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



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JAN 26 2011

FILE:



Office: NEBRASKA SERVICE CENTER

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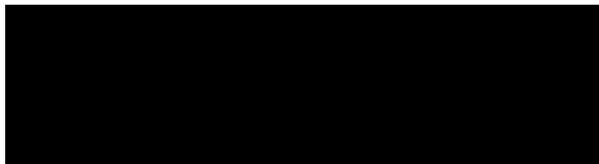
Petitioner:



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 \$630. 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).

Thank you,

Perry Rhew
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 petitioner is an Indian 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 United States 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. The director denied the petition accordingly.

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.

As set forth in the director's April 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on April 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$11.50 per hour (\$23,920 per year). The ETA Form 9089 states that the position requires two years of experience in the position offered as a specialty cook – Indian food.

The AAO maintains plenary power to review each appeal on a de novo basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding is unclear as to the petitioner's structure. Originally, the petitioner submitted Forms 1120 for all of the years in question, indicating that it is a C corporation. In response to the director's Request for Evidence, the petitioner submitted amended tax returns, Forms 1040, indicating that it is a limited liability corporation. The director issued a second Request for Evidence concerning the petitioner's claims that it is a limited liability corporation. In response, the petitioner submitted business documents, however, these documents did not include the original filing with the California Department of State or other documents evidencing whether it is an LLC or a corporation. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In response to the director's first Request for Evidence, the petitioner submitted a letter from [REDACTED] certified public accountant, stating that he communicated with the IRS to determine that the petitioner was organized as an LLC. On appeal, [REDACTED] submitted a second letter stating that the IRS refused to provide proof of the petitioner's registration as an LLC. The petitioner submitted no evidence from the State of California or from another official source concerning its organization. [REDACTED] also stated that the petitioner's owner believed the petitioner to be an LLC. The belief of the owner is insufficient proof of the petitioner's organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the PERM regulations apply because the petitioner filed a labor certification application on ETA Form 9089 seeking to convert the previously submitted ETA Form 750 to an ETA 9089 under the special conversion guidelines set forth in PERM. 20 C.F.R. § 656.17(d) sets forth the requirements necessary for the converted labor certification application to retain the priority date set forth on the former ETA 750.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 petitioner submitted no evidence that it is a LLC and instead, as noted by the director in his decision, the evidence found on the California Department of State website indicates that the petitioner was organized as a corporation until it was suspended.³ See <http://kepler.sos.ca.gov/cbs.aspx> (accessed December 23, 2010). "It is incumbent on 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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We additionally note that the checks used to pay the petitioner from 2001 to 2005 and the pay stubs from 2007 all state that the petitioning entity is [REDACTED] instead of using the designation "LLC."⁴ This issue is relevant to determine the proper tax form to examine for the petitioner and from where the petitioner's net income would be derived in order to determine the petitioner's ability to pay the proffered wage.

On the petition, the petitioner claimed to have been established in 2001 and to currently employ six workers. On the ETA Form 9089, signed by the beneficiary on June 6, 2007, the beneficiary claimed to work for the petitioner beginning on February 22, 2002.⁵

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, United

³ The corporation on record with the state of California is [REDACTED], not [REDACTED] [REDACTED] the name of the petitioner found on the Form I-140. Another entity is registered with the State of California called [REDACTED] but that entity does not seem to be related to the petitioner in this case. The relation of the two companies is discussed *supra* in footnote 4. As stated in the AAO's Notice of Derogatory Information, the California Secretary of State notified the AAO in a phone call that the petitioner was suspended from doing business in April 2004. The AAO requested information in this NDI demonstrating that the company "is currently in active status." In response, the petitioner submitted a current City of Pasadena Business Tax Permit and Health Permit and an Alcoholic Beverage License as well as the second quarter Form 941 State 2010 Quarterly Income Tax Return. The 2010 Form 941 does not show the beneficiary as a current employee.

⁴ Counsel claims that the petitioner can elect to be taxed as either an LLC or as a corporation under California law, however, that argument does not explain the petitioner's alternating use of the "LLC" or "Inc." designation in its name.

⁵ The beneficiary additionally lists his start date with the petitioner on Form G-325A filed with his I-485 adjustment of status application as February 2002.

States 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 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 submitted the following evidence concerning payment made to the beneficiary:⁶

- The accepted checks submitted for 2001⁷ show that the petitioner paid the beneficiary \$12,667.24.⁸
- The accepted checks submitted for 2002 show that the petitioner paid the beneficiary \$2,589.08.
- The petitioner submitted no accepted evidence of pay for 2003.
- The petitioner submitted no accepted evidence of pay for 2004.
- The petitioner submitted no accepted evidence of pay for 2005.

⁶ On appeal, counsel argues that the beneficiary's rate of pay should be considered in determining the petitioner's ability to pay the proffered wage. He asserts that the beneficiary is paid at a rate of \$15 per hour which is higher than the proffered wage. Despite being notified that USCIS would only consider the checks in evidence as the total amount paid instead of as evidence of an hourly rate being paid, the petitioner submitted no additional checks or paystubs on appeal nor did it submit any Forms W-2 to show total amounts paid. The evidence as submitted does not indicate that the position is full-time as opposed to a part-time position. The petitioner states on appeal that the pay information was submitted to show the beneficiary has been paid at or above the hourly rate since 2001 instead of as an exhaustive list of the amounts paid to the beneficiary. 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)).

⁷ As noted above, on two separate signed documents, the beneficiary stated that he did not begin working for the petitioner until 2002. Therefore, without explanation, the checks for 2001 particularly are in question. "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).

⁸ The petitioner submitted some checks that included only the front side of the check and therefore lacked evidence of their negotiation by a bank. Specifically, checks in the amount of \$5,089 in 2002, \$8,400 in 2003, \$2,596 in 2004, and \$2,800 in 2005 contained only the front side of the check. Although it appears that the director accepted all of the checks issued, without evidence of negotiation, the AAO does not agree. As a result, those amounts will not be considered as wages paid in the determination of whether the petitioner can pay the proffered wage.

- The petitioner submitted no evidence of pay for 2006.
- The paystubs for 2007 show that the petitioner paid the beneficiary \$22,657.85 as of September 30, 2007.

These amounts are less than the proffered wage. As a result, the petitioner must show that it has the ability to pay the difference between the proffered wage and actual wage paid, which in 2001 was \$11,253; in 2002 was \$21,331; and in 2007 was \$1,262. The petitioner must establish its ability to pay the full proffered wage in 2003, 2004, 2005, and 2006.

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

As noted above, the petitioner initially submitted Forms 1120 showing taxes paid as a corporation. 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 record before the director closed on December 20, 2007 with the receipt by the director of the petitioner's submissions in response to the director's second request for evidence. As of that date, the petitioner's income tax return for 2006 was the most recent return available.⁹

- The 2001 Form 1120-A states the petitioner's net income as \$0.¹⁰
- The 2002 Form 1120 states the petitioner's net income as -\$29,036.¹¹
- The 2003 Form 1120 states the petitioner's net income as -\$40,790.
- The 2004 Form 1120 states the petitioner's net income as -\$34,877.
- The 2005 Form 1120 states the petitioner's net income as -\$41,106.

These tax returns indicate that the petitioner had insufficient net income to pay the proffered wage for 2001 to 2005.

In 2006, the petitioner reported its income as a limited liability company on its owner's Form 1040. The petitioner's net income is found on Line 31 of Schedule C, which was \$2,347. This amount is less than the proffered wage and is thus insufficient to establish the petitioner's ability to pay for that year.¹²

⁹ We note that the Employer Identification Number provided on the tax returns does not match the one provided on the Form I-140 or the Form ETA 9089. The EINs are almost the same, however, having only one digit different. In any further submissions, the petitioner should submit evidence concerning this discrepancy.

¹⁰ The line for net income on the short form 1120-A is Line 26.

¹¹ The petitioner submitted "amended tax returns" for 2002, 2003, 2004, and 2005 submitting the petitioner's information on Form 1040, Schedule C instead of the Form 1120 originally submitted. Although the petitioner's organization as an LLC or a corporation is undetermined, even if we considered the Forms 1040, Schedule C shows the same amounts as the Forms 1120.

¹² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹³ 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 2001 Form 1120-A states net current assets of \$0.¹⁴
- The 2002 Form 1120 states net current assets of \$14,442.
- The 2003 Form 1120 states net current assets of \$5,062.
- The 2004 Form 1120 states net current assets of \$1,595.
- The 2005 Form 1120 states net current assets of -\$13,101.

None of these amounts is sufficient to demonstrate the petitioner's ability to pay the difference between the proffered wage and the actual wage paid.¹⁵

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of

be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

¹³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹⁴ On IRS Form 1120, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) and total assets at the end of the tax year less than \$250,000 are not required to complete Schedules L, M-1, and M-2 if the "Yes" box on Schedule K, question 13, is checked. See <http://www.irs.gov/instructions/i1120> (accessed April 28, 2010). Here, the 2001 tax return shows no gross receipts, no salaries paid, no net income, and no assets. This similarly calls into question the petitioner's claim that it paid the beneficiary in 2001. "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. at 591.

¹⁵ If the amended Forms 1040 with Schedule C are considered, the petitioner's net current assets cannot be calculated from these documents.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 (BIA 1967). 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 universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

In the instant case, the tax returns in the record indicate that the petitioner paid minimal wages, did not have a positive (minimal) net profit until 2006 (\$2,347), and has minimal net assets that declined from 2002 to 2005. The company's gross receipts total only slightly more than the proffered wage in 2002 (\$32,161) and were nonexistent in 2001 as were wages paid from 2001 through 2004. The petitioner submitted no evidence to liken its situation to the one in *Sonogawa* including evidence of its reputation, unusual expenses, or one off year. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

In addition to the issue of the petitioner's ability to pay the proffered wage, we have identified an additional issue of ineligibility upon appeal. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The ETA Form 9089 requires two years of experience as a restaurant cook. The specific duties required in Part H, block 11 are: "Prepare, marinate and cook Indian dishes and soups such as Tikka Masala, Chicken Saag, Chicken Korma, Shrimp Masala, Shrimp Tikka, Lamb Boti Kebab, Tandoori Chicken, Tandoori Shrimp, Fish Korma, Fish Masala, many Indian appetizers, curries and other vegetables." The petitioner submitted a letter from [REDACTED] that states that the beneficiary worked for the restaurant as a chef for ten years. The undated letter does not specify which years the beneficiary was employed to determine whether he had the required two years of experience by the time of the priority date nor does it specify that the beneficiary has the ability to cook the dishes specified on the ETA Form 9089. As a result, we are unable to conclude that the beneficiary had the requisite experience as of the priority date.

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

ORDER: The appeal is dismissed.