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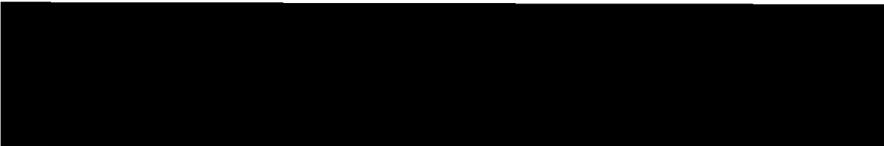
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **AUG 20 2010**

IN RE: Petitioner: WITHERS FOOD SERVICE, INC. DBA KIRKS STEAKBURGERS
 Beneficiary: SEVERA MACEDO

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 fast food restaurant. It seeks to employ the beneficiary permanently in the United States as a fast food prep and cook. As required by statute, the petition is accompanied by a Form ETA 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 July 28, 2008 denial, the 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 the 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 the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 S corporation. On the petition, the petitioner claimed to have been established on January 1, 1948 and to currently employ 21 workers. The Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.10 per hour which equates to \$15,756 per year based on a 30-hour week. DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).² A 35 hour work week would require pay at an annual rate of \$18,382 based on the hourly rate certified.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Further, the job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10).

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, the beneficiary claimed on her Form ETA 750 that she was employed 30 hours per week by the petitioner as a fast food prep worker from September 1999 to the date that the labor certification was filed, April 30, 2001. On appeal, the petitioner stated that the beneficiary has been employed by him continuously since October 1, 1998 and provided reprinted copies of the beneficiary's Forms W-2 for the years 2001 through 2007 and the beneficiary's payroll summaries for 2001 through 2007. The beneficiary's Forms W-2 and payroll summaries (adjusted gross pay) for 2001 through 2007 stated compensation of \$14,573.38, \$17,833.78, \$18,220.05, \$12,898.53, \$19,036.67, \$20,230.98, \$24,365.01,

¹ 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).

² This issue will be discussed later in the decision.

respectively.³ The petitioner did not provide a 2008 Form W-2 for the beneficiary but the beneficiary's payroll summary shows her adjusted gross pay from January 1 through August 14, 2008 is \$14,659.84. The Form ETA 750 reveals that the beneficiary's proffered wage of \$15,756 per year is based on a 30 hour week. Although the petitioner established that he paid the beneficiary the proffered wage in 2002 and 2003, and 2005 through 2007, the job offer must be for a full-time position. In the denial notice, the director calculated the beneficiary's annual salary as \$21,008 based on a 40 hour work week (\$10.10 per hour). The director must read the terms of the labor certification as certified. 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). However, as the labor certification was improperly certified, absent an amended ETA 750, showing the beneficiary will be employed full-time (at least 35 hours per week), the documentation submitted does not establish that the job offered is a full-time position and does not establish the petitioner's ability to pay the proffered wage.

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).

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.

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 a specific cash

³ The director's RFE requested all W-2 forms from 2001 through 2007. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 June 9, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). In response, the petitioner submitted a copy of the beneficiary’s 2007 W-2 form and her pay stub for the period May 28, 2008 to June 3, 2008 showing her net pay year to date of \$9,235.48. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. With the appeal, the petitioner submitted the first page of the company’s tax returns from 2001 through 2007 but subsequently provided the company’s complete tax returns for 2001 through 2007.⁴ The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, the petitioner’s Form 1120S stated net income ⁵of -\$53,300.

⁴ The petitioner failed to submit its tax returns in response to the director’s RFE despite the director’s specific request for the petitioner’s full tax returns from 2001 through 2007 with all supporting schedules. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

⁵ 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) line 18* (2006) of Schedule K. See Instructions for

- In 2002, the petitioner's Form 1120S stated net income of -\$126,746.
- In 2003, the petitioner's Form 1120S stated net income of -\$55,105.
- In 2004, the petitioner's Form 1120S stated net income of -\$111,362.
- In 2005, the petitioner's Form 1120S stated net income of -\$104,213.
- In 2006, the petitioner's Form 1120S stated net income of \$37,105.
- In 2007, the petitioner's Form 1120S stated net income of -\$51,152.

Although, the W-2 wages paid to the beneficiary would theoretically establish the petitioner's ability to pay the proffered wage based on 30 hours for all the years in question, except 2001 and 2004, as the labor certification was improperly certified, we cannot adequately conclude that the petitioner had the ability to pay had the labor certification been properly certified. Further, the petitioner's net income in all the years, with the exception of 2006 would be deficient to pay the difference between the wages paid and a properly certified labor certification requiring full-time employment.

Additionally, USCIS records indicate that the petitioner has filed five I-140 petitions, including the instant petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the respective priority date until each respective beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The director in his RFE asked for information concerning the other beneficiaries, including each labor certification's priority date and the wages for each beneficiary. The petitioner failed to provide any specific information related to these points in response to the director's RFE or on appeal.⁶

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 petitioner's current assets and current liabilities. 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 only submitted on appeal despite the director's request, demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net current assets of -\$127,128.
- In 2002, the petitioner's Form 1120S stated net current assets of -\$118,795.

Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed as of July 20, 2010) (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, alternative minimum tax items, deductions, other adjustments shown on its Schedule K for all the relevant years, the petitioner's net income is found on Schedule K of its tax return.

⁶ The petitioner merely stated that "the original material [was] . . . in storage," and that he thought each sponsored worker's wage was \$7.64 an hour. Such generalities are insufficient to determine the petitioner's total wage obligation.

- In 2003, the petitioner's Form 1120S stated net current assets of -\$130,579.
- In 2004, the petitioner's Form 1120S stated net current assets of -\$109,421.
- In 2005, the petitioner's Form 1120S stated net current assets of -\$173,235.
- In 2006, the petitioner's Form 1120S stated net current assets of -\$107,710.
- In 2007, the petitioner's Form 1120S stated net current assets of -\$168,079.

Similarly, although, the W-2 wages paid to the beneficiary would theoretically establish the petitioner's ability to pay the proffered wage based on 30 hours for all the years in question, except 2001 and 2004, as the labor certification was improperly certified, we cannot adequately conclude that the petitioner had the ability to pay. The petitioner's net current assets in all the years would be deficient to pay the difference between the wages paid and a properly certified labor certification requiring full-time employment.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the Form ETA 750 and the tax returns as submitted by the petitioner that demonstrates that the petitioner was not offering full-time employment and could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. On appeal, the petitioner's president argues that the company is a subchapter S corporation and that depreciation, owner's compensation and section 179 deduction would result in "net discretionary cash flow," which should be considered.

However, 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, as noted in *River Street Donuts*, 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." See *River Street Donuts* at 116.

Furthermore, in determining the petitioner's ability to pay, the petitioner cites the [REDACTED] Associate Director for Operations, Ability to Pay Memo, HQOPRD 90/16.45 (May 4, 2004). The petitioner states that in accordance to the memo, USCIS should make a positive ability to pay determination when the record contains credible, verifiable evidence that the petitioner is not only employing the beneficiary but has also paid or is currently paying the proffered wage.

The Yates' memorandum relied upon by the petitioner provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the [REDACTED] memorandum. However, the petitioner's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If

USCIS and the AAO were to interpret and apply the [REDACTED] memorandum as the petitioner urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only on April 30, 2001, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002 and onwards. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Regarding officer compensation, the documentation presented here indicates that the petitioner's 2001 through 2007 United States Income Tax Return, Forms 1120S, lists the compensation paid to officers as \$140,000, \$160,000, \$200,000, 208,462, \$175,000, \$60,000 and \$60,000, respectively. The tax returns do not provide the names of the officers and these figures are not supported by W-2 Forms. Further, the petitioner did not provide sufficient information on the proffered wages offered all its sponsored workers, either in response to the director's RFE or on appeal, to adequately determine the total proffered wages, amounts paid and the required amount of officer compensation that would or could be used. While the petitioner's president shares the same surname as the company's name, it is not clear from the record that he is the sole shareholder or that he is willing to use part of his income to pay the proffered wage(s). Additionally, as the petitioner had negative net income and net current assets, it is not entirely credible if officer compensation would be foregone, that it would go to payment of wages and not to other debt reduction.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

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*, 12 I&N Dec. 612 (BIA 1967). 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

While the petitioner does exhibit some favorable circumstances, length of time in business, partial wage payment to the beneficiary, the petitioner's net income, net current assets and failure to submit documents in response to the director's RFE would not warrant a favorable finding based on the totality of the circumstances in this instance.

In the instant case, the petitioner's tax returns show negative net income from 2001 to 2005 with the exception of 2006 and substantial negative net current assets for all the years represented. The petitioner has additionally sponsored other workers and the petitioner must demonstrate that it can pay all of its sponsored workers from each respective priority date until each beneficiary obtains permanent residence. The petitioner has not provided its historical growth, its reputation within the restaurant business, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. The petitioner submitted its Kirk's Steakhburgers menu and its certificate of recognition from the State of California Senate in honor of doing business in Palo Alto since 1948. Although this is evidence of an established business, it fails to overcome the deficiencies in failing to document its total wage obligation to adequately determine if *Sonegawa* should apply. 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.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, April 30, 2001 through the present.

Beyond the decision of the director, 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The Department of Labor regulations at 20 C.F.R. § 656.3 define employment as "Permanent, full-time work by an employee for an employer other than oneself. . . ." The petitioner has not established that the proffered position is a full-time (at least 35 hours per week) position. In the instant case, the labor certification was improperly certified, and even if the petitioner could establish its ability to pay, which it has not, we would be unable to reach a favorable determination on the petition as the terms as certified do not require full-time employment. Therefore, the petition may not be approved.

Accordingly, 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.