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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

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 20 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 Mexican-specialty restaurant. It seeks to employ the beneficiary permanently in the United States as a supervising specialty 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 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 September 28, 2008 denial, the single 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 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 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 for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage set by the DOL, as stated on the Form ETA 750, is $13.53 per hour or $28,142.40 per year. The Form ETA 750 further states that the prospective employee must have a minimum of 2 years experience in the job offered. The beneficiary indicated on part B of the Form

ETA 750 that she had worked as a cook for the petitioner from 1996. A letter verifying the beneficiary's employment as a cook with the petitioner since 1996 is in the record.

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]

Relevant evidence in the record includes copies of the following documents:

- 's individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2007;
- Financial statement for 2002 (unaudited);[2]
- The beneficiary's Form W-2 for 2006;
- The beneficiary's paystubs for December 2006, March 2007, and April 2007; and
- The beneficiary's individual tax returns filed on Forms 1040 for 2003-2006.

The evidence in the record of proceeding shows that or the petitioner is structured as a sole proprietorship. is the sole proprietor of the business. On the petition, the petitioner claims to have established the business in 1986, to currently employ 10 workers, and to have gross annual income and net income of $307,248 and $79,227, respectively.

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 Sonegawa*, 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

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[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 financial statement is submitted in lieu of the petitioner's complete tax return for 2002. , the owner and sole operator of the business, states on appeal that he could not locate a copy of his 2002 tax return.

greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Here, even though the petitioner claimed that it had employed the beneficiary since 1996, the evidence does not establish that the petitioner employed the beneficiary until 2006.[3] In both 2006 and 2007, the beneficiary was paid substantially less than the proffered wage of $13.53 per hour or $28,142.40 per year. The beneficiary received the following wages from the petitioner in 2006 and 2007:

- In 2006, the beneficiary received $15,912 ($12,230.40 less than the proffered wage).
- In 2007, the beneficiary was paid at a rate of $8.84 per hour, receiving $353.60 in March and April of 2007.[4]

When 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner, as noted earlier, 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

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[3] The beneficiary claimed in her schedule C-EZ (Form 1040) that she earned $18,033, $17,575, and $18,275 in 2003, 2004, and 2005 as a cook (sole proprietor) but did not indicate the source of this income. There are no tax returns for the beneficiary from 2001 and 2002. The returns from 2003 and 2004 were not filed until February 2006, thus reducing their evidentiary value as contemporaneously filed documentation. Since the source of this income is unknown, the evidence does not establish that the beneficiary was paid or employed by the petitioner in 2003, 2004, or 2005.

[4] The paystubs submitted shows that the beneficiary earned $353.60 on the following dates: 12/31/2006, 3/18/2007, 3/25/2007, 4/1/2007, 4/8/2007, and 4/15/2007.

of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th 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.

The director, before denying the petition, requested the petitioner to submit, *inter alia*, a list of his monthly recurring household expenses, including mortgage payments, automobile payments, installment loans, credit card payments, and household expenses, such as utilities, gas, insurance, food, medication, and so forth. This information, according to the director, is important to determine whether the petitioner can cover his business expenses and sustain himself and his dependents as well as pay the proffered wage out of his income.

The petitioner did not submit the requested evidence, and the director subsequently denied the petition. In his decision, the director noted that the petition could not be sustained since no information regarding the petitioner's monthly expenses was submitted.

A review of the petitioner's tax returns shows that the petitioner is married and has one dependent child. Further, the tax returns reveal the following information:

Tax Year	Adjusted Gross Income (AGI)	Net Operating Loss (NOL) Carryover[5]	AGI without NOL Carryover – Modified AGI[6]	The Proffered Wage (PW)	Annual Household Expenses	Modified AGI less Annual Household Expenses (Net Income)
2001	($9,623)	None	($9,623)	$28,142.40	Unknown	Unknown
2002[7]	Unknown	Unknown	Unknown	$28,142.40	Unknown	Unknown
2003	($90,677)	($34,491)	($56,186)	$28,142.40	Unknown	Unknown

[5] The net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company and individual can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

[6] The AAO considers the modified AGI – that is AGI without NOL carryover – to be more reflective of the petitioner's gross income between 2001 and 2007.

[7] As noted above, the petitioner did not submit its complete 2002 tax return.

Tax Year	Adjusted Gross Income (AGI)	Net Operating Loss (NOL) Carryover	AGI without NOL Carryover – Modified AGI	The Proffered wage (PW)	Annual Household Expenses	Modified AGI less Annual Household Expenses (Net Income)
2004	($38,521)	($75,687)	$37,166	$28,142.40	Unknown	Unknown
2005	($21,438)	($75,687)	$54,249	$28,142.40	Unknown	Unknown
2006	$56,829	($17,090)	$73,919	$28,142.40	Unknown	Unknown
2007	$87,083	None	$87,083	$28,142.40	Unknown	Unknown

Based on the table above, the AAO agrees with the director that the petitioner has not established its ability to pay the proffered wage beginning on the priority date. Without further information or evidence of the petitioner's monthly recurring household expenses, this office cannot determine whether the petitioner has that ability or not. The evidence in the record does not explain how, for instance, the petitioner could support himself, his wife, and one dependent child on a modified AGI of $37,166 in 2004, $54,249 in 2005, $73,919 in 2006, and $87,083 in 2007. In addition, the AAO observes that the petitioner's modified AGI in 2001 and 2003 is negative. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The director's request for a list of the petitioner's monthly recurring household expenses is authorized by regulation and is reasonable.

The regulation at 8 C.F.R. § 103.2(b)(14) states:

> Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

As noted above, the director has specifically requested the petitioner to submit a list of his monthly recurring household expenses. The petitioner did not submit such a list. Such a list, if submitted, would demonstrate whether the petitioner has the financial resources to pay the proffered wage of the current beneficiary and of the beneficiaries of the other approved visa petitions. The petitioner's failure to comply creates doubt about the credibility of the remaining evidence of record and shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The AAO acknowledges the submission of the financial statement for 2002 into the record but will not accept the statement as reliable. 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. In this case, the financial statement in the record has not been audited. The cover letter accompanying the financial statement clearly indicates that the preparer has not

audited or reviewed the financial statements. The accountant's report that accompanied the financial statement makes clear that it was 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.

On appeal, counsel for the petitioner states that the petitioner has sufficient assets to pay the beneficiary's wage. Referring to the 2002 financial statements, counsel claims that the petitioner owns a commercial building with a market value of $450,000 and owner's equity of $97,501.80. Further, counsel indicates that the petitioner deducted over $50,000 per year for mortgage interest expense. According to counsel, the petitioner would have had positive AGI in 2001, 2002, and 2003 had this annual mortgage interest expense been excluded from the petitioner's tax returns.

Mortgage interest expense is a real item of expenditure, which the petitioner has to pay so long as he owns the property. In addition, a real property such as the commercial building in this case is not readily convertible into cash. Moreover, no concrete evidence has been submitted to show that the petitioner owns a commercial building. As indicated above, the financial statement listing the property is not reliable. 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)). Even were the petitioner to establish that he does own a commercial building, it is unlikely that he would sell his business property to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. 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).

On appeal, counsel also raises an estoppel claim. Counsel claims that the government (referring to USCIS) has taken more than seven years to deny the petition, and the petitioner, as a result, has been prejudiced by the failure of the government to adjudicate the petition sooner. Counsel states, "Had the government issued its denial in a timely fashion, the petitioner could have refiled the labor certification and the I-140 petition at any time subsequent to 2003, when the schedule C net income clearly exceeded the prevailing wage." The failure of the government to adjudicate the petition in a timely fashion, according to counsel, amounts to "affirmative misconduct," which may estop the government from enforcing the immigration laws. *See Heckler v. Community Health Services*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *INS v. Hibi*, 414 U.S. 5 (1973); *Montana v. Kennedy*, 366 U.S. 308 (1961).

The AAO, however, has no authority to address an equitable estoppel claim. The AAO, like the Board of Immigration Appeals, has no authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United

States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1.[8]

In addition, no regulation bars or prevents the petitioner from filing or refiling another labor certification and I-140 petition on behalf of the beneficiary. The petition in this case is denied because of the petitioner's failure to submit evidence showing its ability to pay the proffered wage.

Finally, 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially between 2001 and 2007, had uncharacteristically substantial expenditures.

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[8] In the process of reorganizing the immigration regulations, DHS deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting USCIS the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. *See* DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

The AAO acknowledges that the petitioner has been in a competitive field since 1986 and is a viable business. The business' gross receipts and net profits have consistently increased since 2001. However, the issue here is whether the petitioner has the ability to pay $13.53/hour or $28,142.40/year as of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

Beyond the decision of the director, the AAO finds that this petition cannot be sustained because the petitioner has not established that the petition is for an unskilled worker, especially when the evidence submitted (the approved Form ETA 750) shows that the petitioner required the beneficiary to have at least two years experience in the job offered or as a supervising cook as of April 30, 2001.

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.

Further, the regulation at 8 C.F.R. § 204.5(l)(4), in pertinent part, provides:

> *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the petitioner requested the unskilled worker classification (**less than two years of experience**) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least two years experience in the job offered or as a supervising cook as of April 30, 2001. There is no provision in statute or regulation that compels USCIS or the AAO to accept a petition under a different visa classification. In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.