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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

PUBLIC COPY

[redacted]

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DATE: MAY 04 2011 Office: NEBRASKA SERVICE CENTER [redacted]

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:

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

The petitioner is a construction company specializing in structural and ornamental ironworks, which seeks to classify the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) and to employ him permanently in the United States as an industrial production manager. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the ability to pay the proffered wage in 2006.

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 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. Section 203(b)(3)(A)(ii) of 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 at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d). It is noted that the Form ETA 750 was filed by [redacted]. which changed names to [redacted] on May 2, 2000. The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 was accepted for processing on June 14, 2004. It lists the proffered wage as $50,000 per year based on a 35 hour workweek. The petition requires a four year bachelor's

degree in "metallurgy, metallurgy engineer or civil engineer" and two years of experience in the proffered position or in the related occupations of metallurgy engineer, production manager or engineering manager.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ seven workers. The record contains the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, reflecting that it operates on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on April 24, 2004, the beneficiary claimed to have worked for the petitioner since June 2003.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a 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, United States Citizenship and Immigration Services (USCIS) 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. The beneficiary's IRS Forms W-2, Wage and Tax Statements, reflect that he earned $39,858 from the petitioner in 2004 and $35,184 in 2005, amounts less than the proffered wage of $50,000 per year. He was not employed by the company in 2006. Thus, the petitioner is obligated to demonstrate it can pay the difference of $10,142 between wages actually paid and the proffered wage in 2004 and $14,816 in 2005. The petitioner is obligated to demonstrate that it can pay the full proffered wage in 2006 and thereafter.

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, USCIS next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

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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 at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

River Street Donuts, LLC v. Napolitano, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano* at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 record before the director closed on July 25, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. At that time, the

petitioner's 2006 tax return would have been the most current tax return available and the record contains it.

The petitioner's net income on its IRS Form 1120S tax return for 2004 was $7,177. When this is added to the $39,858 he earned in 2004, there is a shortfall of $2,965 when the proffered wage of $50,000 is considered. The company's net income in 2005 was $15,349 and the beneficiary earned $35,184 in that year which is $50,533, exceeding $50,000. In 2006, the corporation net income was $39,107 and the beneficiary earned no wages from the company leaving a shortfall of $10,893.[2] After considering net income combined with the amounts paid to the beneficiary, the petitioner had the ability to pay the proffered wage in 2005, but not in 2004 or 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] 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. As stated above, the petitioner has shown the ability to pay the proffered wage in 2005. Therefore, this analysis will focus on 2004 and 2006. The petitioner's tax returns demonstrate its net current assets for 2004 were $14,684 and -$5,680 in 2006. As stated above, the petitioner paid the beneficiary $39,858 in 2004. His wages added to the petitioner's net current assets for 2004 amounts to $54,542, an amount higher than $50,000. Therefore, based on net current assets and the wages paid the beneficiary, the petitioner had sufficient assets to pay the beneficiary the proffered wage in 2004.

In his decision dated July 31, 2007, the NSC Director acknowledged the petitioner's ability to pay the proffered wage in 2004 and 2005 and that only 2006 is in dispute. The above analysis confirms his finding.

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. The petitioner reported no adjustments affecting net income on its Schedule K forms for tax year 2004 through 2006.

[3] 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.

On appeal, counsel emphasizes that the petitioner is 100% owned by [redacted], an assertion that is substantiated by the corporation's IRS Forms 1120S for 2004, 2005 and 2006. On appeal, counsel submits an affidavit by the owner, in which she explains, in part, that as sole owner, she could have taken less than maximum salary during 2006, and ttat she only took the maximum salary possible to avoid "double taxation" on the same income. The record shows that the owner paid herself a salary of $110,769 of the total of $300,688 in salary and wages paid by the company during 2006. Importantly, [redacted] does not state that she would, or could, have sacrificed any of this income to pay the beneficiary the proffered wage in 2006. Accordingly, this affidavit is not persuasive in establishing that any of these funds were truly available to pay the beneficiary the proffered wage in 2006. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Furthermore, distributions and other payments by an S corporation to a corporate officer must be treated as wages to the extent the amounts are reasonable compensation for services rendered to the corporation.[4]

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the individual's assets should be considered in determining whether the employer has the ability to pay the offered wage. Counsel does not state how the USDOL Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that

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[4] 2009 IRS Instructions for Form 1120S, U.S. Income Tax Return for an S Corporation, page 15. The owner(s) of an S corporation have the authority to allocate expenses of the company for legitimate business purposes, including for the purpose of reducing the corporation's taxable income. In this case, [redacted] is the 100% owner and president of the corporation during 2004 through 2006. She chose to pay herself a salary or wage and report it on line 8 of page one of the corporation's tax forms which is in compliance with the above IRS requirement, although she had the option of reporting her wages as officer compensation in line 7 on page one and her choice of reporting line has no bearing on the fact that she earned $110,769 as owner and president of the corporation in 2006 and that she had the authority to allocate this expense item during that year. The wage paid to the owner in this case may be considered as additional financial recourses of the petitioner, in addition to its figure for ordinary income. The record contains the corporation's New York State Employment Taxes report for the fourth quarter of 2006 showing the owner earned $110,769 in gross wages during the year, substantiating counsel's statement listed above. The owner and president of the company would only have needed to transfer $10,894 of her $110,769 salary in 2006 and added that to the corporation's $39,107 net income to have had the ability to pay the beneficiary's proffered wage during 2006l. However, because the owner of the corporation reported her compensation on line 8 and not on line 7, it has not been established that she had the authority to allocate this expense for legitimate business purposes because her income was considered as wages and not as officer compensation. As indicated above, the focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* Accordingly, after considering net income and the compensation of its owner in 2006, it is concluded the petitioner has not established it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation. 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'r 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel argues that AAO should consider the beneficiary's ability to generate income when determining the petitioner's ability to pay salary. This issue has been directly addressed in the following USCIS precedent decision:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Matter of Great Wall, 16 I&N Dec. at 144-45.

Counsel argues that six employees quit in 2006 and that those funds became available to pay the proffered wage. In 2006, the corporation net income was $39,107 based on its tax return. Any funds that would have become available from the fact that six employees quit in 2006 would have already been reflected in the 2006 net income calculation. In general, wages already paid or projected to be paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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 Sonegawa,* 12 I&N Dec. 612. 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. 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.

On appeal, counsel argues that the petitioner should be considered using a totality of circumstances method because its gross sales improved from $648,765 in 2005, $847,187 in 2005, and $1,337,758 in 2006 along with corresponding increases in salaries and wages for the three years. This argument is not persuasive because, as indicated above, the petitioner failed to establish its ability to pay in 2006, even after the gross sales improvement. Plus, the increase in gross receipts in 2006 must be balanced against other factors. For example, the petitioner's "cost of goods sold" in 2006 skyrocketed to $653,718 from 2005's figure of $111,566, thus resulting in decreasing total income. Additionally it is noted hat the petitioner had filed a Form I-140 for an additional beneficiary named [redacted] under receipt number [redacted] that was also pending during 2006 and continued pending until the visa petition was denied for abandonment on March 13, 2007. The company's request that this petition be approved is weakened because petitioners must produce evidence that its job offers to each beneficiary are realistic and that it has the ability to pay the proffered wages to all of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall, supra*, (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Also, 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 occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, or that the beneficiary will be replacing a former employee or an outsourced service.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, 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)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also 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. United States Citizenship and Immigration Services (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). *See also, 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 (1st 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 required education, training, experience and skills for the offered position are set forth at Part A, #14 of the labor certification. In this case the labor certification states that the position requires two years of experience in the job offered or the related occupation of "Metallurgy Engineer, Production Manager or Engineering Manager."

On the Form ETA 750B, signed by the beneficiary on April 24, 2004, he stated that he worked for [redacted] in Istanbul, Turkey, from January 1996 until September 2000. He also stated that he was employed for [redacted] in Brooklyn, New York, from March 2001 until June 2003.

The regulation at 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.

However, in the only employment verification letter submitted in behalf of the beneficiary dated January 17, 2007, [redacted], President of [redacted], stated the beneficiary was responsible for production of metal construction works from January 1996 to September 2000. This letter does not meet the requirements of the above regulation because it does not provide a description of the training received by the beneficiary during that period or specify the experience that he gained at that job so it can be established that he had attained the required two years of experience in the job offered or the related occupation of Metallurgy Engineer, Production Manager or Engineering Manager. Additionally, the record does not contain an employment verification letter for the beneficiary's claimed employment experience from [redacted] in Brooklyn, New York, from March 2001 until June 2003.

Therefore, the appeal shall be dismissed for the additional reason that the record does not contain evidence establishing that the beneficiary met the two year experience requirement specified in the ETA Form 750 as of the priority date. .

A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The 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.