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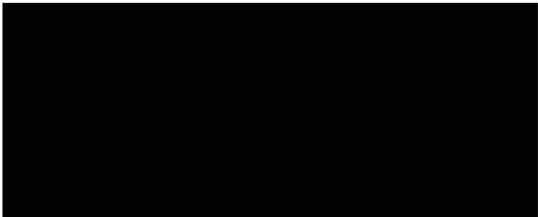
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U.S. Citizenship
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Services

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FILE: LIN 06 105 54144 Office: NEBRASKA SERVICE CENTER Date: FEB 04 2009

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a restaurant cafe. It seeks to employ the beneficiary permanently in the United States as a grill cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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, and the petitioner had not demonstrated that the beneficiary met the requirements of the labor certification at the time it was filed. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 dated January 30, 2007, the issues in this case are 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, and whether or not the petitioner has demonstrated that the beneficiary met the requirements of the labor certification at the time it was filed.

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 Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 10, 2004.¹ The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840.00 per year).

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.²

Ability to Pay the Proffered Wage

Relevant evidence in the record includes the following: the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; an employment verification letter from the owner of the [REDACTED], Indiana dated September 27, 2004; an explanatory letter dated July 26, 2006, from counsel made in response to the director's request for evidence dated May 4, 2006; an information sheet concerning the petitioner dated March 13, 2006; the petitioner's projected financial statements and supplemental information (compiled) for the periods December 31, 2007, 2008, and 2009, prepared by the petitioner's accounting firm; a compiled balance sheet of the petitioner as of February 28, 2006, prepared by the petitioner's accounting firm; the petitioner's financial statement (compiled) for the period December 31, 2005, prepared by the petitioner's accounting firm; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2004 and 2005;³ the petitioner's unaudited financial statements prepared on the accrual basis as of December 31, 2005; approximately nine pages of the petitioner's bank checking statement for the

¹ It has been over four years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid 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." However, in accordance with 8 C.F.R. § 204.5(g)(2) the petitioner must demonstrate that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

³ Counsel stated in his legal brief submitted in this matter that he has submitted the petitioner's 2003 federal income tax return but no tax return for 2003 was submitted.

period December 31, 2005 to July 26, 2006; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1986 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$3,364.00 and \$649,044.00 respectively. On the Form ETA 750, signed by the beneficiary on February 9, 2004, the beneficiary claimed to have worked for the petitioner since December 2001.

On appeal, counsel asserts that the beneficiary was paid but he was paid in cash and customer tips, therefore the beneficiary did not receive a W-2 statement from the petitioner. Counsel asserts that the beneficiary's wages are included in the wages stated on the tax returns submitted. There is no statement in the record of the specific amount(s) the beneficiary was paid by the petitioner, and the petitioner provided no documentation of any wages specifically paid to the beneficiary.

Counsel further contends that the petitioner's business has grown exponentially and it has the ability to pay the proffered wage as demonstrated by the financial statements and bank statements submitted.

The petitioner submitted compiled statements for the time periods ending December 31, 2005 and February 28, 2006.

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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's 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 ability to pay the proffered wage.

Additionally, the petitioner submitted "prospective" financial statements for the time period ending December 31, 2007, 2008 and 2009. The accountant's letter is dated April 28, 2006. Accordingly, these statements are based on projected data rather than actual earnings and are similarly unaudited and therefore the statements are not in compliance with the regulation at 8 C.F.R. § 204.5(g)(2).

Related to bank statements submitted into evidence, counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is

inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedules L that will be considered below in determining the petitioner's net current assets.

Counsel additionally asserts that the petitioner must relocate its business as its popularity far exceeds its capacity and that profit forecasts demonstrate the petitioner will require more workers. A petitioner must establish the elements for the approval of the petitioner at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner cannot rely on future predictions of profitability to demonstrate its ability to pay the proffered wage. The petitioner's own accountants note in the projected unaudited statements that the projected figures are subject to potential "differences [which] may be material."

Counsel asserts that U.S. Citizenship and Immigration Services (USCIS) has already approved another I-140 petition which was filed under the circumstances similar to the instant petition.

The director's decision does not indicate whether he reviewed the prior approval of the other immigrant petition. If the previous immigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 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, U.S. USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be

considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary lists that he has worked for the petitioner since December 2001, the petitioner has not provided any evidence of wage or compensation payment to the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 supported by federal case law. *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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns⁴ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2004, the Form 1120S stated net income of \$1,870.00.
- In 2005, the Form 1120S stated net income of \$20,281.00.

⁴ 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

Since the proffered wage is \$21,840.00 per year per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2004 and 2005.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any,⁵ 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. 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 net current assets during 2004 and 2005 were <\$52,173.00>⁷ and <\$27,414.00> respectively.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Additionally, USCIS electronic database records accessed as of December 4, 2008, show that the petitioner filed I-140 petitions on behalf of seven other beneficiaries. It would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been filed or may be pending from each beneficiary's respective priority date onwards.

Related to this issue, on appeal counsel states that each of the I-140 beneficiaries (which are the four petitions referenced by the director) will also be paid \$10.50 per hour. As evidenced through the foregoing analysis, the petitioner cannot establish its ability to pay for the subject beneficiary under

⁵ As noted above, the petitioner has failed to document that it paid the beneficiary wages.

⁶ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

the regulation at 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner cannot demonstrate its ability to pay the proffered wage for all the beneficiaries for which it has petitions pending.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the instant beneficiary the proffered wage as of the priority date through an examination of wages⁸ paid to the beneficiary, or its net income or net current assets.

The Beneficiary's Qualifications

The director found that the petitioner has not demonstrated that the beneficiary met the requirements of the labor certification at the time it was filed.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

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 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the

⁸ As noted above, the petitioner states that it paid the beneficiary in cash. The petitioner asserts those wages are listed under salaries on the petitioner's tax return. General salaries that are listed on income tax returns are insufficient to document wages paid to the beneficiary.

position of grill cook. In the instant case, item 14 describes the requirements of the proffered position of grill cook as follows:

14. Education	
Grade School	<u>Blank</u>
High School	<u>Blank</u>
College	<u>Blank</u>
College Degree Required	<u>Blank</u>
Major Field of Study	<u>Blank</u>

The applicant must also have two years of experience in the job offered, or two years in a “related cook position.” The duties are delineated at Item 13 of the Form ETA 750A. Since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A “Other special requirements” is blank.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(ii) Other documentation-

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Counsel submitted as evidence of the beneficiary’s prior employment experience and qualifications a letter from ██████████, owner of a restaurant called ██████████ Indiana, dated September 27, 2004. In that letter ██████████ stated that the beneficiary was employed as a cook on a full-time basis from May 1998 to November 2001.

The director issued a request for evidence on May 4, 2006, consistent with the regulation 8 C.F.R. § 204.5(l)(3)(ii)(A) above stated. The director requested evidence that the beneficiary met the requirements of the labor certification at the time it was filed. Specifically the director noted that the duties of the cook position in the ██████████ letter were taken almost exactly from the DOL Dictionary of Occupational Titles description for the occupation “restaurant cook.” Further the director derived information from the petitioner’s website that the petitioner preferred to train its restaurant

employees and required no prior experience. The director found that this contradicted the requirements found in the labor certification that the position of grill cook requires two years of experience in the proffered position or two years in a “related cook position.” The director requested additional evidence to verify that the beneficiary had the required experience. Among other requested documents, the director requested corroborating evidence of the employment such as payroll records, W-2 Forms, paycheck stubs or other evidence.

In response, counsel submitted no additional evidence but asserted in response to the request for evidence that the letter was sufficient to document the beneficiary’s experience. Further counsel claimed that reliance on the DOT description would not negate the validity of the letter if the beneficiary performed similar duties.

The director denied the petition on January 30, 2007, finding, *inter alia*, that the petitioner has not demonstrated that the beneficiary met the requirements of the labor certification at the time it was filed.

We note that the director requested corroborating evidence of the beneficiary’s employment experience such as payroll records, W-2 Forms, paycheck stubs or other evidence to verify the claimed experience from the [REDACTED] and petitioner’s restaurant. The petitioner submitted no evidence. Counsel states on appeal that the beneficiary was paid in cash for the [REDACTED] position as well as for his work with the petitioner. As the petitioner is unable to provide corroboration of the beneficiary’s employment letter, the lack of corroboration raises doubts.

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date, and, the petitioner has not demonstrated that the beneficiary met the requirements of the labor certification at the time it was filed

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.