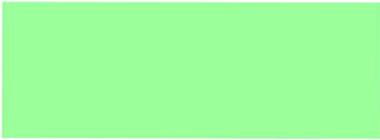


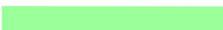


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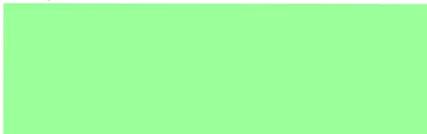


DATE: **MAR 28 2013** OFFICE: NEBRASKA SERVICE CENTER FILE 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
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 petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi chef. 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, 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 14, 2010 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, Application for Permanent Employment Certification, 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, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 4, 2008. The proffered wage as stated on the ETA Form 9089 is \$22,506 per year. The ETA Form 9089 states that the position requires twenty-four months in the job offered of sushi chef.

The AAO conducts appellate review on a *de novo* basis. See *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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a corporation.² On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$184,774, and to currently employ three workers. On the ETA Form 9089, signed by the beneficiary on January 6, 2010, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 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'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United 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'l Comm'r 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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

¹ 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).

² The AAO notes that the petitioner is incorporated in the State of Illinois, file number [REDACTED] with Employment Identification Number (EIN) [REDACTED]. See <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed February 21, 2013).

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d 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 at 118. "[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).

Unless exempt under section 501 of the Internal Revenue Code, all domestic corporations must file an income tax return with the Internal Revenue Service (IRS) whether or not they have taxable

income. Domestic corporations must file IRS Form 1120, unless they are required or elect to file a special return, such as IRS Form 1120S for an S corporation or IRS Form 1120-F for a foreign corporation. See <http://www.irs.gov/instructions/i1120/ch01.html> (accessed March 13, 2013). The petitioner is an Illinois domestic corporation and was not permitted to file IRS Form 1040 Schedule C in lieu of a corporate tax return. Therefore, the IRS Forms 1040 submitted by the corporate petitioner for 2007 and 2008 will not be accepted as evidence of its ability to pay the proffered wage.

The AAO notes that the director examined the petitioner's ability to pay using methods for both corporations and sole proprietors. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." [REDACTED] is a corporation registered in the State of Illinois. The petitioner's failure to file corporate taxes does not change the legal structure of the entity. The president of the company does not have a legal obligation to pay the beneficiary's wage, and therefore, her individual tax returns, bank account statements, investment statements, and any other personal assets will not be considered in determining the petitioner's ability to pay the proffered wage. Therefore, the petitioner has failed to provide any regulatory prescribed evidence of its ability to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 (Reg'l Comm'r 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, counsel asserts in his brief accompanying the appeal that the beneficiary will replace contract employees and the executive chef. Counsel states that the replacement of the independent contractors should be considered in evaluating the totality of the circumstances. To support this assertion, on appeal, the petitioner resubmits a copy of a letter from [REDACTED] president of the petitioner; copies of the Forms 1099 for the petitioner's contract employees; and a copy of a letter from [REDACTED] executive chef for the petitioner.

In her letter, the petitioner's president states that she needs to hire the beneficiary to replace her husband as executive chef, as well as replace thirteen part-time independent contractors.³ 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. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be 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. In this case, it is unlikely that the beneficiary, who claims to have just under three years of experience as a sushi chef, would immediately and completely replace the executive chef who has over thirty years of experience, as well as thirteen part-time contractors.⁴ The AAO notes that the petitioner's president lists her husband's job title as "sales manager" on her tax returns. The record of proceeding does not contain any evidence that the positions of the executive chef and sales manager involve the same duties as those set forth in the Form 9089. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If the employee performed other kinds of work, then the beneficiary could not replace him.

Counsel asserts on appeal,

"The Petitioner had clearly explained that the plan is for the Beneficiary to take over for the chef eventually, after the chef had brought him up to speed. At that point, once the Beneficiary took over, other workers, either W2 or 1099 (or both), would have to be brought in for the work that the Beneficiary had temporarily undertaken."

³ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner, as a matter of choice, is replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

⁴ See http://m2catering.com/about_us.htm (accessed March 13, 2013).

The letter submitted by [REDACTED] executive chef, states that the beneficiary will replace the independent contractors while he is training to be the executive chef, at which point, the independent contractors will be re-hired. This letter is inconsistent with the petitioner's president's letter which states that the beneficiary will replace the executive chef and the independent contractors. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Furthermore, a labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 9089. 20 C.F.R. § 656.30(c)(2). The labor certification states that the proffered position is for a sushi chef and requires two years of experience. It further states that no training is required in the job opportunity. The duties of the proffered position, as indicated on the labor certification, are as follows:

Directs the preparation of sushi for Japanese catering business. Will prepare sushi dishes using authentic and specialized Japanese culinary techniques, and instruct other workers in preparing and artistically presenting each dish. Acts as live sushi chef on site at cultural and corporate events. Assesses wholesaler options for purchase of seafood, taking quality, price, and budget into account. Orders food supplies, monitors sanitation practices, and ensures that each sushi dish follows standards and regulations. Creates new menu items after assessing market conditions and profit margins. Directly interacts with Japanese corporate clients to sell live chef sessions.

The record of proceeding does not contain any evidence regarding the executive chef's duties and whether the beneficiary will be engaged in the same duties as the executive chef. The executive chef, in his letter, states that he will train the beneficiary to assume the position of executive chef. If the beneficiary will be hired as a sushi chef only temporarily to be trained as an executive chef, then the position would be outside the terms of the labor certification. Therefore, the petitioner would not be in compliance with the terms of the labor certification and would not be able to establish that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

On appeal, counsel also contends that the independent contractors will work for the petitioner until the beneficiary is authorized to work in the U.S. and can begin working for the petitioner, and therefore, their termination cannot be documented. The executive chef states in his letter that the beneficiary will replace the independent contractors during his training period, and then the independent contractors will be re-hired once the beneficiary becomes executive chef. The AAO notes that one of the independent contractors on the petitioner's president's list of workers to be replaced by the beneficiary includes a worker who received both a Form 1099 and a Form W-2 in 2008. As noted above, the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner, as a matter of choice, is replacing its independent contractors who are U.S. workers with foreign workers, or suspending their

employment for a time while the foreign worker assumes their positions, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification.

Counsel further asserts in his brief on appeal,

“It should not raise an eyebrow that the \$88 thousand-per-year, 62-year-old chef plays a key sales role outside of the kitchen. Nor is it even slightly controversial that the firm’s owner would take over that sales role upon the chef’s retirement.”

However, there is nothing in the record to corroborate counsel’s assertion that the president of the petitioner would assume her husband’s duties as sales manager. In her letter, the petitioner’s president never states that she is going to take over the role of sales manager for the business when her husband retires. This assertion was made only by counsel in his brief on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also refers to a decision issued by the AAO concerning the ability to pay based on the totality of the circumstances and replacement of an outsourced service, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Additionally, the case to which counsel refers is not similar to the present case and is easily distinguishable.

Counsel further argues that the petitioner’s president’s assets such as real estate equity, personal bank accounts, and investment accounts should be considered in evaluating the totality of the circumstances. However, as stated above, the petitioner is a corporation, and thus, it is a separate and distinct entity from its officers and shareholders. As such, the petitioner’s president’s personal assets will not be considered in evaluating the petitioner’s ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm’r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

The petitioner has not demonstrated sufficient net income or net assets to pay the proffered wage for any of the relevant years. The petitioner also failed to include any evidence of historical growth of the petitioner’s business, the petitioner’s reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As set forth in the director's April 14, 2010 denial, another issue in this case is whether the petitioner will be the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁵ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The petitioner has not submitted any evidence showing its control over the beneficiary such as an employment contract. Additionally, based on the evidence in the record, the petitioner hires mostly independent contractors. The petitioner employed three employees in 2009 (one of whom is the petitioner's president's husband) and thirteen independent contractors. In 2008, the petitioner employed four employees and eleven independent contractors.⁶ In a letter resubmitted on appeal, the petitioner's president states that the petitioner also hires other independent contractors for other positions, but the independent contractor information submitted is the information regarding those that will be replaced by the beneficiary. Therefore, it appears that there are more independent contractors working for the

⁵ 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. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the 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.

⁶ The AAO notes that one of the employees who received a Form W-2 in 2008 also received a Form 1099 in 2008.

petitioner than those that were noted by the petitioner. As such, the petitioner appears to hire almost exclusively contract employees, and there is nothing in the record to establish that the beneficiary will be an employee of the petitioner. Based on the evidence in the record, the petitioner has not established that it will be the beneficiary's actual employer.

Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

Beyond the decision of the director,⁷ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all of the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires twenty-four months experience in the proffered position of sushi chef and completion of high school. On the labor certification, the beneficiary claims to qualify for the position based on experience as a sushi chef at [REDACTED] in Osaka, Japan from December 1, 2001 to November 1, 2005 and on graduation from [REDACTED] in Fukushima, Japan in 1998.

The record contains the beneficiary's high school diploma in Japanese which is accompanied by an English document titled, "Transcript of Graduation Certificate." The document contains an illegible signature accompanied by a notary stamp and is dated October 22, 2009. Nothing in the record indicates who translated the letter or that he or she is competent to translate from Japanese to English.

In the instant case, the translation of the diploma does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing a foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she

⁷ 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).

is competent to translate from the foreign language into English.

Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

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.