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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 2 1 2012 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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. §.103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 and 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 February 27, 2009 denial, an 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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). 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $11.56 per hour which is $24,044.80 per year based on forty hours per week. The Form ETA 750 states that the position requires two years of experience in the job offered, as a cook.

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 evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to work for the petitioner since 1992.

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 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).

On appeal, counsel asserts that [redacted] is the owner of the [redacted] in Placentia, CA and has employed the beneficiary as a cook. According to counsel, [redacted] is married and has one dependent child, and his personal income, combined with his savings, establish that he has enough disposable income to support himself, his wife and child, and pay the beneficiary the proffered wage of $24,044 per year. Counsel claims that the documentation submitted on appeal shows that the petitioner paid the beneficiary at least $12,000 per year and that [redacted] liquid assets of $127,764.59 should be considered. To support counsel's assertions the petitioner submitted the following evidence:

- A copy of the Certificate of deposit dated August 18, 2008;
- A copy of the Certificate of deposit dated November 7, 2008;
- Copies of the beneficiary's IRS Forms W-2 issued by the petitioner in 2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2007;

[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).

- Copies of [redacted] Personal Savings Account Statements from September 29, 2001 to September 30, 2008;
- Copies of [redacted] Individual Tax Returns for years 2003, 2004, 2005, 2006, and 2007.

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 paid the beneficiary the full proffered wage from the priority date in 2001 onwards.

Counsel claims that the documentation submitted on appeal shows that the petitioner paid the beneficiary at least $12,000 per year since 2001. Research revealed that the Social Security Number listed on the beneficiary's IRS Forms W-2 was issued in California between 1972 and 1973. This SSN is linked to multiple people, including the beneficiary. Therefore the AAO cannot accept the beneficiary's IRS Forms W-2 as evidence the petitioner's ability to pay the proffered wage.[2]

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[2] Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Further, the Employer Identification Number (EIN) listed on the Forms W-2 for 2000, 2001, and 2002 do not match the IRS Tax number listed by the petitioner on Form I-140.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). 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). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, pursuant to the most updated information of record, the sole proprietor supports a family of three.[3] The proprietor's 2003, 2004, 2005, 2006, and 2007 tax returns reflect the following information:

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

[3] and 2007 jointly filed Individual Income Tax return (Form 1040) lists as a dependent child.

	2003		
Proprietor's adjusted gross Income (Form 1040, line 34)	$2,361		
	2004		
Proprietor's adjusted gross Income (Form 1040, line 36)	$(5,010)		
	2005	2006	2007
Proprietor's adjusted gross Income (Form 1040, line 37)	$19,988	$13,923	$27,023

In years 2003, 2004, 2005, and 2006, the sole proprietor's adjusted gross incomes fail to cover the proffered wage of $24,044.80 per year. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

As mentioned above, sole proprietors must show that they can cover their existing business expenses, pay the proffered wage out of their adjusted gross income or other available funds, and support themselves and their dependents. Even though the sole proprietor's adjusted gross income for 2007 is greater the proffered wage, without considering the sole proprietor's monthly expenses, it is impossible to evaluate the petitioner's ability to pay. The petitioner failed to provide a statement of the sole proprietor's monthly household expenses. Thus, the evidence of record is deficient.

The record of proceeding contains quarterly statements from the sole proprietor's personal savings account covering the period from September 29, 2001 through September 30, 2008, with average annual balances of $9,328.11, $16,788.19, $6,550.33, $2,043.25, $19,269.84, and $1,016.97 for the years 2002, 2003, 2004, 2005, 2006, and 2007 respectively.[4] As in the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The average annual balances in the years 2002, 2003, 2004, 2005, 2006, and 2007 are not sufficient to cover the full proffered wage of $24,044 per year.

In addition, the petitioner submitted two certificates of deposits made in two different account numbers, in the amount of $62,764.59 and $65,000.00. Counsel claims the sole proprietor's liquid assets of $127,764.59 should be considered in determining the petitioner's ability to pay the proffered wage. The sole proprietor's CDs were not to be matured until August and November 2009,

[4] Since the information of record covers the period from September 29, 2001 through September 30, 2008, the average annual balance for years 2001 and 2008 is not available.

respectively. In this case, the CDs would demonstrate the petitioner's ability to pay the proffered wage for the year of 2009 only.

Thus, the sole proprietor's substantial cash assets as reflected in his personal savings accounts and CDs do not establish the petitioner's continuing ability to pay the proffered wage.

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 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's ability to pay the proffered wage was not established for all years considered. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during those years. No evidence was submitted to establish a basis for the petitioner's expected continued growth. Although the petitioner has been in business since 2003, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. Further, no regulatory prescribed evidence of the petitioner's ability to pay the proffered wage in 2001 or 2002 was provided. 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.

Beyond the decision of the director,[5] the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

Although the petitioner is and is the employer listed on the labor certification, in response to the Request for Evidence issued to the petitioner by the Nebraska Service Center Director on November 3, 2008, counsel stated that the petitioner's sole proprietor, purchased his business in 2003. Counsel asserted that was unable to provide the petitioner's 2001 and 2002 income tax returns because the restaurant was owned by another person at the time.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Also beyond the decision of the director, another issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth in the Form ETA 750, Application for Alien Employment Certification. In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook is two years of experience in the job offered as a cook. In the instant case, the applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 750B and signed his name on April 26, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. On

[5] 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).

Part B, eliciting information of the beneficiary's work experience, he represented that he worked as a as a full-time cook for the petitioner, from 1992 to 1997, and from 1997 to present.[6]
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.

The record contains a letter dated December 2, 2006 and signed by [redacted] stated that the beneficiary was his employee from 1992 to 1997, when [redacted] was the owner of [redacted] located at [redacted], Placentia, CA [redacted] stated that the beneficiary was employed as a cook. Also, on Form G-325A, Biographic Information, signed by the beneficiary on July 25, 2007, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status, the beneficiary represented that he worked as a cook for [redacted] located at [redacted], Placentia, CA [redacted] from 1992 to present.[7]

20 C.F.R. § 656.21(b)(5) [2004] states:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

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[6] Since the labor certification was signed by the beneficiary on April 26, 2001, the AAO will consider the end date of employment to be at least until that date.
[7] Since Form G-325 was signed by the beneficiary on July 25, 2007, the AAO will consider the end date of employment to beat least until that date.

Representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered as a cook and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. *See* 20 C.F.R. § 656.21(b)(5) [2004]. The petitioner is basing the beneficiary's qualifications for the proffered position on experience acquired with the petitioning employer. However, in hiring the beneficiary with less than two years of experience for the position of a cook, the petitioner has indicated that the actual minimum requirements are, in fact, not two years of experience. Rather, in that the beneficiary can perform the job duties of the offered position with less than two years of experience, it is evident that the actual minimum requirements for the offered position are *less* than two years of experience.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750.[8] In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. 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

[8] This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA):

> [W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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.