



U.S. Citizenship
and Immigration
Services

B6

DEC 03 2009

FILE:

[REDACTED]
SRC 07 118 51191

Office: TEXAS SERVICE CENTER

Date:

IN RE:

Petitioner:

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:

[REDACTED]

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hairdresser. The petition is accompanied by a duplicate incomplete original ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Additionally, beyond the decision of the director, an issue in this case is whether or not the petitioner has filed another I-140 petition and has the ability to pay the proffered wage to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

Finally, beyond the decision of the director, an issue on appeal in this case is whether the petitioner has made a permanent, full time job offer to the beneficiary.

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

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 750 was accepted on February 13, 2004. The proffered wage as stated on the ETA Form 750 is \$16.10 per hour (\$33,488.00 per year). The ETA Form 750 states that the position requires two years job experience.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1983² and to currently employ 36 workers. The duplicate incomplete original ETA Form Parts A and B is unsigned and undated.

The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. Counsel dated the appeal March 3, 2008. Although counsel stated that she would submit a legal brief within 60 days (or in the appeal statement, submit a brief and/or additional evidence within 30 days) no brief or additional evidence was submitted.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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).

¹ 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).

² The petitioner was incorporated on July 1, 1987.

On April 19, 2007, the director issued a Request for Additional Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. In response to the RFE, the petitioner submitted the petitioner's U.S. Internal Revenue Service (IRS) Forms 1120 tax returns for 2004 and 2005; W-2 Wage and Tax Statements for 2004, 2005 and 2006 issued by the petitioner to the beneficiary and pay statements issued by the petitioner to the beneficiary for the period March 11, 2007 to May 26, 2007, showing year to date wage payments of \$10,184.26; and a Dun & Bradstreet "Company Snapshot" report printed from <<http://smallbusiness.dnb.com>> as accessed June 20, 2007.

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 submitted W-2 statements for 2004, 2005 and 2006 stating wages paid by the petitioner to the beneficiary of \$14,044.53, \$15,109.15 and \$15,196.04 respectively.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date. Since the proffered wage is \$33,488.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which are \$19,443.47, \$18,378.85 and \$18,291.96 respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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.

Counsel asserts that the petitioner's depreciation, used to reduce its taxable income and utilized as a tax strategy to lower its taxes, is evidence of its ability to pay the proffered wage. 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 specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on July 19, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006, which has been submitted upon appeal, was the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120 stated net income³ of \$12,146.00.
- In 2005, the Form 1120 stated net income of <\$11,176.00>.
- In 2006, the Form 1120 stated net income of <424.00>.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage, or the difference between wages actually paid and the proffered wage, for the years 2004, 2005, and 2006.

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

³ Form 1120, Line 28 for years 2004, 2005 and 2006.

petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120 stated net current assets of <\$11,322.00>.
- In 2005, the Form 1120 stated net current assets of <\$25,798.00>.
- In 2006, the Form 1120 stated net current assets of <\$13,088.00>.

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between wages actually paid and the proffered wage, for the years 2004, 2005, and 2006.

Therefore, from the date the ETA Form 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel contends that the petitioner's ratio of current assets to total current liabilities demonstrates its ability to pay the proffered wage. In a generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, present an analysis of the financial health of a business. Counsel has submitted no audited cash flow computation or other evidence to substantiate the assertion. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that the petitioner's special deductions and "credits" are used to reduce its taxable income. They are utilized as a tax strategy to lower its taxes and counsel contends are evidence of its ability to pay the proffered wage. Since the special deductions and credits are not identified by counsel, the AAO has insufficient evidence to confirm or analyze counsel's assertion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel states that the petitioner's total assets are evidence of its ability to pay the proffered wage. The AAO rejects the idea the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include assets that the petitioner uses in its business. Those 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.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

According to the petition, the business was initially established in 1983, and, according to the Dun & Bradstreet "Company Snapshot" report in the record, the petitioner pays its bills on time. On appeal, counsel asserts the petitioner has the ability to pay the proffered wage because in the "last three years" it had over \$1.7 million in gross revenues and paid more than \$850,000.00 in salaries and wages. In the instant case, the petitioner stated gross receipts of \$1,762,428.00, \$1,728,845.00 and \$1,678,734.00 in 2004, 2005 and 2006; therefore, its business revenue was steady for those years. However, the petitioner stated substantial expenses for both officer compensation and salaries and wages that resulted in the petitioner suffering net income losses in 2004 and 2006, with only a nominal net income in 2005. Officer compensation and salaries and wages expenses in 2004 totaled \$1,165,092.00; in 2005-\$1,129,175.00; and in 2006-\$1,061,739.00. Even with the addition of wages

paid to the beneficiary, the petitioner had insufficient net income or net current assets to pay the proffered wage. 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 for 2004, 2005, and 2006.

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, an issue in this case is whether or not the petitioner has filed another I-140 petition and has the ability to pay the proffered wage to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

USCIS electronic records indicate that the petitioner has filed one other I-140 petition.⁵ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed other petitions, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the ETA Form 750 job offer. *See also* 8 C.F.R. § 204.5(g)(2).

The record in the instant case contains no information about the proffered wage for the other potential beneficiary of the I-140 petition filed by the petitioner. No information is submitted about the priority date of the other I-140 petition. No information is provided about the current immigration status the other beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to any beneficiary.

Lacking sufficient evidence about the beneficiary of the other petition submitted by the petitioner, even if the record contained sufficient evidence about the petitioner's finances, the record in the instant petition would still fail to establish the ability of the petitioner to pay the proffered wage to each beneficiary for whom it has filed a petition, since the record fails to provide a basis for calculating the petitioner's total proffered wage obligations during the relevant period.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition during the relevant period. The record also fails to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of other petitions filed by the petitioner.

Beyond the decision of the director, an issue on appeal in this case is whether the petitioner has made a permanent, full time job offer to the beneficiary. The petitioner must also demonstrate that, on

⁵ The other I-140 petition is identified in the records of USCIS as

the priority date, the beneficiary had the qualifications stated on its ETA Form 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).

The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

The regulation at 20 C.F.R. § 656.3 further states, in part:

Employment means:

(1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee. In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

The petition is not supported by evidence of a labor certification as required by the regulations at 8 C.F.R § 204.5(l)(3) and at 20 C.F.R § 656.30(C)(2). The former regulation states in pertinent part that a petition under the "Skilled Worker" classification (that is under Section 203(b)(3)(A)(i) of the Act) must be accompanied by a labor certification from the DOL. There is insufficient evidence of the permanent and full-time nature of the position. There is no description of the duties of the hairdresser position in the subject ETA Form 750, Part A, Item 13.

Further, there is no evidence that the petitioner attested to any of the conditions of employment required by the labor certification as found on the Form ETA 750, Part A. The regulation at 20 C.F.R. § 656.20 (4) (c) states in part:

Job offers filed on behalf of aliens on the Application for Alien Employment Certification form must clearly show that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;
- (4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;
- (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
- (6) The employer's job opportunity is not:
 - (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
 - (ii) At issue in a labor dispute involving a work stoppage;
- (7) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law; and
- (8) The job opportunity has been and is clearly open to any qualified U.S. worker.
- (9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the Application for Alien Employment Certification form.

The petitioner's signature is not present on the duplicate labor certification and there is no correlative proof that the petitioner signed and affirmed the above conditions stated in the original ETA Form 750, Part A. Although counsel in his brief in this matter contends that the petitioner is offering the beneficiary a permanent job, this is insufficient evidence of a permanent job offer. A signed and properly attested labor certification is the document required by the regulations, not an employment contract or offer letter.⁶ See 20 C.F.R. § 656.21 et seq.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The decision in the case of *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

⁶ Moreover, there is no letter by the petitioner in the record offering the beneficiary a permanent full-time job, and no correlative acceptance of this offer by the beneficiary in the record.

There is insufficient evidence in the record to demonstrate that the petitioner has made a permanent, full time job offer to the beneficiary.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.⁷ 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, the petitioner has not been met that burden.

ORDER: The appeal is dismissed.

⁷ 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 at 1002 n. 9.