

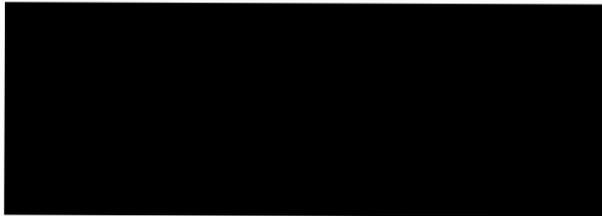
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



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FILE: [REDACTED]
SRC-07-018-52016

Office: NEBRASKA SERVICE CENTER

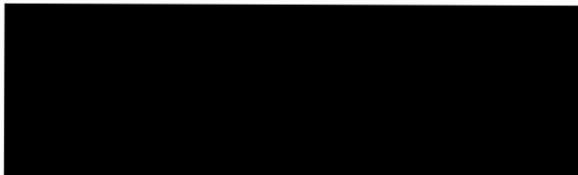
Date: MAY 01 2009

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition¹ 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 food service management company. It seeks to classify the beneficiary pursuant to section 203(b)(3)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(i) as a food service manager (manager). The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present. Accordingly, the petition was denied on April 20, 2008.

On May 15, 2008, counsel filed the instant appeal timely but without a brief and any supporting documents. On the Form 290B, counsel indicated that he would submit a brief and additional evidence to the AAO within 30 days. Counsel dated the appeal May 13, 2008. As of this date, more than 13 months later, the AAO has received nothing further.

On appeal counsel merely stated that the petitioner's one year loss was an extraordinary event and does not reflect the final strength of the eatery and that the employer intends to employ the beneficiary at the petitioning entity and not the affiliate eatery.

Section 203(b)(3)(A)(i) of 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.

¹ The record shows that the instant petitioner filed a Form ETA 750, Application for Alien Employment Certification, (Form ETA 750) on behalf of an original alien on March 26, 2001 and the Form ETA 750 was certified on March 31, 2005. On May 8, 2006, an affiliate of the petitioner filed a Form I-140 petition (LIN-06-161-53649) on behalf of the instant beneficiary for substitution. The director issued a notice of intent to deny (NOID) to the petitioning affiliate on September 21, 2006. The affiliate chose not to respond the NOID. Accordingly, the petition was denied on January 4, 2007. Before the petition (LIN-06-161-53649) was denied, the instant petitioner filed this petition on behalf of the instant beneficiary on October 24, 2006 for substitution based on the same approved labor certification.

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 (Form ETA 750), was accepted for processing by any office within the employment system of the U.S. Department of Labor (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 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).

Here, the Form ETA 750 was accepted on March 26, 2001. The proffered wage as stated on the Form ETA 750 is \$681 per week (\$35,412 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on March 10, 2006, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$563,744, to have a net annual income of \$38,039, and to currently employ five workers.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner or its predecessor employed and paid the beneficiary during that period. If the petitioner or the predecessor 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 record does not contain any evidence showing that the petitioner hired and paid the beneficiary during the relevant years. 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).

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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. 537.

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2006 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. The priority date in the instant case is March 26, 2001, and the record before the director closed on November 14, 2007 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date, the petitioner's federal tax return for 2007 had not been available yet. Therefore, the AAO will examine the petitioner's tax returns for 2001 through 2006 in determining its continuing ability to pay the proffered wage of \$35,412 per year for the relevant years. The tax returns for 2001 through 2006 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the priority date:

- In 2001, the Form 1120S stated a net income² of \$33,723.
In 2002, the Form 1120S stated a net income of \$59,918.
- In 2003, the Form 1120S stated a net income of (\$161,143).
- In 2004, the Form 1120S stated a net income³ of \$70,492.
- In 2005, the Form 1120S stated a net income of \$129,229.
In 2006, the Form 1120S stated a net income⁴ of \$76,755.

For the years 2002, and 2004 through 2006, the petitioner had sufficient net income to pay the beneficiary the proffered wage of \$35,412. However, the net income reflected on its tax returns for 2001 and 2003 was insufficient for the petitioner to pay the proffered wage. Thus, the petitioner failed to establish its ability to pay the proffered wage with its net income in the years of 2001 and 2003.

² 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 1120S 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 line 23 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

³ It is shown on line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. of the Form 1120S for 2004 and 2005.

⁴ It is on line 18 of the Schedule K of the Form 1120S for 2006.

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. 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.⁵ 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 net current assets during 2001 were (\$80,725).
- The petitioner's net current assets during 2003 were (\$186,491).

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage, and thus, failed to establish its ability to pay the proffered wage with its net current assets in these two years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage as of the priority date in 2001 to 2006 through an examination of wages paid to the beneficiary, its net income or net current assets.

Counsel asserts on appeal that the one year loss was an extraordinary event and does not reflect the final strength of the petitioner. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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

⁵ 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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

However, counsel did not submit any documentary evidence to support his assertions on appeal. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2003 were uncharacteristically unprofitable two years in a framework of profitable or successful years for the petitioner. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has not established the 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 Form ETA 750 was accepted for processing by DOL. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As previously noted, the Form ETA 750 was certified on March 31, 2005 initially on behalf of the original beneficiary in a position of manager with the petitioner located at [REDACTED]. The instant petition is for the instant beneficiary.⁶ With the

⁶ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the

petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. However, the Form ETA 750B indicated that the beneficiary will work for Cosimo's Brick Oven at [REDACTED] as a specialty cook. In the RFE dated October 4, 2007, the director requested a written statement from the petitioner to clarify for which company, location and position the beneficiary will be employed. In response to the director's RFE, counsel did not submit any statement from the petitioner. Nor did counsel provide any independent objective evidence to resolve this inconsistency but merely stated that "[t]he employer intends to employ [the beneficiary] at the petitioning entity and not the affiliate eatery." 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). 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)). *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that the beneficiary possessed the qualifying experience for the proffered position prior to the priority date. 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the U.S. Department of Labor (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 March 26, 2001.

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

original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstrec/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 Form ETA-750A requires two years of experience in the job offered or related occupation as a pizza baker.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In corroboration of the regulatory requirements, the instant I-140 petition was submitted with an experience letter dated March 10, 2006 from [REDACTED] of Cosimo's Brick Oven Pizza and Restaurant ([REDACTED]) pertinent to the beneficiary's qualifications for the proffered position. [REDACTED] March 10, 2006 letter stated in pertinent part that:

This letter is to certify that [the beneficiary] was employed at Cosimo's Brick Oven Pizza and Restaurant from January of 1999 through January of 2001 as a wood fired pizza baker, working approximately 40 hours per week.

[The beneficiary]'s duties consisted of preparing semolina based pizza dough, preparing sauces and other related items. He was also responsible for baking bread, pizza and fish in our high temperature wood fire oven. He maintained proper temperature using only aged hardwood and his knowledge of the special technique used for wood ovens.

This letter is on the letterhead of Cosimo's Brick Oven with its address and contact information, and includes the name of the writer, and a specific description of the duties performed by the alien. However, the letter does not include the title of the author. Therefore, it is not clear whether the letter is from the beneficiary's current or former employer or his current or former colleague or co-worker. Accordingly, the AAO cannot accept this letter as primary evidence from the beneficiary's current or former employer to establish the beneficiary's qualifying experience for the proffered position under the regulation at 8 C.F.R. § 204.5(g)(1).

Furthermore, the AAO notes that the experience described in [REDACTED] March 10, 2006 letter is not supported by the beneficiary's statements on the Form ETA 750B and other documentary evidence. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been working as a full-time (working 40 hours per week) manager/pizza baker at Cosimo's Brick Oven since January 2001. Prior to that, he worked as a full-time (working 40 hours per week) cook at IL Fornio Restaurant in Chicago, Illinois from 1994 to 1999. The beneficiary did not provide his employment information for the period between his work for IL Fornio Restaurant and Cosimo's Brick Oven although Form ETA 750A Part 15 requires

information about all jobs during the last three (3) years and any other related jobs beyond three years. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

In addition, the beneficiary did not indicate in what month of 1999 he terminated his employment with IL Fornio Restaurant. It appears more than coincident that the beneficiary worked for exactly two years prior to the priority date and just qualified for the proffered position in this case. The record does not contain any documentary evidence, such as the beneficiary's W-2 forms, 1099 forms, cancelled paychecks, paystubs, other pay records or personnel records from Cosimo's Brick Oven, or the beneficiary's income tax returns for these relevant years, to support the contents of the letter. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591. 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. *Id.*

Therefore, the AAO concludes that the preponderance of the evidence does not demonstrate that the beneficiary possessed two years of experience as a manager or pizza baker prior to the priority date from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

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.

ORDER: The appeal is dismissed.