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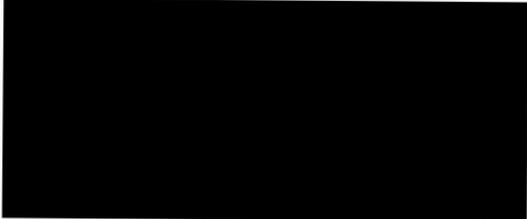
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 05 232 52459

Office: TEXAS SERVICE CENTER

Date: APR 02 2007

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 dry cleaner and laundry. It seeks to employ the beneficiary permanently in the United States as a dry cleaner. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that, based on the petitioner's tax returns for tax years 2002 to 2004, 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 also determined that the petitioner submitted an insufficient letter of previous work experience and, thus, had not established that the beneficiary was qualified to perform the duties of the proffered position. 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 September 2, 2005 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the petitioner established that the beneficiary is qualified to perform the duties of the position. The AAO will examine the petitioner's ability to pay the proffered wage, and then will examine the beneficiary's qualifications to perform the duties of the proffered position.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$37,500 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits an affidavit from [REDACTED] the petitioner's president, along with a copy of a promissory note between the petitioner's owner and a third party in the amount of \$40,000, and a copy of the repayment of the note to the petitioner's owner on September 30, 2005. In his affidavit, [REDACTED] states that he had used his personal funds to support the petitioner in the past and that if the petitioner needed additional funds, [REDACTED] had funds available that he had lent to a third party on October 1, 2001. [REDACTED] stated that he could have recalled the loan anytime after March 31, 2002. [REDACTED] states that the petitioner has thus, always had access to another source of funds to meet its financial obligations.

Other relevant evidence in the record includes the petitioner's IRS Forms 1120S for tax years 2002, 2003, and 2004,² and bank statements for the petitioner's business checking account with [REDACTED] and [REDACTED] for the months January 2005 to June 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on February 23, 1995, to have a gross annual income of \$321,205, and to have six employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 26, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the additional evidence submitted to the record establishes that the petitioner has always had the ability to pay the proffered wage as of the 2001 priority date. Counsel notes that [REDACTED] is the petitioner's sole shareholder and has sufficient funds to establish the petitioner's ability to pay the proffered wage. Counsel also notes that the petitioner was not provided with any opportunity to rebut the director's concerns prior to the issuance of the director's denial of the instant petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the

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 copies of the petitioner's corporate tax returns submitted to the record are incomplete, as they do not contain all accompanying attachments and schedules.

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 the initial petition, the petitioner submitted bank statements for two bank accounts for the months January to June 2005. Although neither counsel nor the director commented on these documents, the AAO notes that reliance on the balances in petitioners' bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 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 material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 no evidence to the record of any wages that it paid the beneficiary. It has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus, the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority date and to the present.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well 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 CIS, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

It is noted that the record does not contain the petitioner's tax return for tax year 2001. The priority date of April 27, 2001 is contained in tax year 2001. Without an examination of the petitioner's tax return for tax year 2001, the AAO cannot determine whether the petitioner had sufficient net income to pay the proffered wage of \$37,500. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net income. Nevertheless, the AAO, for illustrative purposes, will examine the petitioner's tax returns for tax years 2002, 2003, and 2004 with regard to the petitioner's net income and net current assets.

The petitioner's tax returns for 2002 to 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,500 per year from the priority date:

- In 2002, the Form 1120S stated net income³ of \$3,078.
- In 2003, the Form 1120S stated net income of \$31,380.
- In 2004, the Form 1120S stated net income of \$23,720.

Therefore, for the years 2002 to 2004, the petitioner did not have sufficient net income to pay the proffered wage of \$37,500.

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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities.⁴ Otherwise, they cannot properly be considered in the determination of the petitioner's

³ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments or deductions shown on its Schedules K for tax years 2002, 2003, and 2004, the petitioner's net income is found on Schedule K of its tax returns.

⁴ The director in his decision only examined the petitioner's current assets. This is an incorrect analysis of the petitioner's net current assets. The AAO will examine the petitioner's current assets and current liabilities to arrive at the petitioner's net current assets.

ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 noted previously, the record does not contain the petitioner's 2001 corporate tax return. Therefore the AAO cannot examine the petitioner's net current assets for 2001 to establish whether the petitioner had sufficient net current assets to pay the proffered wage of \$37,500. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the priority date based on its net current assets. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). However, for illustrative purposes, the AAO will examine the petitioner's tax returns for tax years 2002 to 2004 to see whether it had sufficient net current assets to pay the proffered wage during these years.

- The petitioner's net current assets during 2002 were -\$1,246.
- The petitioner's net current assets during 2003 were -\$2,578.
- The petitioner's net current assets during 2004 were -\$3,620.

Therefore, for the years 2002 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

From the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that [REDACTED] is the sole shareholder of the petitioner. [REDACTED] in an affidavit submitted on appeal states that he is the petitioner's president and that he had additional funds available to pay the proffered wage in tax year 2001 which he subsequently lent to a third party on October 2001. [REDACTED] also provided bank records to establish that he had received payment of the outstanding loan with interest during 2005. However, the assertions of both [REDACTED] and counsel are not persuasive. 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)). Although counsel states that the petitioner's owner is the sole shareholder of the petitioner, and Mr. Duka states that he is the president and sole shareholder of the petitioner, as noted previously, the petitioner's federal income tax returns contain no form, schedule or statement that identifies any individual as

⁵According 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.

sole owner. In fact, the petitioner's tax returns indicate on page 1, part G, of Forms 1120S, that the petitioner had two shareholders at the end of each tax year between 2002 and 2004. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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."

Furthermore, although sole shareholders of S corporation do have some flexibility in the allocation of the profits of the corporation in areas such as officer compensation, the record is not clear that the personal assets of the petitioner's owner could be utilized to pay the proffered wage. CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Furthermore, even if the funds represented by the promissory loan in the amount of \$40,000 had been available to pay the proffered wage of \$37,500 in tax year 2001, this money would not be able to pay the proffered wage in any subsequent relevant year.

Thus, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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

With regard to the second issue considered in the director's decision to deny the instant petition, namely, the beneficiary's qualifications, Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 27, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁶. On appeal, counsel submits a complete copy of the Form ETA 750 submitted with the initial petition. Counsel states that an incomplete copy of the Form ETA 750 had been submitted with the I-140 petition, that left out Part B of the Form ETA 750, which contains the beneficiary's prior work experience. The record also contains the original

⁶ 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).

Form ETA 750 submitted with the initial petition, and an undated letter of previous work verification written by Don Thresher, Resource Manager, Fahim Investment, Inc. D/B/A Brittmore Grocery Store, Houston, Texas.

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

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of printing machine operator. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|---------|
| 14. Education | |
| Grade School | (Blank) |
| High School | (Blank) |
| College | (Blank) |
| College Degree Required | (Blank) |
| Major Field of Study | (Blank) |

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. Contrary to counsel's assertion, the petitioner submitted a complete Form ETA 750 with the initial petition that contains the beneficiary's previous work experience. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked as a drycleaner with Progressive Enteprenuers [sic] Inc d/b/a/ Touch of Class Cleaners in [redacted] Georgia from February 1994 to July 1999. The beneficiary also claimed that he had worked with [redacted] as a manager from May 2000 to the date the beneficiary signed the Form ETA 750, namely, November 26, 2003. He does not provide any additional information concerning his employment background on that form. As stated previously, the record contains a letter of previous work verification from Fahim Investment Inc., where the beneficiary claimed he had worked as a manager.

In his decision, the director determined that the letter from Fahim Investment Inc. was undated and that it referred to the beneficiary's work experience since May 2000. The director determined that the petitioner had not established that the beneficiary had the required experience as of April 2001.⁷

⁷ Although the director did not explicitly state that the petitioner had not provided sufficient evidence as to the beneficiary's previous work experience as a dry cleaner prior to the priority date of April 27, 2001, within the context of the I-140 petition regulatory guidance, this appears to be what the director intended.

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.

Upon review of the record, the petitioner submitted a letter of work verification that is irrelevant to the duties of the proffered position. The undated letter of work verification attempts to document the beneficiary's previous work experience as a manager. The record is devoid of any evidence with regard to the beneficiary's claimed previous employment as a dry cleaner. The AAO thus affirms the director's decision that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position from the evidence submitted into this record of proceeding.

As stated previously, the petitioner did not establish its ability to pay the proffered wage, and the petitioner also has not established that the beneficiary is qualified to perform the duties of the position. Thus, the director's decision shall be affirmed.

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. The petition is denied.