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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



B6



Date: APR 22 2011

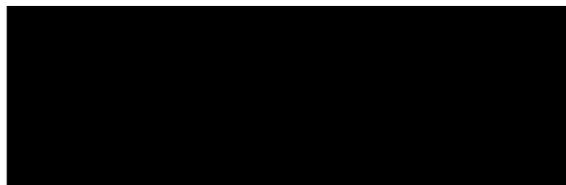
Office: [Redacted]

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other 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 \$630. 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 Director, [REDACTED] Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a coffee shop. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner did not demonstrate its ability to pay the proffered wage. 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 February 10, 2009 denial, the issue in this case is whether the petitioner can establish its ability to pay the proffered wage. On appeal we have identified an additional issue: whether the beneficiary had the requisite education as of the priority date.

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 nature, for which qualified workers are not available in the United States.

The AAO maintains plenary power to review each appeal on a de novo basis. *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

With regard to the petitioner's ability to pay the proffered wage, 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.

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).

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 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).

The evidence in the record shows that the petitioner is an S corporation. On the petition, the petitioner states that it was established in 2001 and currently employs two workers. Here, the Form ETA 750 was accepted on May 14, 2004. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour, \$25.73 for overtime (\$49,779 per year based on the indicated forty hours basic and ten hours overtime per week).²

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. The petitioner submitted no evidence that it ever employed or paid any wages to the beneficiary.

² The original Form ETA 750 in the record did not have a rate of pay. The director referred to a wage of \$17.15 per hour in the decision for an annual wage of \$35,672. The petitioner had stated a weekly wage of \$686 per week, which equates to \$17.15 per hour. This, however, does not account for the petitioner's stated 10 hours of overtime. Pursuant to INA § 204(b), 8 U.S.C. § 1154(b), the AAO consulted the Department of Labor to confirm the wage as box 12 on Form ETA 750 was left blank. DOL issued a duplicate Form ETA 750, which stated the certified hourly rate of pay for the proffered wage as \$17.15 for 40 hours and the overtime rate for 10 hours as \$25.73.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, 881 (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.

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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on November 12, 2008 with the receipt by the director of the petitioner’s submission in response to the Request for Evidence. As of that date, the most current tax return available was the petitioner’s 2007 federal tax return.³ The petitioner submitted the following tax returns:

- In 2004, the Form 1120S stated net income⁴ of -\$4,557.
- In 2005, the Form 1120S stated net income of -\$5,258.
- In 2006, the Form 1120S stated net income of -\$14,991.
- In 2007, the Form 1120S stated net income of -\$9,713.

A negative net income is insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner cannot demonstrate its ability to pay in any of the relevant years based on its net income.

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.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.

³ The tax returns submitted are for [REDACTED] instead of [REDACTED] the name indicated on the I-140 and Form ETA 750. The Employer Identification Number (EIN) and address of the businesses are the same and [REDACTED] is identified on Schedule K of the petitioner’s tax return with the same EIN, therefore, we may consider these returns to demonstrate the petitioner’s ability to pay the proffered wage. As the EINs are the same, it shows that [REDACTED] and [REDACTED] are the same company.

⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s 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), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (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 no additional adjustments shown on its Schedule K, the petitioner’s net income is found on line 21 for each year.

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

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.

- In 2004, the Form 1120S stated net current assets of \$2,595.
- In 2005, the Form 1120S stated net current assets of \$4,769.
- In 2006, the Form 1120S stated net current assets of \$7,380.
- In 2007, the Form 1120S stated net current assets of \$9,956.

The net current assets are less in every year than the proffered wage and are therefore insufficient to demonstrate the petitioner's ability to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets in any of the relevant years.

In response to the director's RFE,⁶ counsel stated that the "sole proprietor's" assets should be considered. The director specifically rejected this argument, stating that a corporation's assets are separate from that of its owners. On appeal, counsel reiterates this argument, stating that the petitioner should be treated as a sole proprietor because the petitioner has only one owner. Counsel cites *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984), in stating that "a sole proprietorship does not exist as an entity apart from the individual owner" and concludes that as the petitioner's owner devotes himself to the petitioner, the petitioner is a sole proprietorship. Contrary to counsel's assertion, a business's organization is not determined by its number of owners, but instead by its formation. The petitioner is not a "sole proprietorship," but instead, the petitioner's owner is the corporation's sole shareholder. The petitioner is organized as an S corporation and reports its income and expenses on a Form 1120S. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. However, a

⁶ The director requested the petitioner's Schedule C of its Form 1040 and a list of household expenses. These items would be relevant if the petitioner is a sole proprietor. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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. In addition, they 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). Here, however, the petitioner is a corporation and such documents would not be required or considered as the analysis for a corporation is different as set forth in this decision.

corporation is different, USCIS 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). On appeal, counsel states that these cases were cited erroneously by the director and asserts that a difference exists between “a self-incorporated individual which may only have one owner or employee, and a corporation which is a separate and distinct legal entity from its owner or stockholders.” Counsel concludes incorrectly that the petitioner is a sole proprietorship. *Matter of Aphrodite Investments* cites to *Matter of M* for the proposition that, “the sole *stockholder* of a corporation [in the non-immigrant context⁷] was able to be employed by that corporation as the corporation has a *separate legal entity from its owners or even its sole owner*.” While we agree with counsel that differences exist between sole proprietors and incorporated entities, the petitioner here is an incorporated entity, an S corporation, and, as such, 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.

On appeal, counsel cites that the May 4, 2004 memorandum from [REDACTED] as the means by which a petitioner’s ability to pay should be examined.⁸ We first note that this memo was rescinded by a memo dated May 14, 2005 from [REDACTED]. Secondly, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely is offered as

⁷ Ownership of the petitioning entity is treated differently in the immigrant context. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), which discussed a beneficiary’s 50% ownership of the petitioning entity. The decision states:

The regulations require a ‘job opportunity’ to be ‘clearly open.’ Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of the regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Summart 374*, 2000-INA-93 (BALCA May 15, 2000).

⁸ The May 4, 2004 memo concerns requests for evidence.

guidance. Where the documentation submitted pursuant to 8 C.F.R. § 204.5(g)(2) is sufficient to render a decision, the director need not consider additional information. Lastly, the AAO's analysis complied with policy set forth by [REDACTED] Associate Director of Operations of USCIS, who issued an internal memorandum dated May 14, 2005 guiding adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

- The petitioner's net income is equal to or greater than the proffered wage;
- The petitioner's net current assets are equal to or greater than the proffered wage; or
- The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

The memorandum then states the acceptance of any other type of financial information is discretionary on the part of the adjudicator. The burden is on the petitioner to show that the financial information pursuant to 8 C.F.R. § 204.5(g)(2) is insufficient to demonstrate the petitioner's true financial situation. The petitioner presented no such evidence here and following the above analysis, the petitioner failed to demonstrate that it had sufficient net income, net current assets, or paid the beneficiary any wages.

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 *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.

In the instant case, the tax returns in the record demonstrate negative net income in every year and minimal net current assets for every year. On appeal, counsel states that the petitioner's years in business, historical growth, overall number of employees, occurrence of any uncharacteristic business expenditures or loss, reputation, and other evidence should be considered to show the petitioner's overall financial picture.⁹ The Form I-140 establishes that the petitioner had only two employees at the time that it filed the I-140 petition. The petitioner's tax returns do not reflect any officer compensation paid and only paid total wages of \$14,000 in 2007, \$16,800 in 2006, \$16,800 in 2005, and \$25,300 in 2004. The petitioner's total wages paid in each year are significantly less than the proffered wage and required overtime of \$49,779. In addition, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. Counsel asserts that the petitioner's owner's personal tax returns combined with the business tax returns "in whole" establish sufficient financial resources to pay the proffered wage. However, as stated above, the personal tax returns of the petitioner's owner may not be considered as a corporation is a separate legal entity from its owner(s) and the petitioner's corporate tax returns do not establish sufficient net income or net current assets to pay the proffered wage for any of the years from the priority date onward. 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.

Additionally, the petitioner failed to establish that the beneficiary met the requirements of the labor certification by 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*, 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).

Regarding the beneficiary's qualifications for the position, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

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

...

⁹ Counsel cites to a number of AAO non-precedent decisions, which considered the totality of the circumstances. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The AAO will, however, consider the petitioner's totality of the circumstances based on *Sonegawa*.

- (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.

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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The Form ETA 750 requires four years of high school before the May 14, 2004 priority date. The petitioner submitted no evidence concerning any education received by the beneficiary. The Form ETA 750 does not contain any work history or education listed for the beneficiary to indicate any required schooling. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, which would apply equally to education, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). As a result, we are unable to conclude that the beneficiary completed four years of high school by the time the labor certification was certified by the DOL.

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.