006 tax return to support the finding that it had an ability to pay the wage in 2007, which the AAO would not do, this office would underscore that in 2007, the petitioner had an additional petition pending. The net income on the 2006 tax return is not sufficient to pay the proffered wage and the additional expense of this second beneficiary’s salary. In sum, the 2006 tax return, even if it were considered, does not reflect sufficient net income to pay the proffered wage and the wage of the petitioner’s other sponsored worker.

If the petitioner does not show that it had sufficient net income available to pay the wage, and does not show that the wages it paid the beneficiary, if any, added to its net income do not equal or exceed the amount of the proffered wage, USCIS will review the petitioner’s assets. However, total assets will not be considered in the determination of the ability to pay the proffered wage. 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, thus, will not become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Thus, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

³ This office notes that the 2007 tax return was also not yet due at the time the petitioner submitted this appeal during March 2008. The petitioner also did not indicate that it would submit any additional documents, such as its 2007 tax return, upon completion, (although such documents would have been useful in the analysis of its ability to pay the wage.)

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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.

As previously noted, the priority date is January 24, 2007; however, the petitioner did not submit the 2007 tax return, as it was not yet available when the record closed before the director. Instead, the petitioner has indicated that USCIS should consider the net current assets as reflected on its 2006 tax return to support the finding that it would have been able to pay the wage in 2007. In response, this office will note here that the petitioner's 2006 Form 1120 states net current assets (liabilities) of -\$71,040.76. As the petitioner had negative net current assets, it did not have sufficient net current assets in 2006 to pay the proffered wage. It also did not have sufficient net current assets to pay the salary of the other beneficiary for whom it had petitioned. Thus, even if we considered the petitioner's 2006 tax return, the petitioner has not shown that this tax return may be used to support the finding that it would have had sufficient net current assets to pay the proffered wage and the wage of the petitioner's other sponsored worker in 2007.

In sum, the petitioner may not suggest that the 2006 tax return can be used in lieu of the 2007 return (which was not yet available at the time the record closed before the director) or that it helps support the finding that the petitioner had the continuing ability to pay the beneficiary the proffered wage from the January 24, 2007 priority date onwards through its net income or net current assets.

On appeal, counsel asserted that the AAO should consider the petitioner's various 2007 bank statements submitted into the record as evidence of its ability to pay the wage. This assertion is misplaced.⁵ First, bank account statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not shown why the documentation specified at 8 C.F.R. § 204.5(g)(2), such as an annual report or audited financial statement, is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, the business checking account statements in the record show the amount in these accounts on a given date, rather than the sustainable ability to pay a proffered wage from the priority date onwards. Further, the AAO would underscore the following. The petitioner submitted only page one of its 2007 monthly statements for three different checking accounts. Page one of these statements does not include each day's fluctuations within the

⁴According 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.

⁵The business checking account statements in the record are those of the petitioner. However, the notice of decision indicates that these bank statements reflect amounts in personal bank accounts, rather than business bank accounts. The AAO withdraws this point in the notice of decision.

accounts, but only the balance at the start and end of the month. One of these business checking accounts fell to -\$1,050.52 on August 27, 2007. This indicates that there were not surplus funds in that account throughout the year sufficient to pay the proffered wage as well as to pay the additional wage on the second petition which the petitioner had pending during 2007. Rather, all the funds in that account were apparently needed in the operation of the petitioner's business. The second business checking account fell to \$9.44 on October 25, 2007, and the third business checking account fell as low as \$1,649.41 on June 25, 2007.⁶ Thus, the evidence does not suggest that the petitioner had sufficient surplus funds in these accounts throughout the year that could have been used to pay the proffered wage and the wage of the petitioner's other sponsored worker in 2007. Finally, the petitioner submitted business checking account statements that are incomplete in that only page one of each statement is in the record. Page one provides the beginning and ending balance each month, but not the daily balance throughout the month. This incomplete evidence leaves open the possibility that on various days throughout 2007 each of these accounts fell even further below the stated August 27, 2007 ending balance of -\$1,050.52.

In sum, the 2007 business checking account statements in the record do not establish the petitioner's ability to pay the proffered wage or the wage of its other sponsored worker from the priority date onwards.

This office also notes that with the petition, the petitioner filed its 2006, State of California, Board of Equalization, Quarterly, Short Form Sales and Use Tax Returns which list the petitioner's sales tax paid based on its gross sales.⁷ Two of these quarterly forms for 2007 should have been available when the petitioner filed its reply to the director's request for evidence, and all four for 2007 should have been available when the petitioner filed its appeal with this office. These 2007 quarterly state tax forms would have provided some evidence regarding whether the petitioner's gross sales declined, increased or remained constant in 2007. However, the petitioner did not provide these forms for 2007, and did not offer any explanation for not providing them.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and

⁶ The petitioner failed to submit the final monthly statement for 2007 for this third business checking account. The latest monthly statement in the record for this account ends on November 26, 2007.

⁷ It is not clear from the record if the petitioner submitted these quarterly state tax forms because its 2006 Form 1120 was not yet available when it filed the petition on May 22, 2007.

universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the petitioner stated that it incorporated in 1992 and has 28 employees. It has not established its historical growth since incorporating. It has not submitted any evidence to suggest that its gross sales and receipts have steadily increased. Rather, it has only provided evidence that in 2006 it had gross sales or receipts of \$1,485,764.60. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on this basis.

Beyond the decision of the director, the petitioner has failed to demonstrate that as of the priority date the beneficiary was qualified to perform the duties of the proffered position.⁸ The petitioner submitted one document to support the assertion on the ETA Form 9089 that the beneficiary had the required 36 months of experience in the proffered position as of the priority date. This document is a Certificate of Work Experience issued on behalf of the beneficiary on December 9, 2003 by the Taishan Notary Public Office, Guangdong Province.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the DOL accepted the ETA Form 9089 on January 24, 2007.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a

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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, section H, items 4 through 14, set forth the minimum education, training, and experience that an applicant must have for the position of cook (Chinese cook). Here, section H, items 4 through 14 indicate that there are no minimum educational requirements or training requirements to qualify for the proffered position, and that the applicant must have at least 36 months of experience in the proffered position. The petitioner did not allow for the applicant to gain qualifying experience in any related occupation. There are no additional special requirements for the position listed on the ETA Form 9089.

The duties of the proffered position as stated at section H, item 11 are to “[p]repare and cook Cantonese soups and dishes: meat, vegetables, desserts or other foodstuffs in restaurant (sic). Assist in menu planning.”

At sections J, K and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At section K where the beneficiary is required to list “all jobs [he] has held during the past 3 years” and to “list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification,” the beneficiary stated that he worked as a cook at [REDACTED] from November 1, 1993 through January 23, 2007. He also stated that he worked as a “kitchen worker” from August 1, 1990 through October 31, 1993 at [REDACTED]. The beneficiary did not list any other work experience or additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The Certificate of Work Experience in the record issued at [REDACTED] on December 9, 2003 states that the beneficiary worked at [REDACTED] from August 1990

through October 1993 where his job was to cook dishes. It also states that from November 1993 through the date which the certificate was issued he worked “as a cook at [REDACTED] where “his job [was] to cook dishes.”⁹

On the ETA Form 9089, the beneficiary indicated that, as of the priority date, his only relevant qualifying work experience was his more than 13 years of experience working as a cook at [REDACTED] and that he was a “kitchen worker” at [REDACTED]. However, the Certificate of Work Experience conflicts with this in that it indicates that the beneficiary also had the job of cook at [REDACTED] Guangdong Province, and not that of “kitchen worker”, from August 1990 through October 1993.

Doubt cast on any aspect of the proof submitted by a petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Further, this certificate does not meet the requirements set forth at 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it is not issued and signed by the beneficiary’s employer at [REDACTED] or [REDACTED]; and, it, in turn, does not provide the title, name and address of either of the beneficiary’s employers. Also, the certificate does not provide a specific description of the duties of the beneficiary at [REDACTED] or [REDACTED] such as whether he prepared and cooked Cantonese soups and dishes, including meat and vegetables dishes and desserts, and whether he assisted in menu planning during the years that he was employed at [REDACTED] or [REDACTED]. Without such description of the specific duties of the beneficiary, as required by 8 C.F.R. § 204.5(l)(3)(ii)(A), USCIS may not determine whether, as of the priority date, the beneficiary had 36 months experience in the qualifying experience as required by the ETA Form 9089.

The AAO finds that the Certificate of Work Experience in the record fails to meet the regulatory requirements of an experience letter as set forth at 8 C.F.R. § 204.5(l)(3) and that it includes inconsistencies with the ETA Form 9089 which the petitioner must resolve, and that it is not probative in this matter.

Thus, the petitioner has not established that, as of the priority date, the beneficiary had acquired 36 months of experience in the proffered position, as required by the ETA Form 9089 as certified by the DOL. Therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

⁹ The AAO finds that the discrepancies in the spelling of [REDACTED] on this document versus [REDACTED] on the ETA Form 9089 are not material, and that these variations in spelling are each acceptable translations of the Chinese terms.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.