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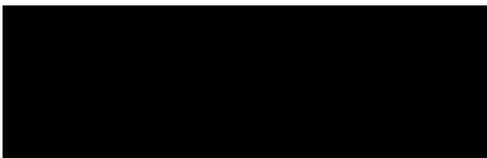
**PUBLIC COPY**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

B6



FILE:

Office: TEXAS SERVICE CENTER

Date:  
**DEC 30 2010**

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a real estate management and construction business. It seeks to permanently employ the beneficiary in the United States as a building maintenance repairer. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is November 17, 2003, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's January 20, 2009 and April 20, 2009 decisions, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.<sup>2</sup>

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

<sup>2</sup> 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the November 17, 2003 priority date.

The proffered wage stated on the labor certification is \$12.40 per hour (\$22,568.00 per year, based on a 35 hour week). On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$376,782.00, and to employ two workers. According to the tax returns in the record, the petitioner is structured as a limited liability partnership (LLP) with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary claimed to have worked for the petitioner, but did not provide a start date of employment. In addition, the record of proceeding does not contain documentary evidence establishing that the petitioner has employed the beneficiary. Moreover, the petitioner's tax returns account for little or no wages having been paid to anyone. Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than 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 each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.

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. 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 gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. See also *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table

below.<sup>4</sup>

<b>Year</b>	<b>Net Income (\$)</b>
2003	-27,269.00
2004	31,371.00
2005	237,318.00
2006	145,813.00
2007	-49,947.00

Therefore, for the years 2003 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. 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, USCIS 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> 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 tax returns demonstrate its net current assets for the required period, as shown in the table below.<sup>6</sup>

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<sup>4</sup> The petitioner filed its tax returns using Form 1065, U.S. Return of Partnership Income. For an LLP, USCIS considers net income to be the figure shown on Line 22 of Form 1065, and income/loss reconciliation is reported on Schedule K, Line 1, on Page 4. When the two numbers differ, the number reported on Schedule K is used for net income.

<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.

<sup>6</sup> On Form 1065, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 15 through 17.

Year	Net Current Assets (\$)
2003	-189,660.00
2004	-228,300.00
2005	-240,396.00
2006	-137,770.00
2007	-103,324.00

The petitioner did not have sufficient net current assets to pay the proffered wage in 2003, 2004, 2005, 2006 and 2007.

Therefore, except for 2004, 2005 and 2006, the petitioner has 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, or its net income or net current assets.

On appeal, counsel notes that the petitioner's 2003 tax return indicates a \$2,654.00 year end cash balance. Counsel also states that, with a priority date of November 17, 2003, the prorated proffered wage for 2003 is \$2,604.00.<sup>7</sup> Counsel asserts that since the petitioner's year-end cash balance exceeds the prorated proffered wage, the petitioner has established its ability to pay the proffered wage for 2003. Counsel's reliance on the year-end cash balance on the petitioner's 2003 tax return is misplaced. USCIS already considered the petitioner's year-end cash balance when it analyzed its net current assets. The year-end cash balance does not identify funds that are already obligated for other purposes. This is underscored by the fact that the petitioner's 2003 tax return indicates that its net current assets totaled -\$189,660.00. The petitioner's year-end cash balance was not sufficient to cover its short term expenses, let alone an additional salary. Regardless, the year-end case balance did not exceed the prorated proffered wage.

Counsel also argues that the petitioner "has always maintained long term assets in the form of profitable real estate with advantageous net equity that could have and would have provided more than enough funds to cover the wage if necessary." As is explained in detail above, USCIS rejects the idea that the petitioner's net assets should have been considered in the determination of the ability to pay the proffered wage. Further, the petitioner's 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.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed

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<sup>7</sup> There are 45 days from November 17, 2003 up to and including December 31, 2003. The prorated annual wage for this period would be \$2,782.36, not \$2,604.00.

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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1998 and to employ two employees. The petitioner's tax returns show generally declining gross rents of \$398,518.00 in 2003, \$434,079.00 in 2004, \$346,685.00 in 2005, \$313,022.00 in 2006, and \$194,602.00 in 2007. This is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

On appeal, counsel claims that the petitioner was negatively impacted by a recession that had "disrupted the entire [U.S.] economy." In support of this claim, counsel submits a Wikipedia article on the "Early 2000s Recession," and a printout of the "PNC Real Estate Finance's 2003 Outlook." A recession does not constitute the occurrence of the type of uncharacteristic business expenditure or loss addressed in *Sonegawa*.

Counsel also claims that the petitioner was affected by a flood in 2007. Counsel includes two articles about the flood in Somerset Country, New Jersey, and asserts that the Form 8825 of the petitioner's tax return proves the financial impact of the flood on the petitioner. The Form 8825 submitted with the petitioner's 2007 tax returns states that the company "was in flood zone and of the \$318,69248 [sic] received of flood insurance proceeds (condemnation award), \$118,168.35 was reinvested as an involuntary conversion to date and the balance will be reinvested within the two year allowed time frame." Under the reasoning of *Sonegawa*, a petitioner who has experienced and recovered from an isolated period of economic duress due to an uncharacteristic business expense or loss can assert its renewed profitability in demonstrating its ability to pay a proffered wage. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). This is not the case here.

First, counsel has not documented precisely how the claimed flood damage impacted the petitioner's finances. Second, counsel has not documented that the petitioner has recovered to profitability following the flood. If the flood negatively impacted the petitioner's long-term prospects for profitability, it would be an argument against the petitioner's ability to pay the proffered wage.

Counsel also notes that [REDACTED] is a 50% co-partner of the petitioner, and that [REDACTED] has an ownership interest in several other businesses. The record contains tax returns for [REDACTED]

[REDACTED] A corporation is a separate and distinct legal entity from its owners, stockholders and sister corporations. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). USCIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). However, like a general partnership, an LLP consists of a general partner and multiple limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. The record of proceeding does not contain information regarding the general partner's personal assets and expenses to demonstrate that [REDACTED] assets may be utilized to pay the proffered wage. In order to make such a determination, counsel would need to provide additional documentation of the general partner's assets and expenses, such as personal tax returns and a detailed itemized list of monthly personal expenses from the priority date.

Further, it is noted that the petitioner has filed a petition on behalf of another beneficiary.<sup>8</sup> Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority date and proffered wage for the beneficiary of the other petition, whether the beneficiary has withdrawn from the petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. There is also no information in the record about whether the petitioner has employed the beneficiary or the wages paid to the beneficiary, if any. Thus, the petitioner has not established its ability to pay the proffered wage for the beneficiary or the proffered wages to the beneficiary of the other petition.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage

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<sup>8</sup> The Form I-140, Immigrant Petition for Alien Worker, has a Receipt Number of [REDACTED]

beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also 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). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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); *Madany 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. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at \*7.

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the position requires two years of experience in the job offered.

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B).

The record contains an employment experience letter by [REDACTED] Owner of [REDACTED] [REDACTED] dated May 24, 2007, stating that the company employed the beneficiary from July 2001 through October 2003. The letter provides a detailed description of the beneficiary's employment, and the described duties are in the same occupation as the offered position. However, the labor certification, signed by the beneficiary under penalty of perjury, does not mention this employment. The instructions to the labor certification instruct the beneficiary to "List all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification." The beneficiary's failure to mention this experience undermines the

credibility of the enclosed experience letter. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(beneficiary's claim of prior employment experience is less credible if the experience is not stated on the labor certification). Therefore, without additional corroborating documentary evidence of the beneficiary's employment with [REDACTED] the experience letter, by itself, is not sufficient to establish that the beneficiary obtained two years of experience in the job offered by the priority date.

Thus, the petitioner has not established that the beneficiary possesses the experience required to perform the offered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.