U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

Date: OCT 19 2011 Office: NEBRASKA SERVICE CENTER FILE: [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:

SELF-REPRESENTED

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 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 21, 2008 denial, the single 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. [1]

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 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.

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[1] USCIS records indicate that the petitioner has filed 65 petitions since the petitioner's establishment in 1999, including 58 Form I-129 petitions, and seven Form I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 24, 2005. The proffered wage as stated on the Form ETA 750 is $84,739 per year. The Form ETA 750 states that the position requires either a B.S. or foreign equivalent in C.S., C.E., E.E. or a related field, or in lieu of that, no degree and four years of experience in the job offered or a related occupation. The position also requires that the successful candidate have two years experience in the job offered or two years experience in a related occupation.

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.[2]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition and in materials in support of the petition, the petitioner claimed to have been established on April 23, 1999, to have a gross annual income of $1 million in 2004, $1.56 million in 2005, $1.6 million 2006, and to currently employ six workers.[3] The 2007 tax return submitted on appeal reflects gross receipts of $834,193. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on March 22, 2005, the beneficiary claimed to have worked for the petitioner since May, 2001.

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'l Comm'r 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

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[2] 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).

[3] In a subsequent letter on appeal dated September 19, 2008, the petitioner claimed to now employ eight other workers in addition to the beneficiary.

affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date on March 24, 2005. On May 23rd, 2008, the petitioner submitted Forms W-2 issued to the beneficiary which demonstrate that it paid the following to the beneficiary:

- In 2005, the petitioner paid the beneficiary $56,500
- In 2006, the petitioner paid the beneficiary $60,000
- In 2007, the petitioner paid the beneficiary $69,000

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 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 (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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d 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.
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> 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 118. "[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." [redacted].

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 23, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. On appeal, the petitioner submitted its 2007 tax return, which will be considered under the AAO's *de novo* review authority. The petitioner's tax returns demonstrate its net income from 2005 – 2007[4], as shown in the table below.

- In 2005, the Form 1120 stated a net income of $4,439.
- In 2006, the Form 1120 stated a net income of $21,302.
- In 2007, the Form 1120 stated a net income of $14,438.

When the stated net income is added to the figures paid to the beneficiary reflected in the Forms W-2, the total amount fails to cover the proffered wage of $84,739 in 2005, 2006 and 2007.

	W-2	Stated Net Income	Total
2005	$56,500	$4,439	$60,939
2006	$60,000	$21,302	$81,302
2007	$69,000	$14,309	$83,309

Therefore, for the years 2005-2007, the petitioner did not have sufficient net income to pay the proffered wage.

[4] The petitioner also submitted its 2004 tax return. Because evidence of ability to pay is required from the priority date, the 2004 tax return will only generally be considered.

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 net current assets. 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 and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for 2005, 2006 and 2007, as shown in the table below.

- In 2005, the Form 1120 stated net current assets of ($79,880).
- In 2006, the Form 1120 stated net current assets of ($26,936).
- In 2007, the Form 1120 stated net current assets of ($95,913).

For the years 2005-2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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, or its net income or net current assets.

On appeal, the petitioner asserts that he "continues to pay the beneficiary the proffered wages - $84,000 plus over $5,000 in benefits. Benefits include full health coverage for self and family." The petitioner submits a financial statement for 2007 indicating that it paid health insurance for its employees in the total amount of $30,765.92 in 2007.[6] The petitioner also submits a monthly

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[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.

[6] On appeal, the petitioner submitted a financial statement for 2007. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement that counsel submitted with the petition is not persuasive evidence. As no accountant's report accompanied the financial statements, the statement is not audited. Unaudited financial statements are the representations of management. The unsupported representations of management

statement from its health insurance provider indicating $423 owed on behalf of the beneficiary for the month of September, 2008. While the one month statement may evidence health insurance paid for September, 2008, the statement does not evidence health insurance paid in earlier months and years. Moreover, the petitioner has not established that it may deduct benefits such as health insurance purchased for the beneficiary from the proffered wage. *See Kids "R" Us*, 89-INA-311 (BALCA Jan. 28, 1991) (*en banc*) [employer bears heavy burden when it seeks to include value of fringe benefits]. Thus, the health insurance premiums the petitioner paid on behalf of the beneficiary will not be deducted from the proffered wage in order to determine its ability to pay. In summary, the petitioner submitted Forms W-2 which shows that it paid the beneficiary $69,000 in 2007, $60,000 in 2006, and $56,500 in 2005. There also lacks a sufficient net income to make up the difference. Therefore, the petitioner's assertions on appeal that it paid the beneficiary the proffered wage including $5,000 per year in benefits do not comport with the evidence in the record.

The petitioner further asserts that "the beneficiary is a key employee and having to let him go would jeopardize our ability to exist as a growing business. Apart from the beneficiary we employ 8 other employees and several contractors. If we have to shutter our business, this would result in every one losing their jobs." The AAO cannot ignore the statute and precedent. As the record does not establish that the petitioner has the ability to pay, the appeal must be dismissed.

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 (Reg'l Comm'r 1967). 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 [redacted] The petitioner's clients had been included in the lists of the best-dressed [redacted] The petitioner lectured on fashion design at design and fashion shows throughout the United States and at [redacted] The Regional Commissioner's determination in [redacted] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in [redacted] 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.

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are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Thus, the 2007 financial statement will not be considered.

In the instant case, there is nothing extraordinary in the record that would parallel the circumstances in [redacted] The petitioner describes the company as "a small business" that has been in business for twelve years and employs eight people in addition to the beneficiary. Officer compensation was less than the proffered wage that the petitioner wants to pay the beneficiary; $72,000 in 2007, $66,000 in 2006, and $60,000 in 2005.[7] Further, the petitioner has not shown unusual circumstances in any of those years causing it to earn less money than would typically have been made. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Thus, the appeal will be dismissed.

Beyond the directors' decision, the AAO also finds that the beneficiary lacked the qualifying work experience necessary for this position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In the petitioner's letter dated August 9, 2007, the petitioner requested that the beneficiary be classified as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on March 24, 2005.

As stated above, 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. The relevant evidence in the record includes the beneficiary's employment letters. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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[7] The petitioner has not established that its owner would be willing or able to forego officer compensation to pay the beneficiary's remaining salary from the priority date until he obtains lawful permanent resident status.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. at 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 required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: B.S., or foreign equivalent in C.S., C.E., E.E., or a related field

Experience: 2 years in the job offered, 2 years in a related occupation. The related occupation was specified as a Programmer, project Manager, Senior Executive R&D, or a Customer Support Engineer

Block 15: In lieu of a B.S. or foreign equivalent in C.S., C.E., E.E. or related field, we will accept no degree and four years of experience in job offered or related occupation.

On the Form ETA 750B, signed by the beneficiary, the beneficiary represents that he has the following education.

Name of School	Field of Study	From	To	Degree
[redacted]	Software Development	04/1994	11/1994	Certificate
[redacted]	Electronics/ Telecomm.	08/1981	05/1985	H.S. Diploma

In the present case, the beneficiary does not have a B.S. degree or equivalent. He only has a high school diploma and a certificate in software development. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977). A seven month

certificate is not comparable to a degree that requires four years to attain. Therefore, the beneficiary's degree from NIIT cannot be considered a foreign equivalent degree.

The beneficiary states that he has the requisite four years of experience in the job offered or related occupation as required on the Form ETA 750 by the petitioner. On the ETA 750b, the beneficiary lists three positions in which he obtained the requisite experience:

1) Name and Address of Employer: [redacted]
Name of Job: [redacted]
Date Started – Date Left: 2/1999 – 4/2001
Kind of Business: Structural analysis and design software
No. of Hours Per Week: 40
Describe in Details the Duties Performed: Design, implementation and supervision of structural analysis and design software.

2) Name and Address of Employer: [redacted]
Name of Job: Senior Executive, R&D
Date Started – Date Left: 2/1996 – 1/1999
Kind of Business: Anti-Virus Software Development
No. of Hours Per Week: 40
Describe in Details the Duties Performed: Development of anti-virus software on DOS, Windows and Netware, using Visual C++, Borland C/C++, TASM and VtoolsD.

3) Name and Address of Employer: [redacted]
Name of Job: Cust. Support Eng/Software Engineer/Sr. Software Eng.
Date Started – Date Left: 1/1993 – 1/1996
Kind of Business: Anti-virus and system utilities development
No. of Hours Per Week: 40
Describe in Details the Duties Performed: Development of disk management, editing and repair tooks for DOS using Borland C and TASM.

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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be

> accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In the present case, the petitioner submitted job letters on behalf of the beneficiary from [redacted] (P) Ltd, [redacted] P.) Ltd. As required by statute, all three letters named the beneficiary, provided the name, address and title of the employer, and provided the months and years that the beneficiary worked for these companies. However, the letters from [redacted] systems did not contain a description of the training received or the experience of the alien. Therefore, the record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification. For this additional reason the petition must be denied.

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.