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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 31 2008

EAC-05-044-52216

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 preference visa petition[1] was denied by Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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 record did not establish that the petitioner had the ability to pay the proffered wage at the time of filing. 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 12, 2006 denial, the primary 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).

Here, the Form ETA 750 was accepted on April 9, 2001. The proffered wage as stated on the Form ETA 750 is $20.48 per hour ($42,598.40 per year[2]). The Form ETA 750 states that the position requires three years of

[1] The instant petition was re-filed by the petitioner on behalf of the same beneficiary. The previous petition (EAC-03-066-52867) was filed on December 23, 2002 and denied by the acting director of the Vermont Service Center on February 20, 2004 due to abandonment because the petitioner failed to respond to the director's request for evidence within the allowable period of time.

experience in the job offered. On the Form ETA 750B submitted on April 9, 2001[3], the beneficiary claimed to have worked for the petitioner since April 2000. On the petition, the petitioner claimed to have been established on January 17, 2001, to have a gross annual income of $160,955, and to currently employ ten 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 appeal[4]. Relevant evidence in the record and submitted on appeal includes the beneficiary's W-2 forms and individual income tax returns for 2001 through 2005, the petitioner's corporate tax returns and W-3 forms for 2001 through 2005, Nerison G. Oliveira's individual income tax returns for 2001 through 2005, bank statements of the petitioner's business checking accounts for the months from February to April 2001, October 2001, December 2001, December 2002, December 2003, December 2004, December 2005 and from January to March 2006, and a letter dated August 2, 2006 and consolidation report from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that CIS must review the petitioner's corporate income tax returns and Nerison Oliveira's individual income tax returns with schedules C together to determined the petitioner's ability to pay the proffered wage because of an accounting blunder, and in that way, the petitioner demonstrated 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

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[2] Based on working 40 hours per week and 52 weeks per year as set forth on the Form ETA 750A. Therefore, counsel's calculation of the annual proffered wage of $35,840 based on working 35 hours per week and 50 weeks per year is misplaced.

[3] The beneficiary signed the Form ETA 750B but did not date it.

[4] 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).

instant case, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2005. These W-2 forms show that the petitioner paid the beneficiary $24,237.00 in 2001, $28,540.40 in 2002, $26,000.00 in 2003, $28,490.00 in 2004, and $31,200.00 in 2005. The petitioner demonstrated that it employed and paid the beneficiary the partial proffered wage, however, it failed to establish its ability to pay the full proffered wage through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the difference of $18,361.40 in 2001, $14,058.00 in 2002, $16,598.40 in 2003, $14,108.40 in 2004 and $11,398.40 in 2005 between wages actually paid to the beneficiary and the proffered wage respectively 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, contrary to counsel's assertion. Counsel's assertion on appeal that the amount of the petitioner's depreciation must be added back to the net income because it does not represent an actual cash expenses is misplaced. 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 petitioner submitted copies of its Form 1120, U.S. Corporation Income Tax Return, for 2001 through 2005 and the sole proprietor's individual income tax returns for 2001 through 2005. The record shows that [redacted]c. was incorporated on January 17, 2001 and filed the relevant labor certification with the DOL on April 9, 2001 and the instant petition with CIS on December 1, 2004. Therefore, the petitioner of the instant petition and the employer listed on the relevant labor certification application is [redacted] who must demonstrate its ability to pay the proffered wage during the relevant years from 2001 to the present. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." However, in the instant case, counsel submits a letter from the petitioner's accountant asserting that pursuant to the Internal Revenue Services (IRS)' instructions, the petitioner reported its payroll expenses on its corporate income tax returns and the business income was reported in Schedule Cs of the sole proprietor's individual income tax returns. Counsel's assertion is supported by the petitioner's corporate tax returns for 2001 through 2003 in the record. The tax returns for 2001 through 2003 do not state any income but payroll and taxes and licenses expenses. In general, income or assets of its shareholders or of other enterprises including a sole proprietor cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. However, in the instant case, counsel did not request to consider the sole proprietor's income but the income of the petitioner, which was reported in the sole proprietor's schedule C with IRS special arrangement. The AAO concurs with counsel's assertion and will consider the net profit reported on line 31 of Schedule C to the sole proprietor's Form 1040 as the petitioner's net income together with taxable income reported on line 28 of Form 1120 for 2001 through 2003. However, for 2004 and latter years, the AAO will review and consider the petitioner's Form 1120 only without consideration of the sole proprietor's schedule Cs because the petitioner's tax returns for 2004 and 2005 submitted in the record show that the petitioner reported its income on its IRS Form 1120 and the record does not contain any evidence showing that the petitioner continued to report its income on the sole proprietor's schedule Cs.

Accordingly, the sole proprietor's individual income tax returns for 2001 through 2003 and the petitioner's corporate tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $42,598.40 per year from the year of the priority date:

- In 2001, the Form 1040 Schedule C stated a net profit[5] of $40,160 and the Form 1120 stated a net income[6] of $(27,272), and thus, the petitioner's actual net income was $12,888.
- In 2002, the Form 1040 Schedule C stated a net profit of $45,885 and the Form 1120 stated a net income of $(34,602), and thus, the petitioner's net income was $11,283.
- In 2003, the Form 1040 Schedule C stated a net profit of $37,240 and the Form 1120 stated a net income of $(28,980), and thus, the petitioner's net income was $8,260.
- In 2004, the Form 1120 stated a net income of $72,829.
- In 2005, the Form 1120 stated a net income of $42,579.

The calculation shows that the petitioner did not have sufficient net income to pay the difference of $18,361.40 in 2001, $14,058.00 in 2002 and $16,598.40 in 2003 between wages actually paid to the beneficiary and the proffered wage respectively; however, the petitioner had sufficient net income to pay the difference of $14,108.40 in 2004 and $11,398.40 in 2005 between wages actually paid to the beneficiary and the proffered wage respectively. Therefore, the petitioner established its ability to pay the proffered wage in 2004 and 2005, however, failed to demonstrate that it had sufficient net income to pay the proffered wage in 2001 through 2003.

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[5] Net profit or (loss) as reported on Line 31 of the Form 1040 Schedule C.

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

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. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. On appeal counsel asserts that the stockholder's equity is money available to the petitioner and should be calculated in determining the petitioner's ability to pay. The petitioner's total assets include depreciable assets such as stockholder's equity 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. Counsel's reliance on the stockholder's equity in determining the petitioner's ability to pay the proffered wage is misplaced.

Net current assets are the difference between the petitioner's current assets and current liabilities.[7] 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.
- The petitioner's net current assets during 2002 were $0.
- The petitioner's net current assets during 2003 were $0.

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the difference between wages actually paid to the beneficiary and 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.

Counsel submitted bank statements for the petitioner's business checking accounts covering the months from February to April 2001, October 2001, December 2001, December 2002, December 2003, December 2004, December 2005 and January to March 2006. Counsel's reliance on the balances in the petitioner's bank checking accounts is misplaced. 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

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[7] 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.

Counsel asserts in the brief accompanying with appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel asserts that CIS must consider the totality of the circumstances affecting the petitioner if the evidence necessitates it. 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*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 2001 and employs approximately ten workers. However, the tax returns show that the petitioner's gross receipts were never greater than $500,000 in 2001 through 2003, and the petitioner's W-3 forms show that all the salaries and wages the petitioner paid to its employees were $24,237 in 2001, $28,540.40 in 2002 and $26,000 in 2003. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the years 2001 through 2003 were uncharacteristically unprofitable three years in a framework of profitable or successful years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength or viability, and the petitioner has not established its ability to pay the proffered wage.

Counsel referred to decisions issued by the AAO, but does not provide their published citations. 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).

On appeal counsel suggests CIS consider the ratio of current assets to current liabilities for year 2005. Financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.[8] In addition the ratio of current assets to current liabilities for 2005 would not establish the petitioner's ability to pay for 2001 through 2003.

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

[8] The observation that a particular ratio is high or low depends on the purpose for which the ration is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. *See Financial Ratio Analysis,* http://www.finpipe.com/equity/finratan.htm (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis,* http://www.zeromillion.com/business/ financial/financial-ratio.html (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis,* http://www.ventureline.com/FinAnal_indAnalysis.asp (accessed March 21, 2006).

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 qualifying 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 computer programmer requires three (3) 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(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.

The record contains an experience letter dated January 10, 2001 from [redacted] ' January 10, 2001 letter) as evidence from the beneficiary's former employer verifying that the beneficiary possessed the qualifications as required by the Form ETA 750. The [redacted]' January 10, 2001 letter is from the beneficiary's former employer, however, the English translation does not contain the author's name and title. Therefore, it is not clear whether this letter is from someone authorized to represent the company and to issue a document on behalf of the company. The letter verifies that the beneficiary worked in that company as a stonemason from January 3, 1990 through 1994, however, it does not confirm the beneficiary's full-time employment. In addition, the letter does not contain a specific description of duties performed by the beneficiary during the employment with that company. Without a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's experience with [redacted]. qualifies him to perform the duties described in item 13 of the Form ETA 750A. Furthermore, the experience letter is not supported by the beneficiary's statement. The beneficiary did not list this experience on the Form ETA 750B. The [redacted] January 10, 2001 letter does not meet the requirement of the regulation at 8 C.F.R. § 204.5(g)(1) and the record does not contain any other experience letter to demonstrate that the beneficiary possessed the requisite three years of experience in the job offered prior to the priority date. Therefore, the petitioner failed to demonstrate that the beneficiary

possessed the qualifying experience for the proffered position 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.