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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



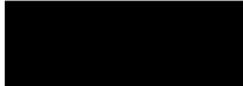
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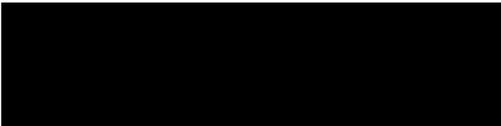
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DATE: DEC 08 2011 Office: NEBRASKA SERVICE CENTER

FILE: 

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner distributes products to health and personal care stores. It seeks to employ the beneficiary permanently in the United States as a sales manager. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. The director also determined the petitioner had not established the beneficiary met the education and experience requirement listed on the labor certification.

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 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 who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 ETA Form 9089 as accepted for processing by any office within the employment system of the USDOL. *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 ETA Form 9089 as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 that was accepted for processing on August 10, 2005 shows the proffered wage as \$3,050.80 bi-weekly which equates to \$79,320.80 per year and that the position requires nine years experience in the job offered with a high school degree or four years of work experience with a bachelor's degree.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner is structured as a C corporation and claims to have been established in 1993 and to employ one worker when the petition was filed. Its IRS Forms 1120, U.S. Corporation Income Tax Returns, reflect it operates on a tax year basis beginning July 1 and ending June 30. On the ETA Form 9089, signed by the beneficiary on June 11, 2007, he did not claim to have worked for the petitioner.

A certified labor certification establishes a priority date for any immigrant petition later based on the ETA Form 9089. Therefore, 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 a 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. On December 22, 2008, the director sent the company a Request for Evidence (RFE), asking, in part, that the petitioner submit copies of the beneficiary's IRS Forms W-2, Wage and Tax Statement, and/or IRS Forms 1099-MISC, Miscellaneous Income, for each year that he worked for the corporation. Although the record contains an undated letter from [REDACTED] as president of the company stating that the beneficiary had been employed by the corporation since February 2005 on a full time basis as sales manager and that his annual salary was \$40,012 for 2008, IRS Forms W-2 for the beneficiary were submitted for only 2007 and 2008 in response to the director's request. The IRS Forms W-2 indicate wages that the beneficiary received from the petitioner as shown in the table below:

<u>Year</u>	<u>Wages</u>
2005	No W-2 submitted
2006	No W-2 submitted
2006	No W-2 submitted
2007	\$29,925
2008	\$40,012.50

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of August 10, 2005 or subsequently.

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 next examines 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 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*, *supra*, at 1084, the court held that 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 116.

“[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

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 March 16, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. 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 was the most recent return available. In his RFE, the director requested, in part, that the petitioner submit financial information for the time periods since June 30, 2006 which would include the corporation’s IRS Forms 1120 for 2006 and 2007. No tax returns were submitted for those years.

<u>Year</u>	<u>Net Income</u>
2005	-\$103,905
2006	No IRS Form 1120
2007	No IRS Form 1120

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

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.¹ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns demonstrate its net current assets for the required period, as shown in the table below:

<u>Year</u>	<u>Net Current Assets</u>
2005	-\$70,218
2006	No IRS Form 1120
2007	No IRS Form 1120

¹According 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.

Therefore, for the years 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the USDOL, 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 states the director erred in denying the visa petition. Counsel submits a letter from [REDACTED], dated February 20, 2009, who states that for the first 12 years of existence, the petitioner "couldn't show a profit," and was only able to continue as a business due to the financial strength of its owners. However, "during the past 3 years, under the direction of the beneficiary, the corporation has shown a profit, and despite the difficult economic situation is in position to continue expanding its operating revenues and profit." Counsel also submits a letter from [REDACTED] a public accountant in [REDACTED] dated April 20, 2009 certifying the amount of salary of [REDACTED] earned while working for a company named [REDACTED] since June 22, 1998. Counsel further states that there is adequate proof that the petitioning company, through its owner [REDACTED] has the required funds necessary to maintain the company and to pay the salary of [REDACTED]. Counsel explains that [REDACTED] in the United States is being financially maintained by its owner in [REDACTED] due to the economic recession in the United States. Counsel submits copies of bank statements from the [REDACTED] and [REDACTED] and the company abroad. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."²

On appeal, counsel argues that in this case, the petitioner has a sizeable bank account and that these funds could have been used to pay the required wage. Counsel's reliance on the balance(s) in the petitioner's bank account(s) 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

² Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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. 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).

Counsel's and [REDACTED] assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the USDOL.

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*. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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 this case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets. The petitioner also has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Therefore, the AAO concludes that the petitioner has not demonstrated adequate financial strength through its net current income, net current assets, or any other means to demonstrate its ability to pay the beneficiary the proffered wage beginning on the priority date. 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.

The second issue in this matter is whether the petitioner has established that the beneficiary is qualified for the job offered. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is August 10, 2005. In order to meet the regulatory requirements set forth in 8 C.F.R. § 204.5(1)(3)(ii)(A), 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 or the experience of the alien. In addition, the petitioner must demonstrate that on the priority date, the beneficiary had the qualifications stated on its certified ETA Form 9089. *See Matter of Wing's Tea House*, 16 I&N Dec. at 158.

In evaluating the beneficiary's qualifications, USCIS looks 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). *See also, Mandany 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).

The ETA Form 9089, Part H, set forth the minimum education, training, and experience that an applicant must have for the position of sales manager. Part H describes the requirements of the proffered position as follows:

- | | | |
|------|--|-------------|
| 4. | Education: minimum level required: | High School |
| 4-B. | Major field of study | Blank |
| 5. | Is training required in the job opportunity? | No |
| 6. | Is experience in the job offered required for the job? | Yes |
| 6-A. | If Yes, number of months experience required: | 108 |
| 7. | Is there an alternate field of study that is acceptable? | No |
| 8. | Is there an alternate combination of education and experience that is acceptable? | Yes |
| 8-A. | If Yes, specify the alternate level of education required: | Bachelor's |
| 8-B. | If Other is indicated in question 8-A, indicate the alternate level of education required: | Blank |
| 8-C. | If applicable, indicate the number of years experience acceptable in question 8: | 4 |
| 9. | Is a foreign education equivalent acceptable? | Yes |

As stated above, the main job requirement is a minimum educational level of high school completion with nine years of work experience (108 months). The alternate requirement set forth as Part H, Item 8-A, 8-B, and 8-C, as well as Part H, Item 6 and 6A indicates that applicants may qualify through a bachelor's degree listed in Item 8-A or a foreign education equivalent listed in Item 9 combined with four years of sales manager experience listed in Item 8-C.

On the ETA Form 9089, Part J, Item 11, the beneficiary states the highest education level he achieved relevant to the requested occupation is high school. On appeal, counsel submits documents showing additional educational achievements as follows:

1. The beneficiary received an associate degree diploma dated 29 August 1992 from [REDACTED] for completing studies in the field of Non Pharmacology Therapies.
2. The beneficiary received an associate degree diploma dated July 29, 1997 from [REDACTED] for completing studies in the field of Magnetotherapy.

After review of the above educational attainments, it is determined that the petitioner has failed to demonstrate that the beneficiary possessed a United States bachelor's degree or its equivalent. He is therefore not qualified for the proffered position through the petitioner's alternate requirement of a bachelor's degree or foreign equivalent along with four years experience. This education is also not listed in the ETA Form 9089. The beneficiary only claims to have a high school education. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976); *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The position duties described on the ETA Form 9089 are listed as:

Resolve customer complaints re: sales & service, Monitor customer preferences to determine focus of sales efforts. Direct & coordinate activities involving product sales. Determine price schedules & discount rates. Review operational records & reports to project sales & determine profitability. Direct, coordinate & review activities in sales & service accounting & record keeping, & in receiving and shipping operations. Confer with dept heads to plan advertising services & to secure info on customer specs. Advise dealers & distributors on policies & operating procedures to ensure functional effectiveness of business. Prep budgets & approve budget expenditures. Represent company at trade association meeting to promote products.

On Part K, Alien Work Experience, the beneficiary was required to list all jobs he has held during the past three years and to list any other experience that qualifies him for the job opportunity for which the employer is seeking certification. On June 11, 2007, the date he signed the ETA Form 9089, he listed his experience as follows:

1. Employed by [REDACTED] as a first responder and life guard from February 1, 2002 until August 5, 2005.
2. Employed by [REDACTED], as a chief executive officer from January 1, 2001 until July 28, 2005.
3. Employed by [REDACTED], as a sales manager from October 1, 1999 until December 15, 2001.
4. Employed by [REDACTED] as a chief executive officer from January 1, 1977 until November 1, 1998.

On appeal counsel submits a letter dated April 27, 2009 from [REDACTED], General Manager of [REDACTED], who states that the beneficiary "maintained an independent business relationship as an external sales Manager person with commercial representation in the Caribbean, Ecuador and Venezuela, during the time period of January of 1988 until November of 1998."

The regulation at 8 C.F.R. § 204.5(g)(1) requires:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) also requires that any experience requirements for professional and skilled workers must be supported by letters from employers giving the name, address, and title of the employer, and a description of the experience of the alien.

The letter from [REDACTED] above does not qualify as an employment verification letter because it does not reflect that the beneficiary actually worked for [REDACTED] from 1988 until 1998 although the letter indicates he maintained an independent business relationship as an external "sales Manager person." Additionally, the letter does not provide a specific description of the duties performed by the alien during the period. Also, he did not list experience from this company on the ETA Form 9089. In fact, this employment conflicts with the beneficiary's claim to have been the chief executive officer of [REDACTED] from 1977 to 1998. 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. at 591-92.

The job duties of a first responder and life guard, (Item # 1 above), and of a chief executive officer, (Item # 4), do not correspond to those of a sales manager as listed by the petitioner on the labor certification.

On appeal, the petitioner submits an employment verification letter dated May 24, 2007 from [REDACTED] [REDACTED] in Miami, Florida, (Item # 2), who states:

This letter is written to confirm that [REDACTED] is currently employed as the President at [REDACTED] with the Tax Id: [REDACTED] as been employed for six (6) years. He is loyal and always places the welfare of the company above all else. His long hours and his patience with employees under him and with management make him the ideal employee.

This letter from [REDACTED] not meet the requirements of 8 C.F.R. § 204.5(g)(1) or 204.5(l)(3)(ii)(A) because his duties described as president of [REDACTED] do not correspond to those of a sales manager as outlined by the petitioner on the labor certification. Therefore, the letter does not document qualifying sales manager experience. Again, 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. at 591-92. Absent clarification of these inconsistencies in the record, the AAO will not accept this letter as persuasive evidence of employment experience with this employer.

Based on the evidence in the record of proceedings, the AAO finds that the beneficiary does not possess at least four years of experience with a bachelor's degree or nine years of experience with a high school diploma as of the August 10, 2005 priority date and therefore does not meet the requirements of the labor certification application.

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.