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[redacted]

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

DATE: JUL 12 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.

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, Careplus Chiropractic Health Care,[1] is a health care provider specializing in chiropractic medicine and related services. It seeks to employ the beneficiary permanently in the United States as a Massage Therapist. 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 denial on March 10, 2009, the issue appealed 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. The Director determined that the Petitioner demonstrated the ability to pay the proffered wage for calendar years 2001, 2002, and 2003, but failed to demonstrate the ability to pay the proffered wage for calendar years 2004, 2005, 2006, and 2007. Therefore, at issue is the petitioner's ability to pay the proffered wage for the calendar years 2004 through 2007.

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] Careplus Chiropractic Health Care is not registered with the California Secretary of State. The petitioner submitted tax returns for "Stewart Chen Chiropractic, Inc." which is registered with the California Secretary of State. Counsel has provided no explanation for this discrepancy.

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 July 20, 2001. The proffered wage as stated on the Form ETA 750 is $30.00 per hour ($62,400 per year). The Form ETA 750 states that the position requires three (3) months of training in "Massage Therapy," and two (2) years of work experience as a "Therapeutic Massage Therapist" or two (2) years of work experience in a related field of "Foot Reflexology & Meridian Therapy," as well as the ability to speak "Chinese/Mandarin."

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 an S corporation. On the petition, the petitioner claimed to have been established in January 1988 and to currently employ 6 workers. According to the tax returns in the record,[3] the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 25, 2007, the beneficiary did not claim to have worked for the petitioner.

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).

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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] The U.S. Income Tax Returns for an S Corporation provided share the same Federal Employer Identification Number as listed on the I-140, however, the tax returns bear a different corporate name, that of "Stewart Chen Chiropractic, Inc.," as indicated above.

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, or any wages, during any relevant timeframe including the period from the priority date or subsequently.

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). 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*, 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.

> 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 19, 2009, 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 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 would be the most recent return available.[4] The petitioner provided the U.S. Income Tax Returns for an S Corporation filed on behalf of "Stewart Chen Chiropractic, Inc."[5] The tax returns provided demonstrate net income for 2004-2007, as shown in the table below.

- In 2001, the Form 1120S stated net income[6] of $129,588.
- In 2002, the Form 1120S stated net income of $78,831.
- In 2003, the Form 1120S stated net income of $61,038.
- In 2004, the Form 1120S stated net income of $23,679.
- In 2005, the Form 1120S stated net income of $32,971.

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[4] Based on the date of the petitioner's response to the director's Request for Evidence, it is unclear whether the petitioner's 2008 tax return was available at that time, or at the time of the appeal.

[5] The provided tax returns share the same address and Federal Employer Identification Number as the petitioner has listed on the I-140, but the name, as noted above, is different. Counsel has not provided an explanation or documentation to address this discrepancy. The petitioner must address this issue in any further filings and submit documentation to show that both entities operate under the same federal tax identification number, that one represents a valid assumed name, or that the petitioner "does business as" the stated petitioner to properly determine that the tax returns can be attributed to the petitioner's ability to pay.

[6] 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, then net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 3, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2002, 2003, and 2004, the petitioner's net income is found on Schedule K of its tax returns.

- In 2006, the Form 1120S stated net income of $20,911.
- In 2007, the Form 1120S stated net income of $26,945.

The petitioner's tax returns demonstrate a declining net income that falls significantly below the proffered wage beginning in calendar year 2004. Therefore, the petitioner did not have sufficient net income to pay the proffered wage of $62,400 beginning with calendar year 2003[7] and continuing through 2007.

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.[8] 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001-2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $63,968.
- In 2002, the Form 1120S stated net current assets of -$605.
- In 2003, the Form 1120S stated net current assets of $8,613.
- In 2004, the Form 1120S stated net current assets of $7,773.
- In 2005, the Form 1120S stated net current assets of $28,061.
- In 2006, the Form 1120S stated net current assets of $33,595.
- In 2007, the Form 1120S stated net current assets of $41,286.

Therefore, for the calendar years beginning 2002 and continuing through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage of $62,400.[9]

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, its net income, or its net current assets.

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[7] The director stated the proffered wage as $56,400 in his decision. However, as noted above, the correct proffered wage is $62,400. Therefore, the petitioner's net income in 2003 is insufficient to pay the proffered wage in 2003 as well.

[8] 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.

[9] As noted above, the petitioner can establish its ability to pay the proffered wage in calendar years 2001 and 2002 based on its net income.

On appeal, counsel asserts that the petitioner's business has "steadily grown," and indicates that there is a "growing demand" for its services. Counsel correctly identifies the petitioner as an S Corporation, and indicates the petitioner has two shareholders.[10] Counsel requests that the petitioner's shareholders' individual income tax returns be considered "in determining Petitioner's net income and ability to pay" based on the concept that the "Petitioner's net income 'passes-through' to" the shareholders. In support, counsel provided the U.S. Individual Income Tax Returns filed by [redacted] for the calendar years 2004, 2005, 2006, and 2007.[11]

The shareholders' personal assets and incomes are not germane to the petitioner's ability to pay. 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." Therefore, the shareholders' income tax returns and personal bank statements do not document the petitioner's ability to pay the proffered wage.

On appeal, counsel further asserts that the petitioner's bank statements document its ability to pay the proffered wage. Counsel provides the petitioner's monthly bank statements for December 2004, December 2005, December 2006, and December 2007, in support of its ability to pay the proffered wage. Counsel also provided personal bank statements and Certificates of Deposit held solely in the name of Lori Chen. Counsel's reliance on the balances in the petitioner's and shareholder's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.[12] Further, as discussed above,

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[10] The petitioner's tax returns state on Form 1120S, Part G, that the petitioner has only one shareholder.

[11] Counsel provided Form 1040 only, and did not provide additional informative documents such as W-2 Forms, or additional schedules such as Schedule E.

[12] Counsel asserts that the bank statements do represent funds beyond the cash listed on Schedule L, but fails to document or explain this. The AAO does note discrepancies in the cash listed on the year-end bank statements compared to the cash listed on Schedule L. The reasons for these discrepancies are unclear. It is incumbent upon the petitioner to resolve inconsistencies by providing competent evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

the holding in *Aphrodite Investments* indicates that the personal assets of shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 has been in business since 1991[13] and its gross receipts steadily declined from a high of $424,251 in 2001 to a low of $235,551 in 2005, and again increasing to $291,014 in 2007. The petitioner paid minimal salaries and wages in each relevant year.[14] Further,

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[13] Form I-140 indicates the petitioner was established January 1988, however, the corporate records for the state of California indicate that [redacted]" was established April 1991. *See* http://kepler.ss.ca.gov/cbs.aspx (accessed July 2, 2012). The petitioner must address in any further filings whether the petitioner listed on Form I-140 and [redacted]c. are the same companies.

[14] The petitioner states on Form I-140 that it employs six employees. In 2001, the petitioner paid $64,223 in salaries and wages. It paid $92,112 in 2002, $78,078 in 2003, $55,357 in 2004, $95,050 in 2005, $36,675 in 2006, and $57,120 in 2007. These salaries are not significantly greater than the proffered wage of $62,400, and in fact the total wages paid in 2006 to all employees was approximately one-half the beneficiary's proffered wage.

the petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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, the petitioner has not established that the beneficiary qualifies for the job as offered.[15] 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).

The requirements of the job offered set forth on the ETA 750 Part A, at Item 14, state that the position requires three (3) months of training in "Massage Therapy." In support thereof, counsel has provided an undated "Certificate of Completion" from [redacted], located at [redacted] stating that the beneficiary received training in "Foot Massage Therapy" from "May – November 1999." The certificate is signed by Mr. [redacted] Proprietor.

Form ETA 750 Part A further requires two (2) years of work experience as a "Therapeutic Massage Therapist" or two (2) years of work experience in a related field of "Foot Reflexology & Meridian Therapy." In support thereof, counsel has provided a letter dated June 9, 2007, from [redacted] Enterprise Inc., located at [redacted], Philippines, stating that the beneficiary was employed as a "Full-time Massage Therapist" from "May 1999 to present."

These documents are inconsistent in so far as they indicate an overlap in the beneficiary's claimed training and work experience, two separate requirements, both received at [redacted], which if the letter of training were accepted would result in the beneficiary not having accrued the necessary two years of work experience prior to the priority date of July 20, 2001. The inconsistency in these documents indicates that the beneficiary lacked the work experience required on the labor certification application as of the priority date. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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[15] 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 any further filings, the petitioner must resolve this conflict before the AAO can conclude that the beneficiary has the requisite training and experience to meet the terms of the certified labor certification.

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.