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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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Date: **MAR 08 2012**

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a boat manufacturing company. It seeks to employ the beneficiary permanently in the United States as a boat carpenter. 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 failed to submit the initial required evidence to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary had the education, training, or experience required by the labor certification. 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 March 2, 2009 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether the petitioner can establish that the beneficiary meets the requirements 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.

Ability to Pay the Proffered Wage

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 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 as certified

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

Here, the Form ETA 750 was accepted on March 1, 2003. The proffered wage as stated on the Form ETA 750 is \$21.38 per hour (\$44,470.40 per year). The Form ETA 750 states that the position requires four years of experience in the job offered and does not allow for any experience in any related occupation.

Form ETA 750 lists the labor certification applicant as [REDACTED] with an address [REDACTED]. Form I-140 states the petitioner as [REDACTED], but fails to list any federal employer identification number (FEIN) as required by Form I-140.¹

The petitioner submitted W-2 forms for [REDACTED] and for [REDACTED]. The tax returns submitted for 2003 to 2005 [REDACTED] and for 2006 and 2007 for [REDACTED] from the record whether all these entities are the same and whether all the documentation can be attributed to the petitioner to establish its ability to pay.³

¹ Nothing shows that either [REDACTED] are or ever were registered California Corporations. See <http://kepler.sos.ca.gov/cbs.aspx>, (accessed March 7, 2012).

² Nothing shows that [REDACTED] is or ever was a registered California Corporation. See <http://kepler.sos.ca.gov/cbs.aspx>, (accessed March 7, 2012).

³ A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, 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. 1986).

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 predecessor must demonstrate its ability to pay the proffered wage until the date of transfer, after which the successor must establish its continuing ability to pay the proffered wage.

It is unclear from the evidence in the record whether all three companies are the same entity or whether [REDACTED] would represent a successor-in-interest to [REDACTED]. In any further filings, the petitioner would need to establish that both companies operated under the same FEIN, or that [REDACTED] is the valid successor to the initial labor certification applicant before we can properly accept the financial evidence of [REDACTED] as evidence of the petitioner's ability to pay the proffered wage. The petitioner must also resolve and explain the issue related to the

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.⁴

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 26, 2003, 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 a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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 Sonogawa*, 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 record contains Forms W-2 for 2005 through 2008.⁵ However, the Forms W-2 were for entities other than the petitioner on Form I-140, and stated either

absence of its corporate registration. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in 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).

⁵ The record contains inconsistencies with respect to the pay records and the beneficiary's claimed social security numbers. On the Form I-140, Petition for Alien Worker, the petitioner responded "N/A" to the query about the beneficiary's social security number. However, the 2005 through 2008 Forms W-2 contain a social security number. Therefore, based on the inconsistencies in the beneficiary's listed social security number, we cannot conclude that the wages listed in the Forms

Corporation. Moreover, some of the submitted Forms W-2s list the recipient's name as is stated on Form I-140, and other forms show payments to [REDACTED]. Nothing in the record confirms the beneficiary's use of the name [REDACTED].⁶

If, as in this case, the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the required 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

W-2 can be attributed to the beneficiary. In order to definitively accept the Forms W-2 from the petitioner on behalf of the beneficiary, the petitioner must resolve these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁶ The basis for submitting [REDACTED] W-2 statements is unclear.

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).⁷

The record before the director closed on March 2, 2009 with the director’s denial. As of that date, the petitioner did not submit any tax returns as it failed to file the petition with the initial required evidence. On appeal, the petitioner submitted tax returns for 2003 to 2007. However, these tax returns will not be considered in this decision.

The Form I-140 does not list a Federal Employer Identification Number (FEIN) for the petitioner, [REDACTED]. The petitioner submitted tax returns for 2003 through 2005 under the name [REDACTED] and tax returns for 2005 and 2006 under the name [REDACTED]. All the tax returns contain the [REDACTED]. However, from the record, it is not clear that [REDACTED] are the same entity or operate under the same tax identification number. In order to definitively accept these tax returns, the petitioner must show that all three entities operate under the same tax identification number, or that [REDACTED] is the legitimate successor-in-interest to [REDACTED]. It is incumbent

⁷ 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. 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.

⁸ The AAO notes that, if established that all the tax returns could be accepted on behalf of the petitioner’s ability to pay the proffered wage, which has not been established, the returns would show either sufficient net income or net current assets. However, the 2007 and 2008 tax returns submitted do not exhibit any gross receipts, or wages paid. In addition to showing that the tax returns could be accepted, the petitioner would need to establish that it is a valid ongoing entity offering a bona fide job opportunity. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition’s approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an

upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel states that the appeal is based on USCIS' failure to request additional evidence. However, the regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. Accordingly, the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding.

Since 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, as it is not clear that the tax returns submitted can be attributed to the petitioner, the petitioner cannot establish its 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 Sonogawa*, 12 I&N Dec. 612.

The petitioning entity in *Sonogawa* 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

approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

Also, if the entity pays no wages, it is not clear that it would remain the beneficiary's actual employer. In determining whether a petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision). The petitioner must address these issues in any further filings.

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.

Here, the AAO cannot determine the applicability of *Sonegawa*, or whether applicability of *Sonegawa* would be required as it is unclear from the record whether any of the tax returns may be properly attributed to the petitioner.⁹ 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,¹⁰ the petition may not be approved because the petitioner has not established that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date.

Beneficiary Qualifications

The petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer

⁹ Unlike *Sonegawa*, the record does not contain any evidence reflecting the company's reputation or historical growth since its inception. Nor does the record include any evidence or detailed explanation of the corporation's milestone achievements.

¹⁰ 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.

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: [None Listed]

Experience: 4 years in the job offered.

Block 15: [None Listed]

The beneficiary set forth his credentials on the labor certification and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he listed no employment experience.

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.

On appeal, the petitioner submitted a work experience letter from [REDACTED] The letter was signed by [REDACTED] on January 31, 2009. The letter states that the beneficiary worked as a carpenter from January 1981 to March 1983. It is noted that this claimed

experience was not listed on the labor certification, despite the instructions to list all jobs the alien has held during the past three years as well as "any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification." Therefore, this experience cannot be used to establish that the beneficiary meets the experience requirements of the labor certification. *See Matter of Leung*, 16 I&N Dec. 12 (Reg. Comm. 1976), as standing for the proposition that "new employment not listed when the labor certification was certified or when the visa petition was filed is not credible for the issuance of an immigrant visa classification."

Even if the evidence were sufficient under the regulations, the petitioner fails to offer any credible explanation for its omission of this additional work experience from the labor certification when the instructions clearly require the listing of all experience which qualifies the beneficiary for the job offered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, even if the evidence were sufficient under the regulations, which it is not, the experience letter only accounts for 2 years and 2 months of the required 4 years of experience, and, therefore would be insufficient to show the beneficiary has the four years of experience required to meet the terms of the labor certification.

The beneficiary's work experience letter does not provide sufficient independent, objective evidence of his prior claimed work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner has not established that the beneficiary had the required four years of prior experience as a boat carpenter by the priority date.

The record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In addition, the evidence submitted does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.