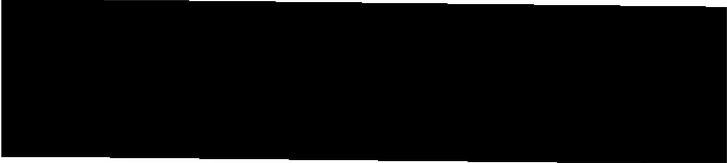




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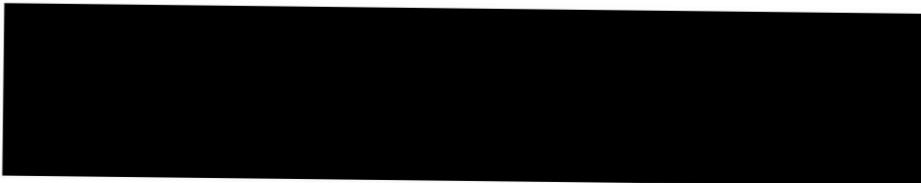
Date: FEB 27 2008

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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom tailoring/alternations service. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the 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 August 3, 2007 denial, the single issue in this case is whether or not the petitioner has established its 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 C.F.R.. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on February 26, 2006. The proffered wage as stated on the ETA Form 9089 is \$15 per hour (\$31,200 per year). The ETA Form 9089 states that the position requires four years of experience in the job offered. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner since November 2001. On the petition, the petitioner claimed to have been established in 1987, to have a gross annual income of \$603,584, to have a net annual income of \$18,808, and to currently employ six workers.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief. Relevant evidence in the record includes the petitioner's corporate tax returns for 2005 and 2006, the petitioner's Form 941 Employer's Quarterly Federal Tax Return (Form 941), and California Employment Development Department (EDD) Form DE 6, Quarterly Wage and Withholding Report (Form DE-6), for 2006, a letter dated May 9, 2007 from the petitioner concerning the beneficiary's employment with the petitioner and compensation in 2006, and the beneficiary's individual income tax returns for 2005 and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner paid the beneficiary \$22,255 in 2006 and the petitioner's net income in 2006 reported on tax return was sufficient to establish its ability to pay the proffered wage for 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 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 its Form 941 and Form DE-6 for 2006. These forms show that the petitioner paid its 9-10 employees between \$33,560.63 and \$44,239.50 in each quarter of 2006. However, the beneficiary was not listed among them. 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. On appeal, counsel submits a letter dated May 9, 2007 from the petitioner asserting that the beneficiary was paid \$22,255 by the petitioner in 2006 and also submits the beneficiary's individual income tax return for 2006 to support its assertion. However, the record does not contain any evidence to support the contents of the petitioner's letter. The petitioner did not submit any W-2 forms, 1099 forms, paystubs or other documents showing that the petitioner paid the beneficiary any compensation in 2006. The assertions of counsel do not

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).

constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The beneficiary's tax return shows that the beneficiary was a proprietor and reported gross receipts of \$22,255 for his master custom tailor business under the name of [REDACTED] on the schedule C for 2006. The record does not contain any evidence showing that the beneficiary's gross receipts of \$22,255 were paid by the petitioner as compensation. 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)). Therefore, the petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$31,200 per year from the year of the priority date to the present with its net income or its net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2005 and 2006. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. Since the priority date in the instant case is February 26, 2006, the petitioner's tax return

for 2005 is not necessarily dispositive. The petitioner's 2006 tax return demonstrates that it had net income² of \$24,229. Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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. 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. Otherwise, they cannot properly be considered in the determination of the petitioner's 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.³ 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. The petitioner's net current assets during 2006 were \$0. Therefore, for the year 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, 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, its net income or its net current assets.

On appeal, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the year 2006 was an uncharacteristically unprofitable year in a framework of profitable or successful years for the petitioner. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*. The petitioner claimed to have been established in 1987, however, its tax return indicated that it was incorporated in 1995. The petitioner claimed to employ six workers on the petition filed in 2006, however, the petitioner's Form 941s for 2006 show that it employed nine or ten employees. Their gross income was about \$600,000 in 2005 and 2006 and they paid salaries and wages \$148,737 in 2005 and \$126,193 in 2006, which indicates that the petitioner paid an average annual salary of \$16,526 to each employee, which is half of the proffered wage in the instant case. The petitioner had net income of \$18,808 in 2005 and \$24,229 in 2006. Therefore, the petitioner did not show that in any year, it had sufficient net income to pay the proffered wage. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has not established its ability to pay the proffered wage.

Counsel referred to a decision issued by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS 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).

In addition, this office notes that the petitioner's corporate status was dissolved in the State of California.⁴ Counsel does not explain when and why the petitioner was dissolved, Nor does counsel claim any business entity as a successor-in-interest to the petitioner with documentary evidence to establish the status of **successor-in-interest and the successor-in-interest's ability to pay the proffered wage**. A dissolved corporation lost its capability to act as a business entity and thus, any documents or requests submitted on behalf of the petitioner since it was dissolved cannot be accepted or considered. Therefore, counsel's request to continue pursuing the instant petition on behalf of the petitioner cannot be accepted and the petition must be denied.

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.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has demonstrated that the beneficiary possessed the requisite four years of experience in the job offered prior to the priority date with regulatory-prescribed evidence. 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).

⁴ See <http://kepler.ss.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C1773655> (accessed on February 4, 2008).

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 ETA Form 9089, Part H, set forth the minimum education, training, and experience that an applicant must have for the proffered position. Item 6 requires forty-eight (48) months of experience in the job offered. The duties are delineated at Item 11 of the ETA Form 9089 Part H and since this is a public record, will not be recited in this decision. Other items of Part H do not reflect any alternative occupation experience and special skills or other requirements.

The beneficiary set forth his credentials on the ETA Form 9089 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part K, eliciting information of the beneficiary's work experience, he represented that he has been working as a full-time custom tailor for the petitioner since November 1, 2001. Prior to that, he represented that he worked as a full-time custom tailor for Tuxedo Depot in Hawthorne, California from August 1, 1998 to November 1, 2001 and for Mattucci's Express in Redondo Beach, California from August 1, 1996 to August 1, 1998. He listed additional three jobs prior to August 1, 1996 on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The instant I-140 petition was submitted on August 8, 2006 with two experience letters as evidence pertinent to the beneficiary's qualifications as required by the above regulation: an experience letter dated November 1, 2001 from [REDACTED], the president of Tuxedo Depot at 3827 W. Rosecrans Avenue, Hawthorne, CA 90250 (Tuxedo Depot November 1, 2001 letter) and the other experience letter dated July 25, 2006 from [REDACTED], Office Manager of Mattucci Express at 528 S. Pacific Coast Hwy, Renondo Beach, CA 90277 (Mattucci Express July 25, 2006 letter). The Tuxedo Depot November 1, 2001 letter concerning the beneficiary's work experience stated in pertinent part that:

[The beneficiary] has been employed with Tuxedo Depot as a Custom Tailor since August 1998 to the present time. His position is considered to be full time and permanent in nature.

First of all, the Tuxedo Depot November 1, 2001 letter did not include a specific description of the duties the beneficiary performed as required by the regulation. Without a specific description of the duties, the AAO cannot determine whether the beneficiary's more than three years of experience with Tuxedo Depot qualifies as part of the requisite four years of experience in the job offered set forth in Part H of the ETA Form 9089. In addition, this experience letter was signed by [REDACTED] as the president of Tuxedo Depot. However, the beneficiary listed [REDACTED] as the employer at the petitioning entity and the California official business entity database website records [REDACTED] as the agent of the petitioner. *See* <http://kepler.ss.ca.gov> (Accessed on February 4, 2008). The record does not contain any evidence that

Tuxedo Depot existed during the period from August 1, 1998 to November 1, 2001 and [REDACTED] was the president of Tuxedo Depot at the time of this experience letter. It is not clear whether the experience letter was from the beneficiary's former employer. The record of proceeding does not contain any independent solid evidence to support the beneficiary's employment with Tuxedo Depot during the period from August 1, 1998 to November 1, 2001. *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." Therefore, the Tuxedo Depot November 1, 2001 letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case.

The Mattucci Express July 25, 2006 letter concerning the beneficiary's work experience stated in pertinent part that:

[The beneficiary] was employed with Mattucci Express as a Custom Tailor from August 1, 1997 to August 30, 1998. He worked for us full time and was a valued employee.

Same as the Tuxedo Depot November 1, 2001 letter, the Mattucci Express July 25, 2006 letter did not include a specific description of the duties the beneficiary performed as required by the regulation. Without a specific description of the duties, the AAO cannot determine whether the beneficiary's one year of experience with Mattucci Express qualifies as part of the requisite four years of experience in the job offered set forth in Part H of the ETA Form 9089. In addition, the Mattucci Express July 25, 2006 letter provided inconsistent information about the beginning date of the beneficiary's employment with Mattucci Express. While this letter verified that the beneficiary worked for Mattucci Express from August 1, 1997, the beneficiary himself represented on Section K of the ETA Form 9089 that he worked for Mattucci Express from August 1, 1996. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain such independent objective evidence to resolve this inconsistency.

Further, the Mattucci Express letter was dated July 25, 2006 and signed by [REDACTED] as the office manager of Mattucci Express. However, the petitioner's EDD Forms DE-6 show that the petitioner paid [REDACTED] as an employee \$2,640 in the first quarter, \$2,860 in the second quarter, \$3,060 in the third quarter and \$3,640 in the fourth quarter of 2006. The evidence shows that [REDACTED] was an employee of the petitioner when she signed the Mattucci Express letter on July 25, 2006. This raises doubt on whether the Mattucci Express July 25, 2006 letter was from the beneficiary's former employer and even whether the letter is fraudulent. "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." *Id.* The record does not contain independent objective evidence to support the contents of the letter and [REDACTED]'s title and/or position at Mattucci Express in 2006. Therefore, the Mattucci Express July 25, 2006 letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case.

The petitioner did not submit documents for the beneficiary's other employment experience to demonstrate the beneficiary's qualifications for the proffered position in the instant case. Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior four years of experience as a custom tailor, and further failed to establish that the beneficiary is qualified for the proffered position.

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.