U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 14 2006

SRC-04-192-50609

In re: Petitioner: [redacted]
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:

[redacted]

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, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a nursing home, seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), and to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's January 24, 2005, denial, the petition was denied based on a determination that the petitioner did not establish its ability to pay the proffered wage

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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.

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 petitioner must establish that its job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of the priority date, here, April 30, 2001, 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).

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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce

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[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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

agency on April 30, 2001. The proffered wage as stated on Form ETA 750 for the position of a medical assistant is $12.05 per hour, 40 hours per week, which is equivalent to $25,064.00 per year.

The labor certification was approved on January 12, 2002. The petitioner listed on the labor certification is: Nursery Road Villa. The beneficiary listed on the petition is: [redacted]; date of birth: April 1, 1970; place of birth: Manila, Philippines. The petitioner filed the I-140 on the beneficiary's behalf on July 1, 2004.[2] On the I-140 petition, the petitioner listed the following information related to the petitioning entity: company or organization name: R&F Medics Care Inc., d/b/a Angel's Touch; IRS Tax #: [redacted] established: March 5, 2002; gross annual income: $175,000.00; net annual income: $15,540.00; and that the petitioner had two employees. The I-140 Petition list the beneficiary's salary as $480.00 per week.[3] The beneficiary on the petition is listed as: [redacted] date of birth: July 26, 1974; place of birth: San Rafael, Tigaon, Philippines. While the substitution of labor certification beneficiaries is permitted,[4] counsel asserts that [redacted] and [redacted] are the same individual.[5] The case was denied on January 24, 2005 based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The petitioner appealed. On the I-290B appeal form submitted on February 24, 2005, counsel states that the "employer can demonstrate ability to pay proffered wage with current tax return that was never reviewed in adjudication of the I-140. Evidence submitted incomplete has been completed on the schedule L for the 2003 tax return. Evidence that the prevailing wage at the time of the priority date 04/31/2001 was $8.86 per hr./$18,429 not the $12.05 per hr./$25.064 [sic] as stated by the U.S. Departmetn [sic] of Labor. Current prevailing wage has also been submitted as evidence of $9.47 per hr./19,698 per yr. Employers most current

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[2] Counsel initially attempted to file the I-140 in May 2004, but the Service Center rejected the filing on May 12, 2004, based on the submission of incorrect filing fees. A second letter from the Service Center indicates that the petitioner did not initially submit the approved labor certification. A letter dated June 23, 2004, indicates that the Department of Labor issued a confirmation of the labor certification, and provided a copy.

[3] To be precise, the proffered wage of $12.05 an hour, would equate to $482 per week, which should be listed on the I-140 Petition as the required wage.

[4] Substitution of beneficiaries in a labor certification is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited the validity of an approved labor certification to the specific alien named on the labor certification application (*See* 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The Kooritzky decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Service based on a Memorandum of Understanding. Procedures for the Service were then set forth in a memorandum from [redacted] INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

[5] Counsel in a letter to USCIS refers to the applicant as [redacted] Further, the G-325A submitted on behalf of the beneficiary lists "all other names used: [redacted] No explanation or documentation is provided for the use of the alias. Further, no explanation is provided for the different dates of birth, and different locations of birth listed on the Forms ETA 750B, and the I-140 Petition.

tax return indicates current assets of $25,050 and ordinary income of $31,175.00 proving ability to pay the proffered wage for the position of Medical Assistant."

The petitioner submitted an amended 2003 tax return, a 2004 tax return, a Department of Labor wage print out for the position of medical assistant, and information related to the petitioner demonstrating that the petitioner had recently been approved as a provider of personal care services for brain and spinal cord injuries. The petitioner had previously submitted a 2003 tax return for the I-140 Petitioner, R&F Medics Inc., the company president's individual 2003 1040 tax return, and Forms 941, Employer's Quarterly Federal Tax Return, dated ending March 31, 2003, June 30, 2003, September 30, 2003, December 31, 2003. In the letter submitted with the appeal, counsel states that the petitioner had a gross income of $140,753 in 2004, a $31,175 net income for the year, and "$25,050 in cash on hand in the bank," and has a projected 2005 gross income of $175,000 with expected profits of $50,000.

First, to address the petitioner's submission of the DOL wage print out and assertion that the proffered wage should be lower, the DOL certified the labor certification on January 12, 2002. The ETA 750 job offer provided that the position required two years of experience. The petitioner submitted the ETA Forms listing the "level two" wage of $12.05.[6] DOL made no changes to the wage. The ETA 750 Forms were then certified for the position listed with the required pay of $12.05 per hour. The petitioner cannot now claim that the proffered wage should be a lower amount. CIS must look to the job offer portion of the labor certification to determine the position's requirements. 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). Therefore, we shall examine the petitioner's ability to pay the proffered wage of $12.05.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On the ETA 750 B for [redacted] the forms do not list that the petitioner employed the beneficiary. Further, the petitioner does not claim that it has employed, or currently employs the beneficiary.[7] The petitioner has not submitted any W-2 statements or paystubs for the beneficiary to document any employment with the petitioning entity. Therefore, we have no evidence that the petitioner has paid the beneficiary the prevailing wage.

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[6] At the time that the petitioner submitted the labor certification, the DOL utilized a "two tier" wage system and would assess a wage at either level one, or level two based on the position's requirements, and the amount of experience required to carry out the position's job duties.

[7] The I-140 Petitioner's address is listed as: 2446 Nursery Road, Clearwater, Florida; the company's Officer, Nilda Rivera, lists the following address on the individual tax return submitted for her: 2448 Nursery Road, Clearwater, Florida; the beneficiary lists the following address on her G-325A Form filed with her I-485 Adjustment of Status application: 2448 Nursery Road, Clearwater, Florida, from September 1998 to present (as of the date of filing March 26, 2004). It is unclear from the record whether 2448 Nursery Road is a separate residence next to the petitioning entity, or whether 2448 Nursery Road is connected to the petitioning facility and the company's Officer, Nilda Rivera resides there, and whether the beneficiary resides at the petitioning entity nursing home. It would appear, however, at a minimum that the beneficiary resides with the Officer of the petitioning entity.

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. 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). *In K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

R&F Medics Care Inc. is a C Corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

| **Tax year** | **Net income or (loss)** |
|---|---|
| 2004 | $31,175 |
| 2003 (amended) | $3,552 |
| 2003 | $7,050 |
| 2002 | No tax return provided |
| 2001 | No tax return provided |

Here, two points are relevant: (1) the petitioner must demonstrate the ability to pay the proffered wage from the priority date (April 30, 2001) onward. The petitioner has submitted no tax return for either 2001 or 2002 at the time of filing, or with the information submitted on appeal. In the absence of any other evidence for those years, the petition is deficient, and by lack of submission alone cannot demonstrate the petitioner's ability to pay the proffered wage from the time of the priority date; and (2) the tax returns submitted demonstrate the ability of R&F Medics Care Inc. to pay the proffered wage in year 2004, and not the petitioner listed on the approved labor certification, Nursery Villa. For the beneficiary to be able to continue processing based on the initially approved labor certification, the petitioner would need to demonstrate that the new business is a successor-in-interest company to the initial petitioner. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). R&F Medics Care Inc.'s tax returns and incorporation documents list that the company was formed in 2002, however, the petitioner has submitted no documentation to show that the company qualifies as a successor-in-interest to the petitioner listed on the certified ETA 750 Forms, Nursery Villa. Therefore, in the absence of information to show valid successor-in-interest status, the tax returns cannot establish the petitioner's ability to pay the proffered wage.[8]

[8] Further, even if we calculated net current assets to determine whether the documents establish the ability to pay in the year 2003, we still would not be able to sustain the appeal since we have no evidence in the record regarding the petitioner's ability to pay the proffered wage in the years 2001 and 2002, as required. Also, we have no evidence that R&F Medics Care Inc. would qualify as a successor-in-interest to the petitioner on the labor certification, Nursery Villa.

Counsel had submitted additional evidence regarding the petitioner's ability to pay, including the company president's individual tax returns, which we note are not relevant. The petitioner's business is structured as a C corporation, and, analysis based on personal assets is not required, and would not be appropriate for the case.[9] 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). 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. 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.

Counsel submitted Forms 941 for R& F Medics Care Inc. dated for the quarters ending March 31, 2003, June 30, 2003, September 30, 2003, December 31, 2003. The Forms 941 show quarterly wage payments and reflect that the petitioner has paid wages to the company's officer, [redacted] The evidence does not demonstrate that the petitioner has paid the beneficiary, and, therefore, is not relevant.

Therefore, from the date that the Form ETA 750 was accepted for processing by the U.S. Department of Labor, April 30, 2001, to the present, the petitioner had not established: (1) its continuing ability to pay the beneficiary the proffered wage; and (2) that the I-140 petitioner is a valid successor-in-interest to the petitioner listed on the labor certification. Since counsel has failed to show the new organization qualifies as a successor-in-interest to the original petitioner to support the beneficiary's application, the petition may be denied on this basis as well.[10] 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*, 229 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).

Further, the petition should also be denied based on the petitioner's failure to document that the beneficiary had the required work experience for the position offered in the certified Form ETA 750. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does

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[9] Such documentation would be considered if the petitioner were structured as a sole proprietorship. A business structured as a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Accordingly, a sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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).

[10] We note, that a new labor certification could be required if the new company is not the successor-in-interest to Nursery Villa. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date 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 priority date in the instant petition is April 30, 2001.

On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a medical assistant, with duties including: "interview patients and measure vital signs such as pulse rate, temperatures, blood pressure, weight, height and record information on patient charts. Assistant to supervisory physician." The petitioner listed no other educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed by the [redacted] on March 7, 2001, the beneficiary listed that she worked for "Formalejo Medical Clinic" from November 1994[11] to March 1997. A letter to document "Miss [redacted] work experience was submitted. *See* 8 C.F.R. § 204.5(1)(3).[12] The letter, signed by [redacted] M.D.,[13] provides that the beneficiary worked for the Formalejo Medical Clinic from November 1995 to March 1997. The one year and five months of documented experience[14] would be less than the required two years listed on the certified Forms ETA750. [redacted] did not list any further experience on the labor certification. Counsel did not submit any further letters to document whether the beneficiary had any

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[11] We note that the year "94" was hand written on the ETA 750B. The majority of the remainder of the form was typed. When the hand written change was made is unclear. The experience letter submitted, however, lists a different year as the beneficiary's start date.

[12] 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

[13] The letter does not state whether [redacted] is a relative to [redacted], or whether the two just have the same surname.

[14] One year and five months would be the maximum time period if the beneficiary began on November 1, 1995 and ended on March 31, 1997. The letter did not list the exact start date and end date, so that the minimum range of experience could also be one year and three months of experience, if the beneficiary started at the end of November 1995, and ended her employment at the beginning of March 1997.

additional work experience.[15] The beneficiary's experience, therefore, is deficient in that she cannot demonstrate two years of prior experience as a medical assistant. Accordingly, the petitioner has failed to meet the regulatory requirements, which state that the beneficiary must have met the requirements for all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). The petition should have been denied on this basis as well.

Further, the record contains material inconsistencies concerning the beneficiary's identify, specifically her alleged use of the name [redacted]" with a different date of birth, and different place of birth. The beneficiary only lists the use of this name on her form G-325A, but provides no further documentation that she has in fact been known under this alias. If [redacted] is a different person, the proper route would have been for the petitioner to file a new labor certification, or substitute the beneficiary, [redacted] into the unused labor certification. The discrepancy in identity with no further documentation to establish the use of this alias raises significant concerns regarding the beneficiary's veracity. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592.

The instant case cannot be approved for four reasons: (1) failure to demonstrate the petitioner's ability to pay the proffered wage; (2) failure to document that the new business is the successor-in-interest to the original petitioner so that the application is still valid for the beneficiary's job offered; (3) failure to document the beneficiary's qualifications for the job offered; and (4) failure to document that the beneficiary listed on the labor certification, is the beneficiary listed on the I-140.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record. Accordingly, 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 denied.

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[15] Counsel did submit some further documentation related to certifications and training for [redacted] however, training does not count as work experience, as the labor certification specifies work experience only, not a combination of education, training, and/or work experience.