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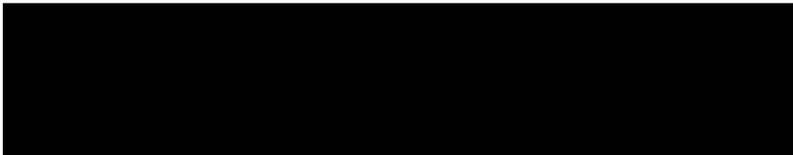
12/16

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 17 2008  
SRC 07 219 51829

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape and snow removal business. It seeks to employ the beneficiary permanently in the United States as a landscape supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 1, 2008 decision, the single issue for the denial was whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [United States Citizenship and Immigration Service].

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 U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment

Certification as certified by the 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).

In the instant matter, the Form ETA 750 was accepted on December April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17 an hour, or \$35,360 per year. The Form ETA 750 states that the position requires one year in the proffered job or two years of work experience as a landscaper.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup>

Relevant evidence submitted on appeal includes counsel's statement. Counsel also submits the petitioner's amended 2001 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation; an amended Form 1040, US. Individual Income Tax Return, for the petitioner's owner and spouse for tax year 2001; a document entitled "Employee Quick Report" for January 1 through July 24, 2008 that lists the beneficiary's weekly wages from June 13, 2008 to July 18, 2008; the petitioner's unaudited Profit and Loss statement for the period January 1 through July 27, 2008, as well as a page that lists Unpaid Bills Detail as of July 23, 2008; a copy of IRS correspondence dated January 3, 2005 to the petitioner's owner and spouse explaining the results of an IRS audit of the petitioner's owner's IRS Form 1040, and the resulting increased taxes based on the audit; a copy of the petitioner's Find Report from January through December 2004 that lists its legal fees, and finally, copies of two bills addressed to the petitioner for work performed by [REDACTED], Fraser, Michigan in 2002 for tax preparation, and in 2003 and 2004 for the IRS audit.

The record also contains the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 through 2006. In response to the director's Request for Evidence (RFE) dated January 31, 2008, the petitioner submitted a financial statement for the years December 31, 2001 through December 31, 2007. This document includes a statement of [REDACTED], C.P.A., Livonia, Michigan, dated March 18, 2008, that stated he reviewed the document. The remainder of the document includes the petitioner's comparative statement of financial condition as of December 31, 2001 to December 2007, and a comparative statement of operations from January 2001 to December 2007. In the petitioner's response to the RFE, counsel stated the comparative statement indicated the wages paid from tax year 2001 to tax year 2007. Counsel noted that the petitioner had paid total wages of

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

\$1,007,695.28 during the relevant period of time.<sup>2</sup> Counsel also noted that the petitioner did not employ the beneficiary continuously, but rather on an as needed basis.<sup>3</sup>

On appeal, counsel asserts that since 2000, the petitioner has had tax problems caused by its former accountant. Counsel states that in tax years 2000 and 2001, the petitioner's tax returns required amendment, and, that, upon audit, the IRS uncovered problems with both returns that resulted in the petitioner's owners paying a significant tax bill, plus interest and penalties. Counsel states that the increased tax bills were paid in 2004 that further reduced the petitioner's income, and that the petitioner also incurred professional fees in 2003 that further reduced the petitioner's income in 2004. Counsel also states that the petitioner made business decisions that tended to reduce the amount of profits that it reported to IRS, and on its tax returns. Counsel notes that in 2004, the petitioner decided to purchase certain trucks and equipment, thereby depleting its income and reducing its tax bill. Counsel finally asserts that the petitioner, during the period of time in question, has had the ability to pay the beneficiary the proffered wage, and has, in fact, done so.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$900,000, and to currently employ twenty-five workers. On the Form ETA 750, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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<sup>2</sup> The petitioner's tax returns reflect low salary payments in most years and \$0 (zero) salaries paid in tax years 2002 and 2003. The petitioner's tax returns do reflect some additional costs of labor paid and some subcontracting fees; however, counsel does not provide a breakdown of salaries paid per year from 2001 to 2007, or where these amounts are reflected on the petitioner's tax returns. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

<sup>3</sup> The record only reflects the "Quick Report" payments to the beneficiary from June 13, 2008 to July 18, 2008. The record does not contain any W-2 statements, Forms 1099, pay stubs or evidence of pay for any other year.

On appeal, the petitioner submitted a reviewed comparative statement of the petitioner's operations and financial condition for the years 2001 to 2007. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also submits the petitioner's amended 2001 Form 1120S and the petitioner's owner's amended Form 1040 for tax year 2001. The AAO notes that any amendments to the petitioner's owner's tax returns would not be material in this proceeding. A corporation is a separate and distinct legal entity from its owners and shareholders, and, thus, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." With regard to the petitioner's amended tax return, the record contains no evidence that the IRS received the amended tax return.<sup>4</sup> The record does identify an IRS audit of the petitioner's owner's tax return and legal fees paid by the petitioner during 2003 and 2004. In this proceeding the AAO will examine both the petitioner's initial and amended tax returns for evidence of the petitioner's ability to pay the proffered wage.

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 petitioner in its response to the director's RFE indicated that it employed the beneficiary on an as needed basis but did not submit any evidentiary documentation regarding wages paid such as W-2 Forms or IRS Forms 1099-MISC. On appeal, the petitioner submits only an Employee Quick Report for January 1, through July 24, 2008 that indicates the beneficiary received five checks from the petitioner for a total of \$2,834.55 in wages in this period of time. Thus, the petitioner cannot establish it had the ability to pay the proffered wage through prior wages it paid to the beneficiary as of the 2001 priority date and through tax year 2006.

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<sup>4</sup> Upon examination of both returns, the AAO notes that the amended tax returns indicate greater gross receipts or sales during tax year 2001, and an increased net income.

The petitioner, therefore, has to establish its ability to pay the entire proffered wage from tax year 2001 to 2006.<sup>5</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,360 per year from the priority date:

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<sup>5</sup> The AAO notes that the record of the proceeding closed as of April 23, 2008 with the petitioner's response to the director's RFE. At that time, the petitioner's tax return for tax year 2007 may have been available. Since the petitioner's 2008 tax return would not have been available at the time the record closed, the AAO will not discuss further whether the petitioner had the ability to pay the difference between the beneficiary's actual wages in tax year 2008 and the proffered wage. The AAO will only examine the petitioner's initial and amended tax return for 2001, and its tax returns for tax years 2002 through 2006.

- In 2001, the Form 1120S stated a net income<sup>6</sup> of \$5,656.
- In 2001, the amended Form 1120S stated a net income of \$54,696.<sup>7</sup>
- In 2002, the Form 1120S stated a net income of -\$15,363
- In 2003, the Form 1120S stated a net income of \$34,746.
- In 2004, the Form 1120S stated a net income of \$10,657.
- In 2005, the Form 1120S stated a net income of \$51,465.
- In 2006, the Form 1120S stated a net income of \$44,790.

For the years 2005 and 2006, the petitioner had sufficient net income to pay the proffered wage of \$35,360. However, the petitioner did not have sufficient net income in tax years 2001, 2002, 2003, and 2004, to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end

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<sup>6</sup>Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its Schedule K for tax years 2001 to 2006, the petitioner's net income is found on Schedule K, for all tax years examined in this proceeding.

<sup>7</sup> The AAO notes that the petitioner did not submit any proof of filing the amended 2001 return with IRS. Without evidence of filing the amended tax return with IRS, amended tax returns are not accepted as sufficient evidence. Therefore, the petitioner cannot establish its ability to pay the proffered wage in 2001 based on the net income on its amended tax return.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were -\$19,985.
- The petitioner's net current assets during 2001 based on its amended tax return were -\$19,988.
- The petitioner's net current assets during 2002 were -\$100,436.
- The petitioner's net current assets during 2003 were -\$17,884.
- The petitioner's net current assets during 2004 were -\$184,077.

As the petitioner's tax returns reflect negative net current assets in each of the above years, the petitioner did not have sufficient net current assets during tax years 2001 to 2004 to pay the proffered wage. Therefore, from the date the Form ETA 750 was filed with the Department of Labor, the petitioner identified on the instant I-140 petition had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, with the exception of tax years 2005 and 2006.<sup>9</sup>

Counsel's assertions on appeal with regard to the total amount of wages paid by the petitioner from the 2001 priority year to 2007 do not outweigh or overcome the evidence presented in the petitioner's tax returns. The tax returns fail to demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor until the beneficiary obtains permanent residence.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO would question whether the petitioner has established that the beneficiary has the required experience as listed on the certified labor certification. 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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

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inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>9</sup> Additionally, we note that the petitioner's tax returns reflect a significant decline in gross receipts from 2004 to 2006.

(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.

As stated previously, the proffered position requires one year of work experience in the proffered position or two years of work experience as a landscaper. With the initial petition, the petitioner submitted a letter dated July 1, 1996 signed by [REDACTED], Vice President, [REDACTED] Landscaping, Novi, Michigan. In his letter [REDACTED] stated that the beneficiary worked for [REDACTED] Landscaping for three years. The AAO notes that [REDACTED], who appears to be the owner of the petitioner in the instant petition, does not provide any information as to the full-time or part-time basis of the beneficiary's work experience, and/or the period of time worked by the beneficiary. Further, the letter does not indicate whether the beneficiary was employed as a landscape supervisor or as a landscaper. In sum, the letter of work verification does not provide sufficient detail to establish that the beneficiary has one year of previous full-time employment as a landscaper or one year of prior full-time employment as a landscape supervisor.<sup>10</sup> Since the petitioner has indicated that the beneficiary works for it on an as needed basis, which can be dictated by the nature of the landscaping business,<sup>11</sup> the AAO determines that the letter of work verification submitted to the record with regard to the beneficiary's prior work in landscaping is not sufficient to establish the requisite one year of work experience as a landscape supervisor or two years of work experience as a landscaper stipulated by the Form ETA 750.

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

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<sup>10</sup> Additionally the AAO notes that if the beneficiary qualifies for the position only based on one year of experience as a landscape supervisor, then the petition would not meet the requirements for classification as a skilled worker petition.

<sup>11</sup> 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself." The petitioner's job offer must be realistic. The petitioner must employ the beneficiary on a full-time basis in accordance with the terms of the labor certification at the time that the beneficiary adjusts status.

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.