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U.S. Citizenship
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Services

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FILE:



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Office: TEXAS SERVICE CENTER

Date: DEC 16 2005

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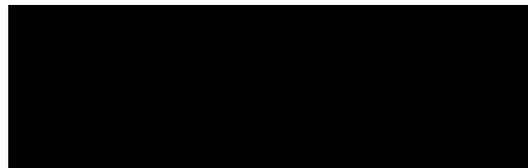
Petitioner:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a wholesaler and retailer of generators and welders. It seeks to employ the beneficiary permanently in the United States as a Wholesaler II. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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 and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 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 Department of Labor. 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 U.S. Department of Labor 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 July 31, 2001. The proffered wage as stated on the Form ETA 750 is \$13 per hour, which equals \$27,040 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

On the petition, which was submitted on January 13, 2003, the petitioner stated that it was established on December 15, 1994 and that it employs two workers. As no Form ETA 750, Part B was submitted with the petition, whether the beneficiary claimed to have worked for the petitioner was unclear. The petition states that the petitioner intends to employ the beneficiary in Miami, Dade County, Florida. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Pompano Beach, Broward County, Florida. The Form ETA 750 shows that the petitioner originally filed the Form ETA 750 for [REDACTED] rather than the current beneficiary. The petitioner was substituted as beneficiary on the Form ETA 750.

With the petition, the petitioner submitted no evidence pertinent to its ability to pay the proffered wage.

As to the petitioner's employment experience, the petitioner provided an undated letter on the letterhead of [REDACTED]. That letter states that the beneficiary worked for that company from November 2000 to December 2002, just over two years, as a generator wholesaler. The letterhead of HFL reveals that it purports to occupy the premises at [REDACTED] the same address that the petitioner, [REDACTED] Incorporated, listed as its own on the Form ETA 750. The letter appears to have been signed by [REDACTED] who is the petitioner's owner's spouse and the petitioner's vice-president.

On June 30, 2003 the Texas Service Center issued a Notice of Intent to Deny in this matter. That Request for Evidence noted that [REDACTED] who represented the petitioner in the labor certification process, has been convicted of various immigration violations including conspiracy to commit immigration fraud by making false representations in multiple visa petitions.

The Request for Evidence asked that the petitioner provide, *inter alia*, (1) the petitioner's physical address, (2) the address at which the beneficiary would be employed, (3) a current lease for the location of the petitioner's facilities, (4) a copy of the petitioner's 2001 and 2002 tax returns, (6) an organizational chart listing all of the petitioner's employees, (7) copies of Form W-2 Wage and Tax Statements showing wages the petitioner paid to its employees during the previous year, (8) Form 941 Quarterly Returns showing wages the petitioner paid to its employees, (9) sworn statements from the beneficiary's previous employers attesting to the beneficiary's employment including the exact dates of that employment and the beneficiary's title and duties, (10) evidence of the wages paid by that employer, (11) a statement of the number of alien worker petitions the petitioner has submitted, and (12) the number of those aliens the petitioner continues to employ.

In response the petitioner's new counsel submitted, *inter alia*, (1) a letter, dated July 23, 2003, from the petitioner's current counsel, (2) an amended version of the Form I-140 petition, (3) an undated letter purporting to be from the petitioner's landlord, (4) a notarized statement from [REDACTED] dated July

17, 2003, indicating that the beneficiary would be employed at [REDACTED] (5) a copy of the petitioner's Articles of Incorporation as amended on June 23, 2003 and filed on June 26, 2003 showing that the petitioner's officers are [REDACTED] President, and [REDACTED] Vice President, (6) the petitioner's 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation, (7) receipts documenting revenue from sales and service, (8) the petitioner's organizational chart, (9) copies of 2001 and 2002 W-2 forms, (10) photocopies of checks drawn against the petitioner's bank account to the order of the beneficiary, and (11) a notarized statement from the beneficiary, dated July 16, 2003.

Counsel's letter states that the petitioner filed petitions for five alien workers, four of whom are still working for the petitioner. The amended version of the Form I-140 petition indicates that the petitioner's address is [REDACTED]. Counsel did not explain how the petitioner's address came to be misstated as [REDACTED] on the original petition. Counsel also did not then explain why [REDACTED] is the same address that appears on the letterhead of the beneficiary's alleged previous employer, [REDACTED]. That revised petition also states that the petitioner's net annual income is \$155,322.

The petitioner's landlord's letter states that the petitioner has been renting the 2,500 square foot building at [REDACTED] since 1998. Counsel did not provide a copy of the petitioner's lease as requested. Counsel gave no reason for that omission. The petitioner also failed to submit the requested Form 941 quarterly returns or any reason for that omission.

The petitioner's tax returns show that the petitioner is a corporation, that it incorporated on December 15, 1994, and that it reports taxes pursuant to accrual convention and the calendar year.

During 2001 the petitioner declared ordinary income of \$20,878. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

During 2002 the petitioner declared ordinary income of \$4,787. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's organizational chart shows that, in addition to the petitioner's owner and owner's spouse, who are the petitioner's president and vice-president, respectively, the petitioner employs four other workers. That number corresponds to the number of alien workers the petitioner's counsel states it employs. The positions held by those workers, the petitioner's entire work force other than its president and vice-president, include two wholesalers, a manager, and a public relations employee. The Public Relations employee listed on that organizational chart is [REDACTED] who is presumably the beneficiary. This office notes that the labor certification in this matter is for a wholesaler, rather than a public relations worker, and that the petition is also for a wholesaler.

The various receipts show that the petitioner continues to conduct business, selling generator parts and servicing generators. The services described include oil changes and installation of various parts.

The 2001 W-2 forms show that the petitioner paid wages of \$10,400 during that year to both its president and its vice-president. The 2002 W-2 forms show that the petitioner paid wages of \$5,200 to both its president and vice-president during that year. No W-2 forms were submitted for any other employees.

The photocopied checks purport to show that the petitioner paid [REDACTED] presumably the beneficiary, \$500 weekly from June 28, 2002 to April 25, 2003 and \$600 weekly from May 2, 2003 to June 20, 2003. Those photocopies contain no evidence that those checks were ever negotiated.

The beneficiary's July 16, 2003 notarized statement attests that he owned a company named [REDACTED] [REDACTED] from January 1995 to February 1998, in which capacity he performed public relations duties.

On December 18, 2003 the Texas Service Center issued a second Notice of Intent to Deny in this matter. In that notice the Service Center requested additional evidence pertinent to the petitioner's ability to pay the proffered wage during 2002 and 2003.¹

In response, counsel submitted (1) copies of portions of the petitioner's 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) the petitioner's compiled financial statements for January through November 2003, and (4) monthly statements pertinent to the petitioner's bank account.

This office notes that, because the priority date in this matter is July 31, 2001, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Further, the petitioner's submission of portions its 2000 tax return was not responsive to the Service Center's request for evidence pertinent to its ability to pay the proffered wage during 2002 and 2003. Counsel did not state what proposition he intended to support by providing portions of the petitioner's 2000 tax returns. Absent any argument pertinent to those forms, the figures on them shall not be considered in the determination of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The director denied the petition on May 10, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience. In that decision the director speaks of the petitioner's need to "overcome the presumption of fraud in this case."

On appeal, counsel asserts that no presumption of fraud should attach to this case based solely upon the conviction of the petitioner's former attorney and without evidence pertinent to fraud in this particular case. Counsel further argues that the evidence submitted is sufficient to demonstrate that the beneficiary has the requisite employment experience and that the petitioner has the ability to pay the proffered wage.

With the appeal counsel submits what purport to be computer printouts of the checks the petitioner wrote from January 5, 2001 to April 30, 2004. That printout purports to show that the petitioner paid [REDACTED]

¹ The December 18, 2003 Request for Evidence misstated the amount of the proffered wage.

and [REDACTED] both of whom are presumably the beneficiary, \$500 per week from January 5, 2001 to April 18, 2003, as well as an additional check for \$200 on November 2, 2001 and an additional check on December 7, 2001 for \$350. The memorandum pertinent to the November 2, 2001 check carries the legend, "Boat Show," as do eight of the other checks. The memorandum pertinent to the December 7, 2001 check is "parts." The meaning of those memoranda is unclear, but they do not appear to support the proposition that those checks represent payment of regular wages for performance of the duties of the proffered position.

The printouts further show that the petitioner paid [REDACTED] \$600 per week from April 25, 2003 to December 5, 2003, \$700 per week from December 12, 2003 to March 12, 2004, and \$1,000 per week from March 19, 2004 to April 30, 2004.

This office concurs with counsel that the fact that the petitioner's original attorney was convicted of multiple counts of immigration fraud does not create a presumption fraud in this case. It does, however, create an articulable suspicion.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The evidence that the petitioner paid wages to the beneficiary consists of photocopies of checks drawn by the petitioner to the order of the beneficiary and computer printouts describing those and other checks allegedly drawn.

The checks were photocopied four to a page, showing the front of those checks only. The photocopies contain no evidence that the checks were ever presented for payment. Under the circumstances, those checks are not reliable evidence that the petitioner paid wages to the beneficiary.

Moreover, the printouts do not appear to have been produced and provided by the petitioner's bank, but either by a bookkeeping service or by the petitioner itself. The record contains no evidence to indicate that those printouts are accurate.

The printouts of checks allegedly paid to the beneficiary show that the petitioner paid him a total of \$20,050 during 2001, \$26,000 during 2002, and \$27,100 during 2003, and \$14,300 from January through April of 2004.

The petitioner's 2001 tax return shows that it paid \$20,800 in Compensation to officers. That amount precisely corresponds to the wage payment amounts shown on the 2001 W-2 forms issued to the petitioner's president and vice-president. The return shows that the petitioner paid Salaries and wages of \$9,770. Schedule A does not show any additional Cost of labor. At Line 5, Other Costs the Schedule A show expenses of \$22,710, referring to Statement 3 for their itemization. Statement 3, however, was not provided with the tax return submitted. This office is unable to locate any line item that includes wages of \$20,500 paid to the beneficiary during 2001 as the printouts indicate.

The petitioner's 2002 tax return shows that it paid \$10,400 in Compensation to officers. That amount precisely corresponds to the wage payment amounts shown on the 2002 W-2 forms issued to the petitioner's president and vice-president. The return shows that the petitioner paid Salaries and wages of \$1,340 and incurred no additional Cost of labor. Schedule A shows that the petitioner incurred Line 5, Other costs of \$26,000, and refers to Statement 4 for their itemization. Statement 4 shows that the petitioner paid that amount to subcontractors. Although that amount corresponds to the payments the petitioner allegedly made to the beneficiary, reason exists to believe that other amounts are included in the petitioner's subcontractor expenses.

As was noted above, the invoices provided show that the petitioner services generators. The services it provides include changing engine oil and installation of parts. The only workers the petitioner employs, however, are its president and vice-president, two wholesalers, a manager, and the beneficiary as a public relations employee. The petitioner has not demonstrated, nor even alleged, that any one of those employees is involved in servicing generators. Without evidence of any employee capable of performing mechanical duties, this office believes that service work was performed by contract labor and does not find convincing the assertion that all of the petitioner's \$26,000 subcontractor expense was paid to the beneficiary, either as a wholesaler or a public relations worker.

Under these circumstances, neither the photocopies of checks nor the computer printouts pertinent to checks are reliable evidence that the petitioner paid any wages to the beneficiary. The petitioner has failed to demonstrate that it paid any wages to the beneficiary during 2001 or 2002.

Bank statements were submitted in response to the second Notice of Intent to Deny in this case. Any reliance on those bank statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it 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.² 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 reported on its tax returns.

Compiled financial statements were also submitted in response to the second Notice of Intent to Deny issued in this case. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

ability to pay the proffered wage. Those unaudited financial statements will be accorded no evidentiary weight.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 submitted no reliable evidence to establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

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 CIS, 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$27,040 per year. The priority date is July 31, 2001.

During 2001 the petitioner declared ordinary income of \$20,878. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner

submitted no reliable evidence of any other funds available to it during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared ordinary income of \$4,787. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner cannot show the ability to pay any portion of the proffered wage out of its net current assets. The petitioner submitted no reliable evidence of any other funds available to it during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The second Notice of Intent to Deny in this case was issued on December 18, 2003. On that date the petitioner's 2003 tax return was unavailable. The petitioner is excused from submitting evidence pertinent to 2002.

The evidence submitted does not establish that the petitioner had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that ground.

As per [REDACTED] the petitioner must show that the beneficiary had the requisite two years of qualifying experience as of the July 31, 2001 priority date. The employment verification letter signed by the petitioner's owner's wife states that the beneficiary began working for [REDACTED] at some time during November 2000. From the date the beneficiary allegedly began working for the [REDACTED] until the July 31, 2001 priority date is a maximum of nine months, far short of the requisite two years of qualifying employment. Even if the employment verification signed by the petitioner's owner's wife were credible evidence, it would be insufficient to show eligibility.

The other employment verification in this case was submitted in response to the first Notice of Intent to Deny in this matter and was attested to by the beneficiary himself. Especially under the circumstances of this case, that employment verification is insufficiently reliable to demonstrate that the beneficiary has the requisite employment experience. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, in the first Notice of Intent to Deny, the Service Center requested evidence showing the wages paid to the beneficiary by the employers with whom he claims qualifying employment. Despite that request, the petitioner submitted no evidence of any wages the beneficiary may have earned while allegedly self-employed. Because that evidence was not submitted, despite the request, the credibility of the employment verification issued by the beneficiary is undermined yet further.

Finally, even if believed, that employment verification does not attest to employment in the proffered position, Wholesaler II, but in public relations. Even if it were credible, that employment verification does not demonstrate the performance of any qualifying employment and is irrelevant to the beneficiary's eligibility for the proffered position.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. The petition was correctly denied upon this additional ground.

Additional issues exist in this matter that were not discussed in the decision of denial. In the first Notice of Intent to Deny issued in this case the Service Center requested that the petitioner provide its Form 941 quarterly returns and a lease showing possession of the premises at which it allegedly conducts business.

Although the petitioner provided a letter from its purported landlord, it failed to provide the requested lease and failed to provide any reason for that omission. Similarly it failed to provide its Form 941 quarterly returns or any reason for that omission. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional ground.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.

Further, the petitioner claimed, on the original petition, to operate its business at [REDACTED] in [REDACTED]. On the Form ETA 750 and in the response to the first Notice of Intent to Deny, the petitioner stated that it operates its business at [REDACTED] and that it intends to employ the beneficiary there. The petitioner never explained, however, how an incorrect address came to be on its original petition. Because the decision of denial did not rely on that discrepancy, however, and the petitioner was not obliged to address it on appeal, today's decision does not rely, even in part, on that discrepancy.

Further still, on January 13, 2003 the petitioner stated, on the Form I-140 petition, that it had two employees. The 2001 and 2002 W-2 forms and figures from the petitioner's 2001 and 2002 tax returns show that during those years the petitioner employed its owner and its owner's spouse, and no one else. In response to the first Notice of Intent to Deny, issued June 30, 2003, however, the petitioner submitted an organizational chart showing that, in addition to employing the petitioner's owner and owner's spouse as president and vice-president, it employed two wholesalers and a manager, and that it employed the beneficiary in public relations.³

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.

³ That the beneficiary worked for the petitioner in public relations at the time that organizational chart was prepared does not necessarily contradict the petitioner's assertion that it intends to employ him as a wholesaler. It is, however, a suspicious circumstance, especially in the context of a petition in which the authenticity of the evidence is already suspect.



ORDER: The appeal is dismissed.