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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

MAY 21 2010

Date:

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

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 nursery.<sup>1</sup> It seeks to employ the beneficiary<sup>2</sup> permanently in the United States as a tractor driver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (the "Application"), approved by the United States Department of Labor (the 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 and 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.

Another issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the priority date as well as the proffered wages of each of the beneficiaries from the priority date that it also sponsors for visa preference immigrant petitions. 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 also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, an additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 unavailable.

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

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<sup>1</sup> The petitioner is a nursery plants grower.

<sup>2</sup> The beneficiary is also known as [REDACTED]

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 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 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 April 24, 2001.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$9.22 per hour (\$19,177.60) per year. The offered position requires one year of experience.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

On April 10, 2007, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. Specifically, director instructed the petitioner to submit his federal income tax returns for 2001, 2005, and 2006, as well as his latest annual report, or audited financial statement. The director indicated that the petitioner could also submit additional evidence such as profit/loss statements, bank account records, and personnel records. The director also requested the beneficiary's Forms W-2 Statements, if any, issued by the petitioner.

In response, counsel submitted the following evidence: the petitioner's federal income tax returns Forms 1040 for 2001 and 2005; payroll statements issued by the petitioner to the beneficiary for the period January 1, 2007, to May 13, 2007; unaudited financial statements of the petitioner for 2005;<sup>5</sup>

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<sup>3</sup> Counsel also submitted correspondence concerning the amendments approved by the DOL to the labor certification.

<sup>4</sup> 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).

<sup>5</sup> 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

information concerning another employee: (a Wage and Tax Statement (W-2) for 2005, a combined tax statement, a mortgage interest statement for 2005, and a copy of a page from Ventura County, California's property tax information website at <http://prop-tax.countyofventura.org>); a 2005 Form 1099-MISC Statement reporting compensation received by the petitioner; the petitioner's "Employer's Annual Federal Unemployment Tax Return (FUTA) Form 940-EZ" for 2005; the petitioner's Form W-3 "Transmittal of Wage and Tax Statements" for 2005; the petitioner's W-2 Statements for its employees in 2005; a Form 1099-MISC Statement for [REDACTED] for 2005; the sole proprietor's W-2 Statement for 2005; and four Form I-797C receipt notices for I-140 petitions filed by the petitioner with U.S. Citizenship and Immigration Services (USCIS) and their related labor certifications.

On appeal, counsel submitted the following evidence (not already submitted): a legal brief dated October 1, 2007; the petitioner's federal income tax return Form 1040 for 2002; the beneficiary's W-2 Statement for 2006; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for the petitioner's employees for the calendar quarters ended December 31, 2006, and March 31, 2007, that was accepted by the State of California; payroll statements issued by the petitioner to the beneficiary for the period January 1, 2007, to August 19, 2007; and, seven of the petitioner's bank checking statements for the period February 29, 2007, to April 30, 2007.

Accompanying the petition, were, *inter alia*, the petitioner's federal income tax returns Forms 1040 for 2002, 2003, and 2004.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1992 and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on March 6, 2001, the beneficiary claimed to work for the petitioner since January 1992.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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. Counsel submitted a W-2 Statement<sup>6</sup> issued by the petitioner to the beneficiary in 2005 in the amount of \$4,760.00, in 2006; a W-2 Statement issued by the petitioner to the beneficiary in 2006 in the amount of \$14,280.00; and payroll statements issued by the petitioner to the beneficiary at the rate of \$9.00 per hour for the period January 1, 2007, to August 19, 2007. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 and onwards.

Also, counsel suggests that the amount of the gross earnings of the petitioner and the large payroll lends credence to the petitioner's ability to pay the proffered wage. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the 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 (1<sup>st</sup> 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can

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<sup>6</sup> On the Form G-325 and Form I-485 in the record, both signed on January 11, 2007, the beneficiary said he did not have a social security number, although, the beneficiary stated in the labor certification that he had been employed by the petitioner since 1992. Furthermore, W-2 Statements for the beneficiary were submitted with a social security number for 2005 and 2006. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of six. The proprietor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor's adjusted gross income (Form 1040, lines 33 & 31)	\$10,888.00	\$12,911.00
	<u>2003</u>	<u>2004</u>
Proprietor's adjusted gross income (Form 1040, line 36)	\$- <sup>7</sup>	\$66,921.00
	<u>2005</u>	
Proprietor's adjusted gross income (Form 1040, line 37)	\$23,483.00	

In 2001, 2002, 2003, 2004, and 2005, the sole proprietor's adjusted gross income fails to cover the proffered wage of \$19,177.60, since it is improbable that the sole proprietor could support his family of six in 2001, 2002, 2003, 2004, and 2005, on what remains after reducing the adjusted gross income by the amount required to pay the proffered wage, and pay the proffered wages for the other sponsored beneficiaries. The record is also devoid of evidence pertaining to the petitioner's household expenses and his net current assets, if any. The burden of proof in these proceedings remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for eight more workers, (seven petitions filed within the same month and year as the subject labor certification), as reflected on their respective labor certifications. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

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<sup>7</sup> Only a partial tax return was found in the record for 2003, therefore no adjusted gross income figure was available. According to Form 1040, Schedule C in the record for that year, the business stated a profit of \$22,206.00 in 2003. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

*Sponsored Beneficiaries*

<i>USCIS number:</i>	<i>Receipt</i>	<i>Date Of Birth</i>	<i>Priority Date</i>	<i>Proffered Wage/Hourly</i>	<i>Proffered Wage/Yearly</i>
LIN0707350124			04/17/2001	\$7.47.	\$15,537.60
SRC0705553019			11/11/2002	\$9.22	\$19,177.60
WAC0522650425			04/26/2001	\$8.36.	\$17,388.80
WAC0522650379			04/13/2001	\$15.99	\$33,259.20
LIN0707850316			04/24/2001	\$15.99	\$33,259.20
LIN0805151449			-----	-----	-----
LIN0803750875			04/13/2001	\$15.99	\$33,259.20
LIN0707850316			04/24/2001	\$15.99	\$33,259.20

All the proffered wages for the nine sponsored beneficiaries that were either disclosed by counsel, or as identified in the electronic records of USCIS, including the subject beneficiary, but not including case number LIN0805151449, for which wage information was not provided, total \$204,318.40.

On appeal, counsel asserts that the evidence presented, including payroll statements that the petitioner has paid the beneficiary \$9.00 per hour in 2007, is evidence of the petitioner's ability to pay. Counsel's contention is misplaced since payment at a rate less than the proffered wage (i.e. \$9.22 per hour) is not proof of the petitioner's ability to pay. See USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. It is also not proof of his ability to pay the proffered wage since the priority date. Further, counsel cites neither regulation nor court decision to support his contention.

Counsel states that the director's decision should be followed by the AAO in this *de novo* proceeding since the director found that the petitioner had demonstrated its ability to pay the proffered wage in 2003, 2004, and 2005. The AAO is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). In 2001, 2002, 2003, 2004, and 2005, the sole proprietor's adjusted gross income fails to cover the proffered wage for the subject beneficiary as well as the wages for all sponsored beneficiaries for the reasons above stated.

Further, the petitioner has provided insufficient evidence for years 2006 and 2007 to demonstrate its ability to pay. Counsel states that because the petitioner filed an extension to file its 2006 federal tax return, but has to date not submitted a 2006 tax return, that this is additional evidence of the petitioner's ability to pay. The unsupported statements of counsel on appeal 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).

Counsel also contends that the depreciation amounts, and other unspecified expenses, on the petitioner's tax returns lowers his net income on his Schedules C but does not represent a loss of funds. By implication, counsel requests on appeal that the depreciation expense charged for each year be treated as an asset. Counsel's statement is misplaced. Counsel cites no legal authority for this proposition and court decisions are contrary to counsel's assertion. *See River Street Donuts, LLC v. Napolitano, id.*; *see also Chi-Feng Chang v. Thornburgh, id.*

Counsel states that funds in the petitioner's bank accounts are evidence of his ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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.

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. 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 counsel, the petitioner's gross receipts and wages paid to its employees have been "consistently high" over the years, that its business is stable, has demonstrated an increase in profits, and it has an expectation of increased profits in the future. According to counsel, the petitioner's business' net profits alone are not determinative of its ability to pay the proffered wage. Counsel's statements must be qualified. According to the court decision of *Ubeda v. Palmer*, sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out

of their adjusted gross income, not the net income stated on Form 1040, Schedules C. Also, at the same time, the sole proprietor must support him/them and their dependents, and pay the proffered wages for all sponsored beneficiaries.

In the instant case, the total of all proffered wages are \$204,318.40 which exceeds the petitioner's adjusted gross incomes for 2001 to 2005, as well as the net profits stated on the sole proprietor's tax returns for 2001-\$10,148.00; 2002-\$13,595.00, 2003-\$22,206.00, 2004-\$72,008.00 and 2005-\$19,594.00, assuming for the sake of argument that the business' net profits are relevant in the determination of the petitioner's ability to pay. There is insufficient evidence of the petitioner's reputation throughout the industry, or of any temporary and uncharacteristic disruption in its business activities. 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.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The Form ETA 750, Part A, Line 13, describes the job duties as follows:

Drives, operates and maintain farm machinery and equipment. Hitches farm implements, such as plow and disk to tractor. Drives tractor while operating implements to till soil and plant, fertilize, cultivate, dust and spray crops, such as tulip, hyacinth, and begonia. Adjusts conveyor speeds and height of digging mechanism, using wrench, and drives and operates harvesting machine to dig up bulbs, applying knowledge of terrain contours and types of bulb harvested. Loads truck with containers of bulbs or flowers, and drives truck to deliver products. Washes, paints, lubricates, and participates in repair of farm machinery, using mechanic's hand tools.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) Other documentation—

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

On January 12, 2007, the director issued a RFE asking for the petitioner to submit information regarding the beneficiary's work experience before the priority date.

In response, the petitioner on February 2, 2007, submitted a statement dated February 14, 2003, from [REDACTED] of Camarillo, California.

The brief statement dated February 14, 2003, was as follows:

To Whom It May Concern:

[The beneficiary] worked for [REDACTED] from January 8, 1991 to January 26, 1992, as a truck driver. He left work for [REDACTED] at that time.

There is insufficient in the record to demonstrate that the beneficiary has the job experience and tractor driver skill set to satisfy the offered job requirements as stated above, or sufficient evidence based upon the one very brief job reference letter that he acquired that experience at [REDACTED]. Therefore, the sole statement submitted in the record concerning the beneficiary's qualifications is insufficient evidence under the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(1)(3) were submitted by the petitioner. Other than the beneficiary's statements in the Form ETA 750, Part B, of his work experiences at the petitioner's business and [REDACTED], which are identical to the above offered job description, there is no other description of the beneficiary's job experience.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.