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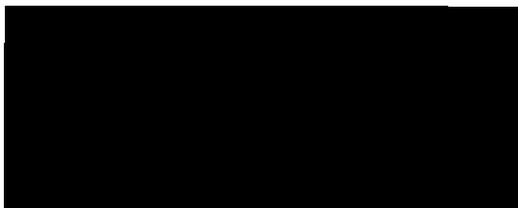
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
LIN-06-240-52611

Office: NEBRASKA SERVICE CENTER

Date: JAN 31 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 the Director, Nebraska Service Center. Upon completion of reviewing the record of proceeding after granting a motion to reopen, the director affirmed the previous decision. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction and property management company. It seeks to employ the beneficiary permanently in the United States as a tile setter (tile installer). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition because its net income or net current assets were insufficient to pay the beneficiary the proffered wage in 2004. 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 July 21, 2007 and October 17, 2007 decisions, 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 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).

The instant petition is for a substituted beneficiary.<sup>1</sup> The original Form ETA 750 was accepted on April 3, 2002. The proffered wage as stated on the Form ETA 750 is \$28.48 per hour (\$59,238.40 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition was submitted on August 7, 2006. On the petition, the petitioner claimed to have been established on July 20, 1995, to have a gross annual income of \$888,813, to have a net annual income of \$65,311, and to currently employ 25 workers. The record contains a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on May 17, 2007, the beneficiary did not claim to have worked for the petitioner.

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 appeal<sup>2</sup>. On appeal counsel submits a brief and a copy of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The relevant evidence in the record includes the petitioner's federal tax returns for 2002 through 2006, and W-2 forms issued to its employees in 2004, and [REDACTED] corporate tax return and W-2 forms for 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the unusual circumstances exist in this case to parallel those in *Sonogawa*, because the petitioner demonstrated that 2004 was an uncharacteristically unprofitable year for the petitioner in a framework of profitable or successful years, and therefore, by applying the *Sonogawa* holding to the instant case, the petitioner established its continuing ability to pay the proffered wage to the instant beneficiary beginning on the priority date.

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 circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612.

The petitioner of the instant petition and the employer listed on the relevant labor certification application is [REDACTED]. However, the petitioner submitted [REDACTED].

<sup>1</sup> An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>2</sup> 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).

Inc.'s federal tax return and W-2 forms for 2004 as evidence of the petitioner's continuing ability to pay the proffered wage as of the priority date. The Pennsylvania official corporation database shows that both [REDACTED] and [REDACTED] are active and separate Pennsylvania domestic business corporations.<sup>3</sup> 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. Therefore, the assets of [REDACTED] cannot be considered in determining the petitioner's ability to pay the proffered wage in the instant case.

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 W-2 forms issued to its employees in 2004, however, none of them shows that the petitioner paid the beneficiary during the relevant years. 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. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary for 2002 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 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

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<sup>3</sup> See <http://www.corporations.state.pa.us/corp/soskb/csearch.asp> (accessed on January 15, 2008).

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 2002 through 2006. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax returns for 2002 through 2006 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$59,238 per year from the year of the priority date:

- In 2002, the Form 1120 stated a net income<sup>4</sup> of \$166,738.
- In 2003, the Form 1120 stated a net income of \$147,903.
- In 2004, the Form 1120 stated a net income of \$17,670.
- In 2005, the Form 1120 stated a net income of \$65,311.
- In 2006, the Form 1120 stated a net income of \$63,932.

Therefore, for the years 2002, 2003, 2005 and 2006, the petitioner had sufficient net income to pay the proffered wage, however, the petitioner's net income in 2004 was not sufficient 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.<sup>5</sup> 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 2004 were \$22,385.

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

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<sup>4</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

On appeal, counsel cites *Matter of Sonegawa*,<sup>12</sup> I&N Dec. 612, 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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the instant case, counsel argues that the petitioner's expenditure of extra costs to establish a new corporation are unusual circumstances that parallel those in *Sonegawa*, and like the facts in *Sonegawa*, the year 2004 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 is also considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*. The petitioner was incorporated in 1995 and employs approximately 25 employees. Although their gross income was up to \$1,775,522 in 2003, it was only \$888,813 in 2005 and \$760,462 in 2006. The petitioner's tax returns on line 13 show that the petitioner paid salaries and wages of \$0 in 2002, \$4,400 in 2003, \$76,722 in 2004, \$69,004 in 2005, and \$0 in 2006. 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 does not have the ability to pay the proffered wage the instant beneficiary for 2004.

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.

Moreover, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or are pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

CIS records show that the petitioner had filed eight (8) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition, and two (2) nonimmigrant petitions (Form I-129). Among the eight immigrant

petitions, six petitions were approved.<sup>6</sup> Therefore, the petitioner must establish its ability to pay two proffered wages in 2002, six in 2003, seven in 2004, seven in 2005, three in 2006 and three in 2007 for those approved petitions and the instant petition.

As previously noted, the petitioner had a net income of \$166,738 and net current assets of \$2,687 in 2002. Assuming the petitioner had offered the same salary as the instant petition's wage to the other beneficiary, the net income could be sufficient to pay the two wage obligations. Therefore, the petitioner established its ability to pay the proffered wage in 2002.

In 2003, the petitioner had a net income of \$147,903 and net current assets of \$3,012. Assuming the petitioner had offered the same salary as the instant petition's wage to the other five beneficiaries, the net income could be sufficient to pay at maximum two beneficiaries. Therefore, neither the net income nor net current assets were sufficient to pay six wage obligations, including the proffered wage for the instant beneficiary, and thus, without further evidence showing the petitioner already paid wages to the other beneficiaries of the approved petitions, the petitioner failed to establish its ability to pay the proffered wage in 2003.

In 2004, the petitioner had a net income of \$17,670 and net current assets of \$22,385. Neither the net income nor net current assets were sufficient to pay even a single proffered wage, and thus, the petitioner failed to establish its ability to pay the proffered wage in 2004.

In 2005, the petitioner had a net income of \$65,311 and net current assets of \$46,057. The net income was sufficient to pay the instant beneficiary only. Therefore, without further evidence showing the petitioner had already paid wages to the six beneficiaries of approved petitions, the petitioner failed to establish its ability to pay the proffered wage in 2005.

In 2006, the petitioner had a net income of \$65,932 and net current assets of \$51,200. The net income was sufficient to pay the instant beneficiary only. Therefore, without further evidence showing the petitioner had already paid wages to the two beneficiaries of approved petitions, the petitioner failed to establish its ability to pay the proffered wages in 2006.

Given the record as a whole, the petitioner's history of filing immigrant petitions, and the number of nonimmigrant petitions, we cannot determine that the petitioner established its continuing ability to pay all the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

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<sup>6</sup> The six approved petitions are as follows:

EAC-04-187-524197 filed on June 4, 2004 with the priority date of August 7, 2003, approved on September 29, 2004, and the beneficiary obtained lawful permanent residence on May 12, 2005;

EAC-04-220-52336 filed on July 20, 2004 with the priority date of August 7, 2003, approved on October 6, 2004, and the beneficiary's adjustment of status application was pending as of April 19, 2005;

EAC-04-225-53291 filed on July 28, 2004 with the priority date of August 7, 2003, approved on October 5, 2004, and the beneficiary obtained lawful permanent residence on April 20, 2005;

EAC-05-022-51677 filed on October 8, 2004 with the priority date of August 7, 2003, approved on November 16, 2004, and the beneficiary obtained lawful permanent residence on April 29, 2005;

EAC-06-241-52091 filed on August 7, 2006 with the priority date of May 1, 2002, approved on November 8, 2006, and the beneficiary obtained lawful permanent residence on June 27, 2007.

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 met the requirement of initial evidence set forth by the regulation at 8 C.F.R. § 204.5(l)(3). 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 regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

*Initial evidence – (i) Labor Certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from DOL, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program.

As previously noted, the instant petition is for a substituted beneficiary. The petition was submitted on August 7, 2006 with a photocopy of the approved labor certification Form ETA 750 Part A and Part B for the original beneficiary of the labor certification but without Form ETA 750B for the new beneficiary. On March 1, 2007 the director issued a request for additional evidence (RFE), requesting the petitioner to submit an original Form ETA 750. In response to the director's RFE, counsel submitted a Form ETA 750 Part B for the new beneficiary and claimed that the original Form ETA 750 Parts A & B was previously submitted with the I-140 petition.

The instant petition is not an application for Schedule A designation, nor does it establish that the beneficiary qualifies for one of the shortage occupations in DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an original individual labor certification from DOL as initial evidence to support its petition under 8 C.F.R. § 204.5(l)(3). However, the record does not contain the original approved Form ETA 750A. Counsel did not explain why the original approved Form ETA 750A was not submitted. Nor did counsel request that the director request a duplicate approval of the application for alien labor certification directly from DOL under the regulation at 20 C.F.R. § 656.30(e).<sup>7</sup> In addition, the copy of the approved Form ETA 750A shows that the labor certification application was certified by the DOL on July 17, 2003, however, the employer signed the Form ETA 750A on July 20, 2006 and the original beneficiary signed the Form ETA 750B on July 27, 2006. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. The AAO finds that the petitioner failed to submit the requisite original approved labor certification.

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<sup>7</sup> The regulation at 20 C.F.R. § 656.30(e) states that:

(e) Certifying Officer shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officer shall issue such duplicate certifications only to the Consular or Immigration Officers who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

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.