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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

B6

[redacted]

Date: FEB 0 1 2012 Office: TEXAS 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:

[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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a retail/convenience store. It seeks to employ the beneficiary permanently in the United States as a night store manager. 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 22, 2008 denial, the 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. On appeal, we have identified an additional issue of whether the petitioner established that the beneficiary has the experience required by the terms of the labor certification.

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.

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). 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). To be eligible for approval, a beneficiary must have all the education, training, and

experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 21, 2001. The proffered wage as stated on the Form ETA 750 is $34,819 per year. The Form ETA 750 states that the position requires two years of experience in the position offered as a night store manager.

The AAO conducts appellate review on a *de novo* basis. *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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 1992 and currently employs six workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on July 2, 2004, the beneficiary claimed to have begun working for the petitioner in October 2002.

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, 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).

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. The petitioner submitted no evidence that it ever employed the beneficiary or paid him any wages.

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

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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 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).

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, 881 (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*, 696 F. Supp. 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, 558 F.3d 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." *Chi-Feng Chang,* 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the receipt by the director of the petitioner's response to the Request for Evidence on July 3, 2008. As of that date, the most current tax return available was the petitioner's 2007 federal tax return.[2] The petitioner submitted the following IRS Forms 1120S:

- The 2001 Form 1120S stated net income[3] of $36,764.
- The 2002 Form 1120S stated net income of $62,646.
- The 2003 Form 1120S stated net income of -$28,516.
- The 2004 Form 1120S stated net income of -$27,172.
- The 2005 Form 1120S stated net income of -$6,346.
- The 2006 Form 1120S stated net income of -$75,535.
- The 2007 Form 1120S stated net income of -$38,960.

The petitioner's net income in 2001 and 2002 is sufficient to establish its ability to pay in those years alone. The petitioner's 2003, 2004, 2005, 2006, and 2007 tax returns demonstrate net income less than the proffered wage, and the petitioner did not establish the ability to pay for those years.

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.[4] A corporation's year-end current assets are shown

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[2] The petitioner did not submit a full and complete copy of its tax return for any year. Instead, it submitted the first 3-4 pages of the 2001, 2002, 2003, 2004, 2005, and 2006 returns which contains Schedules A, B, K, and L. The 2007 tax return additionally includes Schedule K-1 identifying the petitioner's shareholders and additional details concerning the petitioner's income, assets, deductions, and liabilities.

[3] 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. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed September 20, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K in 2001, 2002, 2003, and 2006, the petitioner's net income is found on Schedule K for those years and on line 21 for 2003, 2004, 2005, and 2007.

[4] 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 states that we should consider the petitioner's net assets

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 Forms 1120S stated the following net current assets:

- The 2001 Form 1120S stated net current assets of $32,366.
- The 2002 Form 1120S stated net current assets of $27,232.
- The 2003 Form 1120S stated net current assets of $22,610.
- The 2004 Form 1120S stated net current assets of -$22,709.
- The 2005 Form 1120S stated net current assets of -$25,947.
- The 2006 Form 1120S stated net current assets of -$16,077.
- In 2007, the Form 1120S stated net current assets of -$7,331.

None of the years demonstrates sufficient net current assets to pay the proffered wage from 2003-2007.[5]

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

The petitioner submitted a letter dated November 30, 2007 from Wang & Company CPAs stating that they reviewed the balance sheet for the petitioner from 2001 to 2006. 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.[6] An audit is conducted

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alone as they are stable through the years and indicate an overall stable financial position. First, counsel's assertion is incorrect: the petitioner's total assets have not remained steady, but instead dropped from $382,964 in 2003 to $63,936 in 2004 to $31,011 in 2005 and remained less than the proffered wage in 2006 and 2007. Second, net assets alone are not a complete picture of the petitioner's financial position as they must be weighed against net liabilities, as the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time and the liabilities are those expenses that will come due within that same period of time.

[5] The petitioner has already established the ability to pay the proffered wage in 2001 and 2002 through its net income.

[6] On appeal, counsel states that evidence other than those documents enumerated in 8 C.F.R. § 204.5(g)(2) may be considered in "appropriate cases" and argues that this is such an appropriate case since it submitted information from its accountants. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the

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 accountant's letter makes clear that it is a reviewed statement, as opposed to an audited statement. The report submitted by the accountant states that Bhai's Investments, Inc. is related to the petitioner and states that the petitioner and Bhai's Investments individually or in collaboration could pay the proffered wage to the beneficiary. The accountant's report is generated based on the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Counsel notes on appeal that the accountant stated that the liquidation of some assets to pay off liabilities strengthened the petitioner's financial position and that the assets were decreased when $102,000 in retained earnings were paid in dividends. The petitioner can choose to dispose of or retain its assets any way it chooses, however, as it has disposed of those assets, they are not available to pay the proffered wage to the beneficiary.

In addition, 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

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documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Simply having information that the petitioner would prefer be considered is not sufficient to demonstrate that this is an "appropriate case" as contemplated by the regulation. Counsel additionally cites Section 22.2(c) of the Adjudicator's Field Manual (AFM) for the premise that reviewed financial statements can be accepted. First, the AFM does not mandate that reviewed financial statements be accepted, but allows for adjudicators to accept those statements in their discretion. Second, Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. Third, the evidence submitted was not a reviewed financial statement, but was instead a letter based on a review. The American Institute of Certified Public Accountants defines a "financial statement" as:

> *Financial statement*. A presentation of financial data, including accompanying notes, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time, in accordance with generally accepted accounting principles (GAAP) or an OCBOA [other comprehensive basis of accounting]. Reference in the SSARSs to GAAP include, where applicable, an OCBOA. Financial forecasts, projections and similar presentations, and financial presentations included in tax returns are not financial statements for purposes of this section.

The letter submitted by the petitioner's accountants does not present the petitioner's financial data, has no accompanying notes, and does not intend to communicate the petitioner's economic resources or obligations. Instead, it is a summary of the accountants' conclusions regarding the petitioner's financial standing.

in *Sitar v. Ashcroft*, 2003 [redacted] (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." On appeal, the petitioner submitted the 2007 Form 1120S for Bhai's Investments, Inc. and the Form 1040 of the petitioner's co-owners. Counsel states that because the petitioner is co-owned by the same co-owners as Bhai's Investments, Inc., it should be treated more like a sole proprietorship so that the owners' assets can be considered. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). A June 22, 2008 letter from the petitioner's owner states that both the petitioner and Bhai's Investments, Inc. are capable and willing to pay the beneficiary's proffered wage. The petitioner exists as an entity apart from both Bhai's Investments, Inc. and its co-owners. As these entities are separate and distinct from the petitioner, their financial position may not be considered in determining the petitioner's ability to pay the proffered wage to the beneficiary.

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 (BIA 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 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 had negative net income in 2003, 2004, 2005, 2006, and 2007 and negative net current assets in 2004, 2005, 2006, and 2007. In addition, the petitioner's gross revenue has dropped from $2.1 million in 2001 to $725,858 in 2007, and the total amount of wages paid in 2005, 2006, and 2007 to all workers was less than the proffered wage to the beneficiary in each of those years. The total amount paid in wages in those years does not support the petitioner's assertion on its Form I-140 and December 24, 2007 letter that it employs six workers. On appeal, counsel states that the petitioner has been operating at a loss to improve its business position in the long run and that such scenarios are provided for under *Sonegawa.* Although a business may establish its

ability to pay the proffered wage overall even if it does not so provide in an individual year, the petitioner has shown an ability to pay the proffered wage in only two out of seven years. The source of alternate funding suggested by counsel is that of a separate company related to the petitioner and the petitioner's co-owners. As stated above, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture to liken its situation to *Sonegawa*. 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.

Additionally, beyond the decision of the director, the petitioner has not adequately established that the beneficiary has the required experience for the position offered. 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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. 204(5)(l)(3)(ii) states the following:

> (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.
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> (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.

The above regulation requires that the alien meet the requirements of the labor certification. In connection with a previous application, the beneficiary indicated that he was self-employed as a transportation provider from August 1981 to August 1995 in India and that he arrived in the United States in August 1995. In support of the current application, the petitioner submitted a letter indicating that the beneficiary was employed full-time as a manager at [redacted] in Houston, Texas from January 1995 to February 1997. As the beneficiary's stated employment date in India

was through August 1995, the veracity of the letter from [redacted] is called into question. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No evidence of record resolves this inconsistency. Thus, the AAO finds that the petitioner has not established that the beneficiary has the required work experience. For this additional reason, the petition may not be approved.

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.