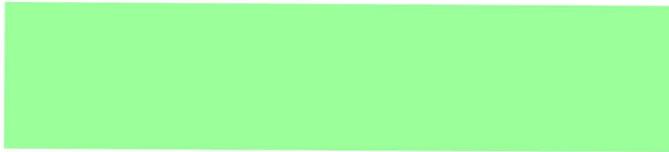


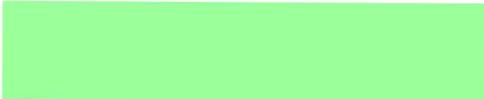
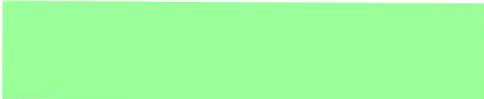


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 03 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. After granting the petitioner's motion to reopen, the AAO affirmed the appeal's dismissal. The matter is now before the AAO on a new motion to reopen by the petitioner. The motion will be granted, the AAO's dismissal of the appeal will be affirmed, and the petition will remain denied.

The petitioner makes and sells inks, primarily for use in the textile screen printing and dyeing industry. It seeks to permanently employ the beneficiary in the United States as a textile chemist. The petition requests classification of the beneficiary as a member of the professions holding an advanced degree under section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A).

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date the DOL accepted the labor certification for processing, is February 7, 2009. See 8 C.F.R. § 204.5(d).

The director concluded that the petitioner failed to demonstrate the beneficiary's qualifying educational requirements for the offered position as required by the labor certification and for classification as an advanced degree professional. Accordingly, the director denied the petition on May 21, 2010.

On May 22, 2013, the AAO dismissed the petitioner's appeal. The AAO found that the petitioner failed to demonstrate that a college or university issued the beneficiary a foreign degree equivalent to a U.S. bachelor's degree. For the same reason, on August 21, 2013, the AAO affirmed the appeal's dismissal after granting the petitioner's motion to reopen.

The petitioner now submits another motion to reopen regarding the beneficiary's educational qualifications for the offered position. The motion states new facts supported by documentary evidence. See 8 C.F.R. § 103.5(a)(2). The AAO therefore grants the petitioner's motion.

The record documents the procedural history of this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

The AAO reviews cases anew, without deferring to previous legal conclusions. See, e.g., *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.¹

¹ The instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

On motion, the petitioner continues to assert that the beneficiary's Associate diploma from [REDACTED] in the United Kingdom constitutes a foreign degree equivalent to a U.S. bachelor's degree in textile chemistry. The petitioner argues that the diploma, which was awarded in 1976, together with the 30-plus years that the beneficiary has since worked in the specialty, qualifies him for the offered position stated on the labor certificate and for classification as an advanced degree professional.

The petitioner submits additional documentary evidence from [REDACTED] (now known as [REDACTED]), where the beneficiary studied before receiving his [REDACTED]. The new materials include: a September 17, 2013 letter from the university's head of registry; a copy of a page from the school's 1972 prospectus regarding "dyeing and textile chemistry;" and copies of the beneficiary's admission records showing examinations and courses taken.

The petitioner argues that the new evidence, together with materials previously submitted, demonstrate: that the beneficiary enrolled at the school for the purpose of studying to obtain the [REDACTED] that a [REDACTED] authorized [REDACTED] to confer degree-level credentials; and that the beneficiary's [REDACTED] is the equivalent of a Bachelor's degree with Honours from an accredited school in the United Kingdom and therefore the equivalent of a U.S. bachelor's degree.

Qualifications for the Offered Position and Classification Sought

Section 203(b)(2)(A) of the Act provides immigrant classification to qualified members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The term "advanced degree" means:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

The following materials must accompany a petition for an advanced degree professional:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

8 C.F.R. § 204.5(k)(3)(i).

In addition, a petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications for the offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states the minimum requirements for the offered position of textile chemist as a U.S. bachelor's degree or a foreign equivalent degree in textile chemistry and 60 months (5 years) of experience in the job offered.

The record contains two evaluations of the beneficiary's foreign educational credentials for commercial evaluation services and four letters from U.S. university professors, all stating that the beneficiary's foreign educational credentials are equivalent to a U.S. bachelor's degree.² However, the November 13, 2000 evaluation by [REDACTED] for [REDACTED] concludes that the beneficiary's [REDACTED] "combined" with his prior studies for technician certificates, equals a U.S. Bachelor of Science degree.

As discussed in the prior decisions of the director and the AAO, Ms. [REDACTED]'s evaluation conflicts with other expert opinions in the record and does not demonstrate the beneficiary's educational qualifications for the offered position specified on the labor certification or for classification as an advanced degree professional. Parts H.4 and H.9 of the ETA Form 9089 state that the position requires a U.S. bachelor's degree or a foreign equivalent degree. In Part H.8 of the form, the petitioner indicated that "no" alternate combination of education and experience was acceptable. The labor certification therefore states the minimum educational requirements for the offered position as a U.S. bachelor's degree or a single foreign equivalent degree.

² USCIS may, at its discretion, treat expert statements as advisory opinions. *See Matter of Caron Int'l Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS retains ultimate authority to determine a petitioner's eligibility for the benefit sought. *Id.* Expert letters are not presumptive evidence of eligibility. USCIS may evaluate whether the contents of the letters support the petitioner's eligibility. *Id.* at 795. USCIS may afford less weight to opinions that are uncorroborated, inconsistent with other information, or questionable in any way. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg'l Comm'r 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert testimony may be given different weight depending on the extent of the expert's qualifications and/or the relevance, reliability, and probative value of the testimony).

Classification as an advanced degree professional also requires a U.S. bachelor's degree or a single foreign degree equivalent (followed by 5 years of progressive experience in the specialty). An advanced degree equivalency requires "[a] United States baccalaureate degree or a *foreign equivalent degree*." 8 C.F.R. § 204.5(k)(2) (emphasis added). The grammatical number of the regulation is singular, indicating that the advanced degree equivalency requires a single foreign equivalent degree, as opposed to a combination of multiple foreign education credentials.

The legislative history of the Immigration Act of 1990, Pub. L. 101-649 (1990), also supports the interpretation that an advanced degree equivalency requires a single foreign degree equivalent to a U.S. bachelor's degree. Congress' conference committee on the 1990 act stated: "[In] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. 101-955 (Oct. 26, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6786.

Also, the record does not establish that the beneficiary obtained the foreign equivalent of a U.S. bachelor's degree in the specified field of textile chemistry.

The labor certification allows for only one field of study: textile chemistry. In Part H.7 of ETA Form 9089, the petitioner states that "no" alternate field of study is acceptable. But the educational evaluations and letters from professors in the record equate the beneficiary's [REDACTED] to U.S. bachelor's degrees in different fields.

The letter from [REDACTED] of [REDACTED] states that the beneficiary's [REDACTED] equals a U.S. Bachelor of Science degree in "color science." The letters of Dr. [REDACTED] of [REDACTED] and Dr. [REDACTED] of [REDACTED] do not identify any specific equivalent fields of study. Dr. [REDACTED] letter states that the beneficiary's [REDACTED] allows him to pursue U.S. graduate studies in a "textile related" field, while Dr. [REDACTED] letter states that his [REDACTED] is suitable to pursue U.S. graduate studies in "fashion and textiles."

Therefore, at least three of the professors' letters do not establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in the required field of textile chemistry. Moreover, the inconsistencies among the evaluations and the letters cast doubt on their accuracy and reliability. *See Matter of Ho*, 19 I&N Dec.582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

In addition, the record does not establish that a college or university issued the beneficiary's [REDACTED]. As indicated in the AAO's prior decisions, the beneficiary of an advanced degree professional petition must possess, at a minimum, a degree from a college or university that is either a U.S. bachelor's degree or a foreign equivalent degree.

When the Service proposed the advanced degree regulations at 8 C.F.R. § 204.5(k), it stated that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." 56 Fed. Reg. 30703, 30706 (July 5, 1991) (emphasis added). Also, members of the

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professions in the third preference category must submit “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). The AAO cannot conclude that an advanced degree professional in a higher preference category enjoys lower requirements without undermining the immigrant preference scheme of Congress. *See APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. Sept. 15, 2003) (citing *Silverman v. Eastrich Multiple Inv. Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995)) (the basic tenet of statutory construction - to give effect to all provisions - also applies to regulatory construction).

The record contains a copy of the March 26, [REDACTED] Royal Charter of Incorporation for [REDACTED] [REDACTED] the organization that issued the beneficiary’s [REDACTED]. The charter states the society’s objectives, which include the encouragement, initiation, and stimulation of education and research in the field of color science. The charter also outlines three classes of the society: fellows; associates; and members corporate. But the charter does not expressly authorize the society to confer educational degrees, nor does it state that an [REDACTED] is the equivalent of a bachelor’s degree.

The [REDACTED] appears to be a professional organization, rather than a college or university. Its website states: “The [society] is a professional, chartered society.” *See* “About Us,” [REDACTED] (accessed Dec. 6, 2013). The petitioner itself concedes in its letter accompanying the instant motion that the society is “not itself a college or university.” Thus, the petitioner has not established that a college or university issued the beneficiary a foreign degree equivalent to a U.S. bachelor’s degree.

For the foregoing reasons, the AAO concludes that the petitioner has failed to establish that the beneficiary possesses the minimum educational qualifications for the offered position as required by the labor certification and for classification as an advanced degree professional.

Ability to Pay the Proffered Wage

Beyond the previous decisions of the director and the AAO, the record also does not establish the petitioner’s continuing ability to pay the beneficiary’s proffered wage.³

A petitioner must establish its ability to pay the beneficiary’s proffered wage as of the petition’s priority date and continuing until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax

³ The AAO may deny a petition that fails to comply with the technical requirements of the law, even if the director did not identify all of the grounds for denial in the initial decision. *See Spencer Enters., 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*, 381 F.3d at 145 (noting that the AAO conducts review on a *de novo* basis).

returns, or audited financial statements” for each relevant year, beginning with the year of the petition’s priority date. *Id.*

As previously indicated, the instant petition’s priority date is February 7, 2009. The record contains a copy of the petitioner’s 2008 federal income tax return. But the record does not contain copies of its annual report, federal tax return, or audited financial statements for 2009 pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) .

The petitioner submitted a copy of a profit and loss statement for the period from January 2009 through September 2009. The profit and loss statement, however, is not accompanied by an auditor’s report advising that the financial information in the statement is presented fairly in all material respects. The record therefore does not establish that the profit and loss statement is audited as the regulation at 8 C.F.R. § 204.5(g)(2) requires. Unaudited financial statements reflect only the representations of management. Management’s unsupported representations do not establish a petitioner’s ability to pay the proffered wage. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190, 193 (Reg’l Comm’r 1972)) (going on record without supporting documentary evidence does not meet the burden of proof in these proceedings).

The AAO’s Notice of Intent to Dismiss (NOID) the petitioner’s appeal, dated March 20, 2013, requested copies of the petitioner’s annual reports, federal tax returns, or audited financial statements for 2010, 2011, and 2012. In response, the petitioner provided copies of its federal tax returns for 2010 and 2011, and a copy of a 2012 balance sheet. The record contains no evidence that the balance sheet was audited. The petitioner also does not explain the absence of the 2012 documents required by the regulation at 8 C.F.R. § 204.5(g)(2) and requested by the AAO’s NOID. *See* 8 C.F.R. § 103.2(b)(14) (“Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the beneficiary request.”)

The petitioner’s failure to provide annual reports, federal tax returns, or audited financial statements for each relevant year, from the year of the petition’s priority date onward, warrants dismissal of the appeal. While a petitioner may submit additional evidence to establish its ability to pay the proffered wage, it may not substitute additional materials for evidence required by regulation.

Accordingly, the AAO finds that the petitioner has failed to establish its continuing ability to pay the beneficiary’s proffered wage from the petition’s priority date onward.

Intent to Employ in the Offered Position

Also, the record is unclear as to whether the petitioner intends to employ the beneficiary in the offered position of textile chemist.

A labor certification remains valid only for the “particular job opportunity” stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2); *see also Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 283

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(Reg'l Comm'r 1979) (upholding the Service's denial of a petition based on a violation of the regulation at 20 C.F.R. § 656.30(c)(2)). A petitioner must also establish that it intends to employ the beneficiary pursuant to the terms of the labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (the Service properly denied a petition where the petitioner failed to establish that he intended to employ the beneficiary as a live-in domestic worker as the labor certification specified).

In the instant case, the offered position stated on the labor certification is textile chemist, with a proffered wage of \$26.59 per hour, or \$55,307.20 per year for a 40-hour work week.⁴ However, evidence indicates that the petitioner began employing the beneficiary in a more responsible position at a greater wage rate before the labor certification's filing.

The record shows that the beneficiary petitioned for himself as an alien of extraordinary ability under section 203(b)(1)(A) of the Act, concurrently filing I-140 petitions with applications for adjustment of status in 2007 and 2008. Forms G-325A, Biographic Information, which accompanied the adjustment applications and which the beneficiary signed and dated on October 15, 2007 and June 23, 2008, respectively, state that he had worked for the petitioner as "[redacted]" of its "[redacted]" since March 2003. Both Forms I-140, which the beneficiary signed and dated on November 2, 2007 and June 23, 2008, respectively, state his occupation as "[redacted]" of "[redacted]." and his annual salary as \$93,000.

The beneficiary also stated on the instant labor certification that he worked as "president" for "[redacted]" from August 6, 2008 until at least February 7, 2009, the date the labor certification was filed.⁵ He described "[redacted]" as an "ink technology/manufacturing" business at the same address as the petitioner. He stated that his job duties as president included: directing and coordinating the organization's financial and budget activities; conferring with board and staff members to discuss issues, coordinate activities, and resolve problems; analyzing operations to evaluate the performance of the company and its staff;

⁴ The petitioner's Form I-140, Immigrant Petition for Alien Worker, states a proffered wage of \$1,800 per week, which the AAO calculates as equaling \$93,600 per year. However, the labor certification, the petitioner's December 15, 2009 letter of support, and the petitioner's April 17, 2013 response to the AAO's NOID state the lesser proffered wage amount of \$26.59 per hour, or \$55,307.20 per year. The preponderance of the evidence establishes the lesser amount as the proffered wage.

⁵ The beneficiary's identification of his employer on his 2007 and 2008 Forms G-325A and I-140 as the "[redacted]" of the petitioner appears to refer to "[redacted]". However, online records of the California Secretary of State's Office indicate that "[redacted]" was established on April 28, 2003 and is a separate entity from the petitioner. See "[redacted]" (accessed Dec. 7, 2013). The "[redacted]" online records state that the beneficiary and the petitioner's president are officers of "[redacted]" and that the beneficiary is its registered agent. *Id.* USCIS records show that the beneficiary has obtained U.S. nonimmigrant visa approvals to work for the petitioner, but not for "[redacted]".

determining areas of potential cost reductions, program improvements, and policy changes; and directing, implementing, and planning policies, objectives, and activities of the organization. The beneficiary stated that the petitioner's president supervised him in this position.

The beneficiary also stated on the labor certification that he worked for the petitioner as "technical manager" from March 29, 2003 to August 5, 2008. He stated that his job duties as technical manager included: evaluating the use, application, and purchase of chemicals; formulating alternate products and minimizing costs; improving efficiency and productivity; initiating development of new procedures and methods; coordinating and harmonizing laboratory techniques; and providing management with targets and deadlines for cost savings. He stated that the petitioner's president also supervised him in this position.

The labor certification states that the job duties of the offered position of textile chemist include: analyzing compounds; developing, researching, improving, and customizing products, formulas, and processes; operating a spectrophotometer and interpreting its findings; and conducting, compiling, and analyzing test information.

The occupational titles, job duties, and wages stated on the labor certification and the 2007 and 2008 Forms G-325A and I-140 indicate that the petitioner began employing the beneficiary before the petition's priority date in more responsible and higher-paying positions than the offered position. The statements on the labor certification and immigration forms suggest that the petitioner did not intend to employ the beneficiary in the less-responsible and lower-paying offered position, as stated on the labor certification. *See Matter of Ho*, 19 I&N Dec. at 591-92 (a petitioner must resolve inconsistencies in the record by independent, objective evidence).

The AAO did not advise the petitioner of this derogatory information and afford the petitioner an opportunity to rebut the information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). Therefore, the AAO makes no finding regarding the petitioner's intent to employ the beneficiary in the offered position. However, in any future filings regarding this job opportunity, the petitioner must submit evidence to establish its intent to employ the beneficiary in the offered position stated on the labor certificate.

Bona Fides of the Job Opportunity

In addition, the record is unclear regarding the *bona fides* of the job opportunity in this matter.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner must demonstrate, when asked, that the job opportunity stated on the labor certification is *bona fide* and was clearly available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545, 1987 WL 34178 (BALCA Oct. 15, 1987) (*en banc*). A job opportunity might not be *bona fide* if the beneficiary is a "blood" relative of the petitioner or has other special relationships to the petitioner, such as financial, marital, and/or friendship ties. *See Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942 (BALCA May 15, 2000).

As indicated previously, online California records indicate that the beneficiary and the petitioner's president have been principals together in [REDACTED] since its establishment in 2003. See [REDACTED] (accessed Dec. 6, 2013). Online records of the [REDACTED] Secretary of State's Office also show that the petitioner's president, the beneficiary, and the beneficiary's wife are officers of [REDACTED] a cosmetics company established on July [REDACTED] 2008. See [REDACTED] [REDACTED] (accessed Dec. 6, 2013). USCIS records also show that the petitioner petitioned for the beneficiary's wife to obtain nonimmigrant work visa status in 2002 and 2003.

The apparent business relationships between the petitioner's president and the beneficiary and the beneficiary's wife suggest that the instant job opportunity of textile chemist is not *bona fide* and is not clearly available to U.S. workers. Because the AAO did not advise the petitioner of this derogatory information and afford the petitioner an opportunity to rebut the information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), the AAO makes no finding regarding the *bona fides* of the job opportunity. However, in any future filings regarding this job opportunity, the petitioner must submit evidence to establish that the job opportunity was clearly available to U.S. workers.

Conclusion

In summary, the AAO grants the petitioner's motion to reopen. After careful review of the record and the petitioner's evidence on motion, the AAO finds that the petitioner has not established the beneficiary's minimum educational qualifications for the offered position as required by the labor certification and for classification as an advanced degree professional. In addition, the AAO finds that the petitioner has failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

The petitioner's appeal will be dismissed for the reasons stated above, with each considered an independent and alternative basis for dismissal. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion is granted, the AAO's decision of August 21, 2013 is affirmed, the appeal is dismissed, and the petition remains denied.