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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

PUBLIC COPY



BE

Date: JUL 20 2011

Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 is a powder coat painter. It seeks to employ the beneficiary permanently in the United States as a spray painter. 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, had not established that the beneficiary completed the required eight years of grade school and four years of high school needed to perform the offered job, and had submitted a copy of the Form ETA 750 that contained an uncertified change rather than the original Form ETA 750 containing a change certified by the DOL.¹ 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 first 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 other 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 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 was accepted for processing by any office within

¹ A review of the Form ETA 750 contained in the record reveals that the director erred in his determination that the petitioner had submitted a copy of the Form ETA 750 with an uncertified change rather than the original Form ETA 750 containing a change certified by the DOL.

the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.99 per hour or \$24,939.20 per year. The position requires eight years of grade school and four years of high school, no training, and no experience in the job offered.

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

On appeal, the [REDACTED] asserted that this corporation is the holding company for a consolidated group comprising four individual companies including the petitioner, [REDACTED], is the sole stockholder of the petitioner. [REDACTED] contended that the beneficiary has been an employee of [REDACTED] since October 1997. In support of the appeal, [REDACTED] submits an audited consolidated financial statement for [REDACTED] and Subsidiaries" for 2006 and 2007.

A review of the website at <https://www.wdfl.org/apps/CorpSearch/Deatasils.aspx?entityIDH022842> reveals that the petitioner is incorporated as a domestic business in the state of Wisconsin. However, the record of proceeding is absent any evidence regarding the petitioner's specific corporate type and structure. On the petition, the petitioner claimed to have been established in 1986, listed gross annual income of \$10,000,000.00, and to currently employ 145 workers. The record is absent any tax returns to determine the specific dates of the petitioner's fiscal year. On the Form ETA 750, which was signed by the beneficiary April 27, 2001, the beneficiary claimed that she had not previously been employed by the petitioner.

On January 11, 2011, the AAO issued a Request for Evidence (RFE) informing the petitioner that it must establish that [REDACTED], with Federal Employer Identification Number (FEIN) [REDACTED] has the continuing ability to pay the proffered wage to the beneficiary since the priority date of April 30, 2001 rather than any other corporate entity. The AAO informed the petitioner that the assets or income of its stockholder or its sister companies may not be used to establish the petitioner's ability to pay the wage beginning on the priority date. A corporation is a separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). *See also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003)

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(nothing in the governing regulation, 8 C.F.R. § 204.5, permits [United States Citizenship and Immigration Services (USCIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage”).

In addition, the AAO noted that [REDACTED] contention on appeal that the beneficiary has been an employee of [REDACTED], since October 1997 was in direct conflict with the fact that the beneficiary made no claim to have been employed by the petitioner on the Form ETA 750B. The AAO informed the petitioner that it was imperative that all of the petitioner’s supporting documents were consistent with the claims made on the present petition. Consequently the AAO requested that the petitioner provide the following additional evidence:

- Form W-2, Wage and Tax Statements, issued by the petitioner, [REDACTED] reflecting employee compensation paid to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and if available 2010;
- Copies of the beneficiary’s federal tax returns for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009; and,
- Copies of the petitioner’s, [REDACTED], complete federal tax returns or audited financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009.

Finally, the AAO informed the petitioner that the record contains a certified translation of a certificate reflecting the beneficiary’s completion of secondary education requirements in Mexico in June of 1988. However, the record does not contain the original Spanish language certificate that corresponds to this certified translation. Therefore, the AAO requested that the petitioner provide a copy of the original Spanish language certificate reflecting the beneficiary’s completion of secondary education requirements.

In response, the petitioner submits copies of Form W-2 statements reflecting wages paid to the beneficiary by the petitioner in 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains Form W-2 statements, reflecting employee compensation paid to the beneficiary by the petitioner since the priority date of April 30, 2001 as follows:



However, the Form W-2 statements are not persuasive evidence of any wages having been paid to the beneficiary because information contained in these forms are inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury. The Form W-2 statements for 2001, 2002, 2003, 2004, 2005, 2006, and 2007 state that the wages were paid to a person having social security number 365-14-1704 and the Form W-2 statements for 2008, 2009, and 2010 state that the wages were paid to a person having social security number 399-29-9336. The petitioner responded "none" to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, either [REDACTED] is the beneficiary's social security number. Furthermore, in the AAO's January 11, 2011 RFE, the petitioner was specifically asked to reconcile [REDACTED] representation on appeal that the beneficiary has been an employee of [REDACTED], since October 1997 despite the fact that the beneficiary made no claim to have been employed by the petitioner on the Form ETA 750B. The petitioner did not address this issue in its response. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Form W-2 statements as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

Regardless, assuming the Forms W-2 are persuasive evidence, the petitioner would have demonstrated the ability to pay the proffered wage in 2006, 2007, 2008, 2009, and 2010, but did not establish that it paid the beneficiary the full proffered wage in 2001, 2002, 2003, 2004, and 2005.

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 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 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).

Although the AAO specifically requested that the petitioner provide copies of its complete federal tax returns or audited financial statements for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 in the RFE dated January 11, 2011, the petitioner failed to submit either the tax returns or the audited financial statements of the petitioner, [REDACTED] for these years. While the record does contain the audited financial statements [REDACTED] and Subsidiaries” for 2006 and 2007, the AAO specifically informed the petitioner in the RFE dated January 11, 2011 that these documents were not relevant and acceptable evidence as the assets or income of the petitioner’s stockholder or its sister companies may not be used to establish the petitioner’s ability to pay the wage beginning on the priority date. A corporation is a separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24; *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530. The record is absent any evidence to determine whether the petitioner had the continuing ability to pay the proffered wage since the priority date of April 30, 2001 through an examination of its net income. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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. However, it must be noted again that the record does not contain any evidence to determine whether the petitioner had the continuing ability to pay the proffered wage since the priority date of April 30, 2001 through an examination of its net current assets despite the AAO’s specific request for such evidence in the RFE dated January 11, 2011. Again, it must be reiterated that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See id.* at § 103.2(b)(14).

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.

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.

¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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 [REDACTED] 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.

In the instant case, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1986. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. Finally, the previously noted discrepancies regarding the dates the petitioner purportedly employed the beneficiary and the Form W-2 statements contained in the record tend to limit the probative value of all the supporting documentation submitted by the petitioner as evidence of its continuing ability to pay the proffered wage to the beneficiary since the priority date of April 30, 2001.

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.

Relevant to the Form ETA 750's requirement that the beneficiary possess eight years of grade school education and four years of high school education, the second issue to be examined in this proceeding is whether the beneficiary possessed the required education as stated on the labor certification as of the priority date of April 30, 2001.

In order for the petition to be approved, the petitioner must establish that the beneficiary is qualified for the offered position. Specifically, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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. 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. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

As noted previously, the Form ETA 750 states that the proffered position of spray painter requires eight years of grade school education and four years of high school education. Thus, the beneficiary must establish that she possessed the required on-the-job training and experience before the April 30, 2001 priority date of the Form ETA 750.

In the RFE dated January 11, 2011, the AAO informed the petitioner that the record contains a certified translation of a certificate reflecting the beneficiary's completion of secondary education requirements in Mexico in June of 1988. However, the record does not contain the original Spanish language certificate that corresponds to this certified translation. Therefore, the AAO requested that the petitioner provide a copy of the original Spanish language certificate reflecting the beneficiary's completion of secondary education requirements. However, the petitioner failed to submit a copy of the original Spanish language certificate reflecting the beneficiary's completion of secondary education requirements. 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)).

The discrepancy noted above seriously impairs the credibility of the claim that the beneficiary has

the required four years of high school education as stated on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Taking into account the lack of evidence in this case, it is concluded that the petitioner has not established that it is more likely than not that the beneficiary possessed the required four years of high school education. Therefore, the petitioner has not established that the beneficiary possesses the education required to perform the proffered position as set forth on the labor certification, and the petition must be denied for this reason as well.

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.