

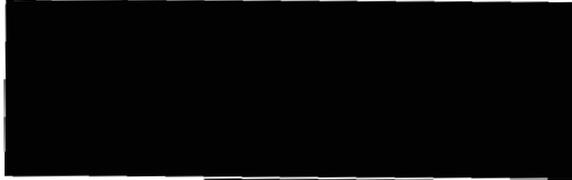
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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BL

FILE: [REDACTED]
EAC 03 137 53318

Office: VERMONT SERVICE CENTER

Date: NOV 20 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the acting director's decision. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The previous decisions of the acting director and AAO will be affirmed. The petition will be denied.

The petitioner was previously represented by counsel. On October 25, 2007 counsel sent a facsimile transmission to AAO stating that she was withdrawing her appearance in this matter. All representations will be considered, but the decision will be furnished only to the petitioner.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 and denied the petition accordingly. The AAO affirmed that decision, and added the supplementary basis for denial that the petitioner had not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification. The AAO dismissed the appeal.

The record shows that the instant motion was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, "Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reconsider because, in the brief, the petitioner's former counsel asserts that the acting director incorrectly applied the pertinent law.

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 granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the 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.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$12.57 per hour, which equals \$26,145.60 per year. The Form ETA 750 also states that, in order to be qualified for the proffered position, the beneficiary must have one year of experience in the proffered position, chef, or two years of experience as a cook.

On the Form ETA 750, Part B, the beneficiary stated that he had worked (1) for [REDACTED] apparently in Brazil, as an assistant cook from June 1989 to May 1992, (2) for [REDACTED] in Minas Gerais, Brazil, as a cook from October 1994 to November 1996, and (3) as a cook for the petitioner since 1997. The beneficiary signed that form on April 16, 2001,

The Form I-140 petition was submitted on March 21, 2003 and states that the petitioner's gross annual income is \$410,528 and that its net annual income is \$26,675. On the Form ETA 750, Part B, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner since October 1997.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Sutton, Massachusetts.

The AAO maintains plenary power to review each appeal and motion on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal or motion.² In the instant case the record contains (1) The 2001 Form 1040 U.S. Individual Income Tax Return of [REDACTED] and a corresponding Schedule C showing the petitioner's performance during that year, (2) 2002 and 2003 Schedules C, excerpted from the tax return of [REDACTED] and related to the petitioner's performance during those years, (3) a list of the recurring monthly personal expenses (budget) of [REDACTED], and (4) a letter dated December 31, 2004. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The record also contains a letter dated February 18, 2003 from the petitioner's president, but no other evidence pertinent to the beneficiary's qualifications for the proffered position. The petitioner produced no evidence in support of his previous employment for either of the two Brazilian employers.

The petitioner's president's February 19, 2003 letter states that the petitioner employed the beneficiary as a cook since October 1997, and that in that capacity he was responsible for portioning, garnishing, presentation, service, supervision of cooks and preparation staff, training kitchen staff and line cooks, and assisting in estimation and ordering foods.

The 2002 tax return of [REDACTED] and [REDACTED] shows that they are a married couple filing jointly. The Schedules C provided show that [REDACTED] owns the petitioner as a sole proprietorship. The 2001 Schedule C shows that the petitioner returned a net profit of \$26,675 during that year. The adjusted gross income of the petitioner's owner and owner's spouse shown on their 2001 tax return, including the petitioner's profit, is \$55,179.

The 2002 and 2003 Schedules C shows that the petitioner returned net profit of \$57,775 and \$84,828 during those years, respectively.

The budget of [REDACTED] shows that they have recurring monthly expenses (Mortgage, Real Estate, Insurance, Medical Care, Utilities, Food, and Transportation) of \$2,978.28 per month, or \$35,739.36 per year.

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

The December 31, 2004 letter is from an attorney who is also a CPA,³ and who argues that the petitioner's depreciation deductions⁴ during the salient years should be added to its net profit in assessing the petitioner's ability to pay the proffered wage during those years.

The acting director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 27, 2004, denied the petition.

On appeal, the petitioner's former counsel submitted the above-described December 31, 2004 letter from the attorney/CPA, and asserted that the petitioner had demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

The Chief, AAO dismissed the appeal on May 31, 2006. In that decision the chief found that, in addition to failing to demonstrate its continuing ability to pay the proffered wage beginning on the priority date, the petitioner had failed to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification.

On the instant motion the petitioner's former counsel stated,

The petitioner moves for reopening and reconsideration for the reason that it contends that it is an error of law for the government to conclude that the sum of the monetary expenditures relating to the individual living expenses of the principals of the petitioner should be mathematically subtracted from the income of the petitioning organization to demonstrate the financial viability of the petitioning organization. The government failed to take into consideration that the individual principals [sic] of the petitioning organization [sic] may have other sources of support and mistakenly constructed a direct financial nexus between individual spending of its principals and the petitioner as an organization. The petitioner maintains that it did have the ability to pay the proffered wage from the time the [Form ETA 750] was filed to the present. Moreover, the government erroneously contends that subsequent tax information was not submitted although IRS Schedules C for the subsequent tax years had been filed by the petitioner in support of the subject petition. Furthermore, the petitioner contends that the alien did have documentation of experience for the occupation but that the government did not request additional documentation prior to adjudication.

³ If the attorney/CPA were speaking as the beneficiary's legal representative, and arguing its case, then the assertions in the December 31, 2004 letter would not be evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The writer appears, instead, to be offering an opinion based on experience in evaluating profitability. This office considers that the writer is writing as a CPA, rather than an attorney, and will consider the opinion expressed not as argument by counsel, but as expert opinion evidence.

⁴ The accountant included figures for the petitioner's gross revenues, cost of goods sold, gross income, and total wage expense in that letter, but made no argument pertinent to them.

Otherwise, the petitioner's former counsel submitted no evidence and no additional argument in support of the instant motion.

In a previous letter dated January 18, 2005 the petitioner's former counsel stated,

We respectfully submit that there is not [sic] basis for denial of an immigration petition [based] upon the personal spending habits of the [petitioner's owner], particularly in the circumstances presented where it has not been established that the business income of the petitioner is the source of income for personal spending.

In conclusion, the petition was erroneously denied for the reasons that: (i) the conclusions upon which the government contends inability to pay the prevailing wage were based upon inaccurate accounting by CIS; and, (ii) personal spending habits of individuals (who, for example, may draw from other investments as in the case presented) are not dispositive of the business viability of a petitioner.

The argument urged by the accountant in the December 31, 2004 letter depends upon the assertion that the petitioner's depreciation deduction during the salient years represent additional funds at its disposal during those years, and that the net profit of a sole proprietorship during a given year plus that year's depreciation deduction equals an index of the sole proprietorship's ability to pay the proffered wage during that year.

Initially, this office notes that a precedent decision discussed below indicates that the sole proprietorship's net profit is not directly probative of that company's ability to pay the proffered wage. Rather, it is considered in the context of the business owner's income and assets. The determination of ability to pay the proffered wage pursuant to that decision is explained in detail below. Further, contrary to the accountant's urging, depreciation does not represent a fund available to pay additional wages.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the petitioner's former counsel asserted that they should not be charged against income according to their

depreciation schedule, she does not offer any alternative allocation of those costs.⁵ The petitioner's former counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 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, CIS will examine whether the petitioner employed 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, although the beneficiary stated on the ETA 750B that he has been working for the petitioner since October 1997, the petitioner submitted no evidence to establish that it employed and paid the beneficiary during any of the salient years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's owner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 its income tax returns, rather than its gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because the petitioner's owner is obliged to satisfy the petitioner's debts and obligations out of his

⁵ The petitioner's former counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

This precedent case directly contradicts the petitioner's former counsel's assertion that the petitioner's owner's personal finances are not directly relevant to the ability of the petitioner to pay the proffered wage. It also, therefore, counters the petitioner's former counsel's argument that the petitioner's owner need not provide his own tax returns or other personal income and asset information, and that the Schedules C submitted, which show only the petitioning business's performance, were sufficient.

The petitioner's former counsel argues, however, that the petitioner's owner had other assets that he was able to use to defray his expenses, and that he did not require the petitioner's net profit for that purpose.

The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. If the petitioner's case relies upon those other assets the burden was on the petitioner, and the petitioner's former counsel, to demonstrate their existence. Merely asserting the existence of additional funds is insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The priority date is April 19, 2001. The proffered wage is \$26,145.60 per year. The petitioner's owner and owner's spouse require \$35,739.36 to support their household. The petitioner's owner would require, therefore, an adjusted gross income of \$61,884.96 during a given year to show, pursuant to *Ubeda v. Palmer*, *Id.*, that the petitioner was able to pay the proffered wage during that year.

During 2001 the petitioner's owner and owner's spouse had adjusted gross income of \$55,179. That amount is insufficient to show, pursuant to the test in *Ubeda v. Palmer*, the petitioner's ability to pay the proffered wage during that year. The petitioner has submitted no reliable evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner's owner's 2002 Schedule C is in the record. The balance of the petitioner's owner's 2002 tax return was not submitted. The record contains no reliable evidence, consistent with *Ubeda v. Palmer*, that the petitioner was able to pay the proffered wage during 2002, and the petitioner has not demonstrated its ability to pay the proffered wage during that year.

The petitioner's owner's 2003 Schedule C is in the record. The balance of the petitioner's owner's 2003 tax return was not submitted. The record contains no reliable evidence, consistent with *Ubeda v. Palmer*, that the

petitioner was able to pay the proffered wage during 2003, and the petitioner has not demonstrated its ability to pay the proffered wage during that year.

The petition in this matter was submitted on March 21, 2003. On that date the petitioner's owner's 2004 tax return was unavailable. On January 26, 2004 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner responded to that request on March 22, 2004, and the record pertinent to ability to pay the proffered wage is deemed to have closed on that date.⁶ On that date the petitioner's owner's 2004 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2004 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The visa petition was correctly denied on this basis, which has not been overcome on appeal.

The remaining issue previously raised is whether the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 labor certification.

The approved labor certification states that the proffered position requires one year as a chef or two years as a cook. Among the beneficiary's claims of qualifying employment, he claimed to have worked for the petitioner as a cook since October 1997. As he made that statement on April 16, 2001, it encompasses more than the requisite two years as a cook before the April 19, 2001 priority date. The duties described by the beneficiary are consistent with those described on the approved Form ETA 750 labor certification. If sufficiently demonstrated, that single employment claim is sufficient to qualify the beneficiary for the proffered position.

The petitioner's president's letter states that the petitioner employed the beneficiary as a cook since October 1997. That statement was made on February 19, 2003, and supports, therefore, the beneficiary's assertion of employment from October 1997 until at least April 16, 2003. The duties described in that letter are consistent with those described on the approved labor certification. The letter sufficiently supports that the beneficiary has the qualifying experience as stated on the labor certification. The petitioner has overcome this basis for denial of the proffered position.

The record suggests an additional issue that was not addressed either in the decision of denial or the decision on appeal.

On the Form ETA 750 B, which the beneficiary signed on April 16, 2001, the beneficiary stated that he was then working for the petitioner. In the January 6, 2004 request for evidence the acting director requested that,

⁶ Additional requests for evidence were issued on March 29, 2004 and August 12, 2004. Those requests, however, pertained to the beneficiary's Form I-485 Application to Adjust Status and did not pertain to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In any event, the petitioner's owner's 2004 tax return was not available on those dates.

if the petitioner had employed the beneficiary during 2001, it submit the Form W-2 Wage and Tax Statement showing the amount it had paid him. The petitioner did not submit any W-2 forms and did not explain that omission.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003); *see also 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 petition will be denied for the above stated reasons, failure to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, and failure to provide requested evidence, 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. Accordingly, the previous decisions of the acting director and the AAO will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The AAO's decision of May 31, 2006 is affirmed. The petition is denied.