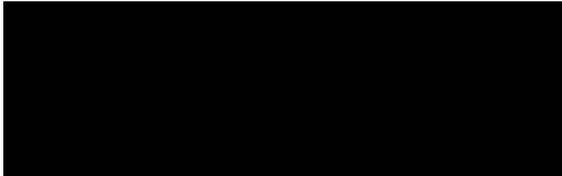


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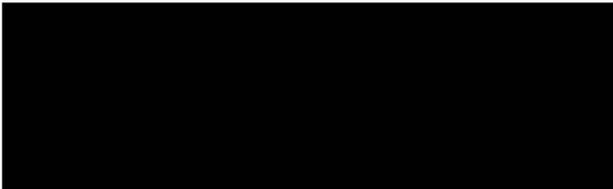
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:
LIN 06 172 52716

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 Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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 and denied the petition accordingly.

The record shows that the appeal 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. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 1, 2004. The proffered wage as stated on the Form ETA 750 is \$91,000 per year.

The Form I-140 petition in this matter was submitted on May 23, 2006. On the petition, the petitioner stated that it was established during 2001 and that it employs 11 workers. The petition states that the petitioner's

gross annual income is \$1,251,480 and that its net annual income is a loss of \$12,763.¹ On the Form ETA 750, Part B, signed by the beneficiary on January 9, 2004, the beneficiary claimed to have worked for the petitioner since October 2001.

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

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.² In the instant case the record contains (1) photocopies of paycheck stubs, (2) photocopies of the petitioner's 2004 Form 1120, U.S. Corporation Income Tax Return, (3) photocopies of two versions of the petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, (4) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2005, (5) two 2004 W-2 Wage and Tax Statements the petitioner issued to the beneficiary, (6) two 2005 Form W-2 Wage and Tax Statements the petitioner issued to the beneficiary, (7) one 2006 W-2 form the petitioner issued to the beneficiary, (8) the petitioner's reviewed financial statements for 2004 and 2005, and (9) photocopies of monthly statements pertinent to the petitioner's checking account. 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 check stubs show that the petitioner paid the beneficiary gross income of \$7,583.34 during January, February, and March of 2006.³ That monthly wage, extrapolated for two months would equal \$15,166.68. Extrapolated for three months it would equal \$22,750.02. The February 28, 2006 stub, however, shows gross year-to-date wages of \$15,166.68, and the March 31, 2006 stub shows year-to-date gross wages of \$22,750.02. The reason for this discrepancy is unknown.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The petitioner's tax returns show that it is a corporation, that it incorporated on October 5, 2001, and that it reports taxes pursuant the calendar year. One version of the petitioner's 2005 tax return, the version

¹ The petitioner's 2005 tax return confirms this loss.

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

³ That amount extrapolated to one year equals \$91,000.08, the amount which the 2006 W-2 form states the petitioner paid the beneficiary during that year.

originally provided with the visa petition, states that it was prepared pursuant to accrual convention accounting. The other version states that it was prepared pursuant to cash convention. Otherwise, those two photocopied returns appear to be duplicates.⁴ The 2004 return, also provided somewhat later than the visa petition, also states that the petitioner reports taxes pursuant to cash convention.

The 2004 income tax return shows that the petitioner declared a loss of \$ [REDACTED] as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of [REDACTED] and current liabilities of \$113,804, which yields net current assets of \$ [REDACTED].

Both versions of the petitioner's 2005 return show that during that year the petitioner declared a loss of \$12,763 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule C shows that at the end of that year the petitioner's current assets exceeded its current liabilities.

The petitioner's quarterly returns show that it paid total wages of \$ [REDACTED] and \$255,568 during the four quarters of 2005, respectively, for a total [REDACTED].

One of the 2004 W-2 forms shows that the petitioner paid the beneficiary \$33,314.40 during that year. The other shows that the petitioner paid the beneficiary \$23,185.59 during the same year. Those amounts total \$56,499.99. One of the 2005 W-2 forms shows that the petitioner paid the beneficiary \$22,500 during that year. The other purports to show that the petitioner paid the beneficiary \$32,500 during the same year. Those amounts total \$55,000. The 2006 W-2 form shows that the petitioner paid the beneficiary \$91,000.08 during that year.

The service center issued a request for evidence in this matter on September 29, 2006. At that time the only income tax return in the record was the version of the petitioner's 2005 return purporting to show that it was prepared pursuant to accrual convention accounting. That request for evidence noted that the 2005 return did not appear to demonstrate the petitioner's ability to pay the proffered wage.

In his response, dated December 14, 2006 and received December 18, 2006, counsel stated that the petitioner had reported taxes pursuant to cash convention, rather than accrual convention, during 2004 and 2005, and that if it had reported pursuant to accrual convention accounting its reported profits would have been much higher. With his response, counsel provided the second copy of the petitioner's 2005 return, altered to indicate that the petitioner reported taxes pursuant to cash convention accounting during that year. At the same time, counsel provided the petitioner's 2004 tax return, which also indicates that the petitioner reports taxes pursuant to cash convention.

Specifically, counsel stated that, had the petitioner reported taxes pursuant to accrual convention, its taxable income before net operating loss deduction and special deductions would have been \$45,984.23 during 2004 and \$44,401.76 during 2005. In support of that assertion counsel provided the unaudited financial statements

⁴ In fact, the signatures on those two returns are identical, indicating that they were likely photocopied from the same return.

noted above. Counsel urged that those amounts added to the wages paid to the beneficiary during those years equaled a sum greater than the proffered wage.

The director denied the petition on December 20, 2006.

On appeal, counsel cited a May 4, 2004 memorandum issued by the [REDACTED] Operations of Citizenship and Immigration Services (CIS), for the proposition that the petition should be approved because the petitioner is currently paying the beneficiary the proffered wage.

Counsel also asserted that the director should have considered figures on the unaudited financial statements provided. Finally, counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), apparently for the proposition that this office should consider the amount of revenue that will be generated by hiring the beneficiary.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.⁵ 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 reported on its tax returns.

Counsel's reliance on the unaudited financial statements provided is similarly misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they are unaudited. As that report also makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

Counsel's citation of *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered is unconvincing.

⁵ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage. Further, the holding in *Masonry Masters* is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns.

While that decision urges CIS to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary will generate income and to guess at the amount. If the petitioner were to hire an additional employee, the expenses of employing the new worker would offset, at least in part, whatever amount of gross income the employee would generate. That the amount remaining, if any, would be sufficient to pay the employee's wages is speculative. The petitioner has submitted no evidence that the net income generated the requisite wages. Absent any such evidence, this office will make no such assumption.

Finally, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during 2004 and 2005, the petitioner would have enjoyed greater profits. In fact, the petitioner employed the beneficiary during both of those years. Especially in light of that fact, counsel's argument fails.

The 2005 tax return originally submitted shows that the petitioner prepared its tax returns during that year pursuant to accrual convention. When a request for evidence indicated that the return might not be found to show the petitioner's ability to pay the proffered wage during that year, counsel submitted an amended version of that return. The sole change was that the amended return shows that the petitioner reports taxes, and produced the same figures, pursuant to cash convention. That discrepancy raises additional concerns about the credibility of the documentary evidence required.

The record contains no evidence that the petitioner submitted the revised version of its 2005 return to IRS. Under these circumstances, if whether the petitioner reports pursuant to cash or accrual were an important issue in this matter, the petitioner would be required to provide a certified copy of its 2005 return showing which version is its *bona fide* 2005 tax return. This office is not inclined to require that certified copy of the petitioner's 2005 tax return, however, because whether the petitioner produced its tax returns pursuant to cash or accrual is, at best, peripheral.

Accrual convention accounting, while it facilitates comparison of one year's performance to another's, is no more accurate an indicator of the petitioner's cash position, or its ability to meet additional obligations during a given year, than is cash convention accounting. The figures on the petitioner's tax returns, absent the upward modification proposed by counsel, will be considered in determining the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

Counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the memorandum as counsel urges, then in this particular factual context, an interoffice guidance memorandum would usurp the clear language in the regulation without binding legal effect. The memorandum, by its own terms, was not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but is merely offered as guidance.

The 2006 W-2 form submitted shows that the petitioner paid the beneficiary the full annual amount of the proffered wage during that year. The petitioner, however, must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 1, 2004. Thus, the petitioner is not merely required to show its ability to pay the proffered wage not only during 2006, when the petitioner apparently began paying the full amount of the proffered wage to the beneficiary. It is also required to show its continuing ability to pay the proffered wage during 2004 and 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year shows the petitioner's ability to pay the proffered wage during that year, but the petitioner must still demonstrate its ability to pay the proffered wage during the other salient years as well.

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, the petitioner established that it paid the beneficiary \$56,499.99, \$55,000, and \$91,000.08 during 2004, 2005, and 2006, respectively. The petitioner must show the ability to pay the balance of the proffered wage during 2004 and 2005, when it did not pay the beneficiary the full annual amount of the proffered wage.

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 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 the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$91,000 per year. The priority date is March 1, 2004.

During 2004 the petitioner paid the beneficiary \$56,499.99. The petitioner is obliged to show the ability to pay the remaining \$34,500.01 balance of the annual amount of the proffered wage during that year. During that year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year, however, the petitioner had net current assets of \$47,071. That amount is sufficient to show the ability to pay the remaining balance of the proffered wage during that year.

During 2005 the petitioner paid the beneficiary \$55,000. The petitioner is obliged to show the ability to pay the remaining \$36,000 balance of the annual amount of the proffered wage during that year. During that year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2005.

During 2006 the petitioner paid the beneficiary \$91,000.08. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated that its ability to pay the proffered wage during 2006.

The petition in this matter was submitted on May 23, 2006. On that date the petitioner's 2007 tax return was unavailable. On September 29, 2006 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. CIS received counsel's response to that request on December 18, 2006, and the record is deemed to have closed on that date. On that date the petitioner's 2007 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 2007 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The record suggests an additional issue of ineligibility that was not addressed in the decision of denial.

The regulation at 8 C.F.R. § 204.5(1)(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.

In the September 29, 2006 request for evidence the service center noted that the employment verification letters submitted did not conform to the requirements of the regulations and requested conforming employment verification letters.

In response, counsel submitted co-worker affidavits, which are non-conforming, and an affidavit from the beneficiary stating,

I certify that in spite of my best efforts I was not able to get the experience letters in details from my past employers and hence I am submitting the co-worker affidavits to show the experience I gained with them.

The beneficiary did not otherwise explain why he was unable to obtain employment verification letters that conform to the regulations. Absent any additional description of the beneficiary's attempts to get conforming employment verification letters and why he was rebuffed or otherwise unable to obtain them, the director should not have accepted the non-conforming employment verification letters. 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), *aff'd*, 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, 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.