U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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APR 20 2007

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:

EAC-05-051-50971

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an internet security provider. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 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 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 February 18, 2005 denial, the only issue in this case is whether or not the petitioner has the 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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).

Here, the Form ETA 750 was accepted on October 15, 2001. The proffered wage as stated on the Form ETA 750 is $79,830.40 per year. The Form ETA 750 states that the position requires four years of college studies, a bachelor's degree in computer systems engineering and two years of experience in the job offered. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of $1,161,515 in 2001, to have a net annual income of $(10,532), and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B signed on September 20, 2001, the beneficiary claimed to have worked for the petitioner as a programmer analyst, scientific, since April 2001.

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]. Relevant evidence in the record includes the petitioner's corporate federal tax return for 2001, the beneficiary's W-2 forms for 2001 through 2003[2], and bank statements for the petitioner's business checking account covering December 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the director failed to consider the total dollars available to pay the proffered wage, and that with the balance of $76,242.10 as of December 31, 2001 reflected on bank statements the petitioner established its ability to pay the proffered wage.

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 Sonegawa*, 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 record contains copies of the beneficiary's W-2 forms for 2001 through 2003. These documents show that the petitioner hired and paid the beneficiary $36,538.52 in 2001, $50,000.08 in 2002 and $50,000.08 in 2003. The petitioner failed to establish that it paid the beneficiary the full proffered wage in the relevant years, however, it established that it paid partial proffered wage. Therefore, the petitioner is obligated to demonstrate that it could pay the difference of $43,291.88 in 2001, and $29,830.32 in 2002 and 2003 between wages actually paid to the beneficiary and 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 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*

[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) and 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).

[2] The petitioner submitted the beneficiary's W-2 form for 2001 with the initial filing of the petition. The record also contains the beneficiary's W-2 forms for 2002 and 2003 submitted with concurrently filed Form I-485 application for adjustment of status.

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 its gross income and gross profit 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* at 537.

The record contains copies of Form 1120S U.S. Income Tax Return for an S Corporation filed by Imaginex, Inc. for 2001.[3] The evidence shows that the petitioner is structured as an S corporation. According to the tax return, the petitioner's fiscal year is based on a calendar year. The petitioner's 2001 tax return demonstrates the following financial information concerning the petitioner's ability to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date:

- In 2001, the Form 1120S stated a net income[4] of $(10,632).

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[3] The AAO notes that the employer changed its name to [redacted]c. on the Form ETA 750 on September 22, 2003 and filed the instant petition using the new name. The petitioner did not submit any documentary evidence to prove the name change and the record does not contain any information about the petitioner's previous name. The petitioner must submit documentary evidence for its name change in any future proceedings. The 2001 tax return of Imaginex, Inc. submitted indicates that both Imaginex, Inc. and the petitioner, [redacted] were established on the same day, use the same federal employer identification number, and are doing business at the same location. It is also noted that [redacted] owned 100% shares of [redacted] and the same [redacted] also signed the Form ETA 750 as the CFO/Founder of [redacted] and signed the instant petition on behalf of the petitioner. Therefore, the AAO will consider the 2001 tax return as the one for the petitioner for the purpose of determining the petitioner's ability to pay the proffered wage for 2001.

[4] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the difference of $43,291.88 between wages actually paid to the beneficiary and the proffered wage that year.

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.[5] 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 2001 were $0.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the difference of $43,291.88 between wages actually paid to the beneficiary and the proffered wage.

The record before the director in the instant case closed on December 6, 2004 with the receipt by the director of the petitioner's submission of the petition. As of that date the petitioner's federal tax returns for 2002 and 2003 should have been available. However, the petitioner did not submit its 2002 and 2003 tax returns, nor did counsel explain why the tax returns were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay

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Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf; Instructions for Form 1120S (2002), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf.

[5]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.

the proffered wage in 2002 and 2003 because it failed to submit its tax returns or other regulatory-prescribed evidence for these years.

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 continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income; or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. On appeal counsel asserts that the petitioner's bank account balance of $76,242.10 as of December 31, 2001 was sufficient to pay the proffered wage. The record of proceeding contains copies of bank statements for the petitioner's business checking account for December 2001. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.[6]

Counsel cites *Matter of Sonegawa,* 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 *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner in a framework of profitable or successful years, nor have the financial documents for 2002 and 2003 been submitted to show they were in a framework of profitable or successful years.

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[6] Counsel cites an unpublished AAO decision for the proposition that cash available is clear evidence of a company's financial ability to pay the proffered wage. 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).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return 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.

Beyond the director's decision and assertions on appeal, the AAO will discuss whether the petitioner demonstrated that the beneficiary possessed the qualifying education and experience prior to the priority date. 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).

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).

The certified Form ETA 750 in the instant case states that the position of programmer analyst requires four (4) years of college studies, a bachelor's degree in computer systems engineering and two (2) years of experience in the job offered.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended National University of Technology in Quito, Ecuador in the field of "Computer System Engineering" from October 1984 through November 1997, culminating in the receipt of a "Bachelor's" degree.

In corroboration of the Form ETA-750B, the petitioner submitted the beneficiary's diploma issued by the National Politechnic School in Ecuador showing the beneficiary was titled of Computer Science Engineer and earned the corresponding degree on November 28, 1997. However, the diploma does not indicate whether or not the beneficiary's degree is from a four year program and the petitioner did not submit the beneficiary's transcripts. The record contains inconsistent information about the beneficiary's years attending college. As noted above, the beneficiary claimed on the Form ETA 750B that he attended National University of

Technology in Quito, Ecuador for 13 years from October 1984 to November 1997, while the submitted diploma was issued by the National Politechnic School. The petitioner did not explain whether these two schools are the same. Therefore, the AAO cannot determine whether or the beneficiary held a foreign equivalent to a US bachelor's degree since a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Further, the AAO cannot determine whether or not the beneficiary met the four years of college studies requirements as set forth on the Form ETA 750 prior to the priority date.

The record also contains a credentials evaluation report from World Education Services, Inc. (WES). WES' evaluation report concludes that the beneficiary's degree from Ecuador is the equivalent to Bachelor's degree in computer systems engineering from a regionally accredited institution based on the following credential analysis:

1. Country: Ecuador
   Credential: *Titulo de Ingeniero de Sistemas* (Title of Systems Engineer)
   Year: 1997
   Awarded by: National University of Technology Quito
   Admission requirements: High school graduation
   Length of program: Five years
   Major/Specialization: Computer Systems Engineering

The WES' evaluation report does not indicate what documents the evaluator examined and on which their conclusion is based, such as the diploma issued by the National Politechnic School or any other documents issued by National University of Technology, and documents indicating the length of program is five years, etc. Further, the evaluation does not conclude that the beneficiary's course of instruction that led to the diploma to be the equivalent of any specific amount of time spent at a US college or university. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The WES' evaluation report in the instant case comes little evidentiary weight.

The certified Form ETA 750 in the instant case states that the position of programmer analyst requires two (2) years of experience in the job offered. On the Form ETA 750B, the beneficiary set forth his work experience. He listed his experience as a "Programmer Analyst, Scientific" for the petitioner since April 2001, and as a full time (working 40 hours per week) "Programmer Analyst" at COMPUEQUIP DOS in Ecuador from July 1995 to December 1999. The beneficiary himself provided inconsistent information on the same Form ETA 750. In Part 11 he represented that he attended school from October 1984 to November 1997. However, the beneficiary did not explain how he could manage both school and a full time job with COMPUEQUIP DOS at the same time from July 1995 to November 1997. The inconsistency casts question on reliability of the beneficiary's statement. *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."

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) of 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. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In corroboration of the regulatory requirements, the petitioner submitted an experience letter dated June 18, 2004 from [redacted], General Manager of COMPUEQUIP DOS certifying that the beneficiary was employed as a programmer/analyst from July 1995 until December 1999. This letter is from the beneficiary's former employer and includes a description of the duties the beneficiary performed during the employment. It appears to meet the requirements by the regulation. However, similarly with the beneficiary's statement on Part 15, this letter provided inconsistent information on the beneficiary's work experience with the beneficiary's statement on Part 11 of the Form ETA 750B. Therefore, again the inconsistency casts doubt on the reliability of the experience letter. "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*, at 592. The letter was not submitted with competent objective evidence to support the contents of the letter and to resolve the inconsistency.

Therefore, the petitioner failed to demonstrate that the beneficiary possessed the required 4 years of college studies, the foreign equivalent to a US bachelor's degree and the two years of experience in the job offered prior to the priority date with regulatory-prescribed evidence.

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.