

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



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



B6

Date:

Office: TEXAS SERVICE CENTER

FILE:



DEC 02 2011

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

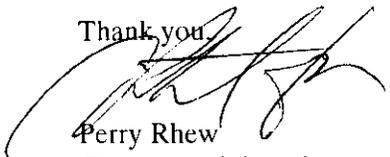


INSTRUCTIONS:

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a financial consultant company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 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)(i) of the Immigration and Nationality Act (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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on August 16, 2004. The proffered wage as stated on the Form ETA 750 is \$15.72 per hour (\$28,610.40 per year).¹ The Form ETA 750 states that the position requires college education [field of study not specified] and two years of experience as a bookkeeper.

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.²

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of \$196,751, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on April 2, 2004, the beneficiary did not claim to have worked for the petitioner.

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'l Comm'r 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'l Comm'r 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. In the instant case, the petitioner has not established

¹ Form ETA 750 states that the position is based on 35 hours per week. The labor certification also states that overtime is "as needed" and would be paid at a rate of one and one-half times the hourly rate.

² 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).

that it employed and paid the beneficiary the full proffered wage or any wages from the priority date onward.

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 (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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 at 118. “[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).³

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 12, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. 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. The petitioner’s tax returns demonstrate its net income for 2007, as shown in the table below.

- In 2007, the Form 1120 stated net income of \$109,206.
- In 2006, the Form 1120 stated net income of -\$78,277.
- In 2005, the Form 1120 stated net income of \$30,221.
- In 2004, the Form 1120 stated net income of \$10,616.

Therefore, for the years 2005 and 2007, the petitioner did have sufficient net income to pay the proffered wage. For the years 2004 and 2006, however, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 demonstrate its end-of-year net current assets for 2004 through 2007, as shown in the table below.

- In 2007, the Form 1120 stated net current assets of \$39,223.
- In 2006, the Form 1120 stated net current assets of -\$4,053.

³ Counsel argues on appeal that USCIS should have considered the petitioner’s depreciation deduction as a resource to pay the proffered wage. This argument has been considered and addressed above. See *River Street Donuts* at 118.

⁴According 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.

- In 2005, the Form 1120 stated net current assets of \$2,071.
- In 2004, the Form 1120 stated net current assets of \$1,763.

Therefore, for the years 2004 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.⁵

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had 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.

On appeal, counsel asserts that USCIS erred in its decision in determining that the petitioner did not have the ability to pay the proffered wage “in failing to take into account that the petitioner used a net operating loss deduction to reduce its taxable income to zero in the years in question, and in failing to consider that the net operating loss deduction is a non cash deduction that is used solely for the purpose of reducing Federal income taxes payable, but does not negate the actual income which the petitioner may have had, or the financial viability of the company.”

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 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.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120 or line 25(a) of Form 1120-A. However, the carryover cannot be more than the corporation’s taxable income after special deductions. *See* 26 C.F.R. §1.172-4 and 26 C.F.R. §1.172-5. *See also* Corporations, I.R.S. Pub. No. 542, at 15-16 (2006), <http://www.irs.gov/pub/irs-pdf/p542.pdf> (accessed October 21, 2011). Because a petitioner’s NOL is related to another year’s outcome, it should be omitted from the analysis of the petitioner’s “bottom line” ability to pay the proffered wage in a certain year. USCIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the IRS Form 1120 in our computation of net income, which is set forth above.

⁵ As noted above, the petitioner’s net income in 2005 and 2007 would be sufficient to pay the proffered wage in those years.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date, August 16, 2004. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel additionally argues that USCIS erred in failing to consider the petitioner's bank statements in 2006. Counsel's reliance on the balance in the petitioner's bank account 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. Here, the record only contains three statements for the time period September 30, 2006 to December 29, 2006. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that have been considered in determining the petitioner's net current assets.

On appeal, counsel states that the petitioner "may have made certain decisions with regard to its 2006 Federal Income tax return solely in the interests of tax planning as set forth in a letter from the Petitioner dated August 1, 2008, and said decisions may not have been similarly made if the beneficiary had been at that time actually employed by the Petitioner."

In a letter to counsel dated August 1, 2008, the petitioner states that "[o]ur loss in 2006 was a result of a considerable delay receiving revenue on a case that took up most of our time. We didn't receive that revenue until October of 2007, resulting in 2007 showing a net income of approximately \$120,000 on my pro forma cash flow projections."⁶ The petitioner further states, "We typically show a net profit between \$10,000 and \$20,000. We manage that by paying bonuses to me. The company is supposed to pay me 50% of gross revenue as commission for bringing in the business. We have never met that figure so there is considerable room to make bonus payments when we show a profit."⁷

⁶ A petitioner must establish its ability to pay from the time of the priority date. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

⁷ The petitioner paid officer compensation of \$40,455 in 2004, \$36,000 in 2005, \$102,750 in 2006, and \$148,200 in 2007. The petitioner's letter of August 1, 2008 asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business

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 (Reg'l Comm'r 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 petitioner's 2007 tax return does show the petitioner's ability to pay the proffered wage for 2007. However, it is not sufficient to establish the petitioner's continuing ability to pay the proffered wage since the filing the Form ETA 750. The petitioner's explanation for its

purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may, in some cases, be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. The documentation presented here, however, does not provide any information regarding the company's officers or stock. The petitioner's 2004-2007 IRS Forms 1120 Schedule E (Compensation of Officers) are blank. Although, in his letter to counsel, the petitioner states that he and his wife live a "rather frugal lifestyle," the petitioner has not defined nor submitted any documentation of his household expenses for analysis as to whether the officer's compensation can realistically be reduced to satisfy the proffered wage. USCIS may reject a fact stated in the petition if 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). Based on the petitioner's low net income and net current assets in 2004, and amount of officer compensation received in 2004, use of officer compensation to pay the proffered wage in that year does not appear realistic.

loss in 2006 does not explain or establish the petitioner's inability to pay the proffered wage in 2004. The tax returns exhibit low wages paid to all employees (2005 total: \$12,000, which is less than half the proffered wage; 2004 total: \$22,832, which is also less than the proffered wage). The petitioner has not submitted any evidence of the business reputation. 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 beginning on the priority date of August 16, 2004.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO conducts appellate review on a *de novo* basis. 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). Here, the record fails to establish that the petitioner submitted sufficient evidence to establish that the beneficiary has the required education for the position offered.

At the outset, the Department of Labor's certification of the Form ETA 750 does not supercede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(1)(3).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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 priority date of the petition, as noted above, is August 16, 2004,

which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).⁸

The job qualifications for the certified position of bookkeeper are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Responsible for accounts payable/receivable, bank reconciliation, investment account reconciliation, using computer software. Must be willing to work overtime as required by employer. References required.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	(blank)
High school	(blank)
College	Y
College Degree Required	(blank)
Major Field of Study	(blank)

Experience:

Job Offered	2 (years)
(or)	
Related Occupation	2 (years) (accountant)

Block 15:

Other Special Requirements	None
----------------------------	------

As set forth above, the proffered position requires two years of experience in the job offered or two years of experience as an accountant. Although the education requirement listed on Form ETA 750 is vague in listing a "Y" for the college requirement, the Form ETA 750 does reflect that the

⁸ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

proffered position does require some college education. The petitioner must address this issue in any further filings.

The record does not contain any evidence that the beneficiary possessed some college education as of the petition's priority date (August 16, 2004).⁹ If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). Accordingly, in the absence of documentation to establish that the beneficiary has college education, the petitioner has failed to demonstrate that the beneficiary meets the educational requirements of the certified labor certification.

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.

⁹ The record does include a certificate issued to the beneficiary by the National Ministry of Education for attendance at a course on theoretical and practical training in certain computer skills. This certificate, however, does not reference that this education was college-level, nor does it list any specific institution of higher education, and does not reference the length of this training.