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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

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 0 2 2011

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On April 19, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on September 7, 2002. The director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on February 26, 2009, and the petitioner subsequently appealed the director's decision to revoke approval of the visa petition. On April 28, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to both the petitioner and the beneficiary. Both the petitioner and the beneficiary timely responded to the NDI/RFE. The appeal will be dismissed.

On appeal, counsel for the petitioner contends that the director's decision to revoke the previously approved petition was erroneous, because it was not based on good and sufficient cause, as required by section 205 of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1155.[1] The AAO in the NDI/RFE, among other things, notified both the petitioner and the beneficiary of several inconsistencies in the record concerning the beneficiary's work experience prior to the filing date of the labor certification. On May 28, 2010, the AAO received a brief from the petitioner's and the beneficiary's counsel of record and additional evidence pertaining to the beneficiary's work experience in Brazil. In her brief, counsel contends that the beneficiary has submitted and provided sufficient evidence and detailed explanation to demonstrate his qualifications for the position as laid out on the Form ETA 750, Application for Alien Employment Certification. The record shows that the appeal is timely and makes a specific allegation of error in law or fact. 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 a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).[2] As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification.

The petitioner must demonstrate that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] Section 205 of the Act, 8 U.S.C. § 1155, states, "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause revoke the approval of any petition approved by him under section 1154 of this title."

[2] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 19, 2001. The petitioner sought to hire an experienced cook. The Form ETA 750 specifically required the applicant to have a minimum of two years experience in the job offered. Under the job description, the petitioner stated that the job to be performed included "preparing all types of dishes."

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of two years of work experience in the job offered. On the Form ETA 750, signed by the beneficiary on February 13, 2001, he represented that he worked at [redacted] in Ipatinga, Minas Gerais, Brazil, as a cook from January 1989 to June 1991. Submitted along with the approved Form ETA 750 and the petition was a signed declaration dated February 15, 2001 and issued by [redacted], who claimed that the beneficiary worked at his establishment ([redacted]) as a cook between January 1989 and June 1991.

The record shows that the Form ETA 750 was certified by the DOL on November 9, 2001. Following the approval of the Form ETA 750, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on April 19, 2002. As stated above, the I-140 petition was approved by the VSC on September 7, 2002.

Before revoking the approval of the petition, the director sent the petitioner a notice of intent to revoke (NOIR), advising the petitioner to provide additional evidence to verify that the beneficiary had at least two years work experience as a cook before his labor certification application was filed on April 19, 2001. In his NOIR, the director found and noted that the beneficiary's prior employer, [redacted] was not registered with the Brazilian government until July 6, 1992.[3] Based on this finding, the director concluded that the beneficiary could not have possibly worked there from January 1989 to June 1991 and that the petitioner must have submitted false documentation regarding the beneficiary's prior work experience in Brazil.

In response to the director's NOIR, the petitioner provided the following evidence:

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[3] The declaration issued by [redacted] included the registration number of [redacted]. That number is [redacted]

- Two affidavits dated September 10, 2008 and September 19, 2008 from ;
- An affidavit from the beneficiary;
- A letter from the petitioner; and
- Various articles, studies, and journals about the Brazilian economy in the 1990s.

In his affidavit dated September 10, 2008, stated that he did not register his restaurant business with the government in 1988, when he first started the business, but confirmed that the beneficiary worked at his restaurant as a cook from January 1989 to June 1991. stated he did not register the business until July 1992 to avoid paying extremely high taxes to the government. In his second affidavit dated September 19, 2008, further stated that starting in October 2005 he closed the restaurant business and began to run a grocery store, selling bakeries, candies, and beverages.

In his affidavit, consistent with his claim on the Form ETA 750, part B, the beneficiary affirmed that he started to work as a cook at Mr. restaurant in January 1989. He further stated that he received cash only as his wages during his employment with and that he did not know that the business was not registered with the government when he worked there. He, however, stated that it was common for sole proprietors like not to register with the government when they started their business. The beneficiary stated that he could not produce any other document to prove his employment with

Upon receipt, the director determined that the petitioner had failed to demonstrate that the beneficiary had the requisite two years of work experience in the job offered before it filed the labor certification form with the Department of Labor (DOL) in April 2001. The director revoked the approval of the visa petition, accordingly.

In adjudicating the appeal, the AAO found several inconsistencies in the record pertaining to the beneficiary's past work experience as a cook in Brazil. On April 28, 2010, the AAO sent both the petitioner and the beneficiary an NDI/RFE in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the NDI/RFE, the AAO specifically indicated that the beneficiary claimed he worked as a cook for from January 1989 to June 1991 on the Form ETA 750, part B. However, the beneficiary failed to list his employment at on his Biographic Information, Form G-325, under a section eliciting information about his work experience abroad. Further, the AAO observed that the signatures of on his two affidavits dated September 10 and September 19, 2008 are different from his signature on his declaration dated February 15, 2001.

In response to the AAO's NDI/RFE, current counsel for both the petitioner and the beneficiary asserts that the decision to revoke the approval of the petition was not based on good and sufficient cause and that the evidence submitted conclusively shows that the beneficiary had the requisite two years work experience necessary to qualify for the position. The following additional evidence was also submitted to demonstrate that the beneficiary had two years work experience in the job offered for the proffered position before the priority date:

- An affidavit dated May 5, 2010 from the beneficiary;
- The beneficiary's social security statement showing his earnings from 1991 to 2008;
- A signature card containing two versions of signature and a declaration of a public notary in Brazil certifying that both versions of signature are recognized as valid;
- A legal memorandum by an attorney licensed to practice in Brazil, concerning the government regulation requiring businesses to register in Brazil; and
- A news article and a study about Brazilian's informal economy.

In her response, counsel claims that the petitioner has submitted sufficient evidence to demonstrate that the existed in 1988 and that the beneficiary worked there from January 1989 to June 1991 as a cook. Counsel contends that no tangible evidence such as copies of paystubs, payroll records, or other evidence can be produced due to the passage of time. Citing 8 C.F.R. § 204.5(g)(1), counsel urges that sworn statements by and the beneficiary should be considered as credible and that other evidence is unavailable. Counsel states, "To require additional documentation so many years after the fact, documentation which simply no longer exists, is overly burdensome and goes above and beyond the regulatory requirements imposed upon the petitioner."

The beneficiary claims in his affidavit that the reason why he failed to list his employment abroad on his biographic information form was because a paralegal in office helped him to complete the form, and any error or missing information was made by the paralegal. He states that he did not read and understand English at that time to know if there was inaccurate or missing information and only signed the form based on the information he provided.[4] A failure to apprise oneself of the contents of documents before signing them is generally not recognized as a defense to misrepresentation. *See, e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)). The record contains no objective documentation resolving this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

The petitioner submitted evidence that the failure to register with the government until July 1992 is consistent with business practices in Brazil, where the informal economy accounts for up to 40% of the Brazilian gross national income. the owner of the business, stated in one of his affidavits that he did not register his business to avoid paying high taxes, which according to is a common business practice. Nevertheless, given the inconsistencies in the beneficiary's application forms, where he did not list his last employment abroad with and the lack of

[4] The office of the beneficiary's previous attorney, represents itself as fluent in Portuguese. Thus the beneficiary's assertion that he did not understand what he was signing because of language difficulties is not credible.

contemporaneous documentation establishing the beneficiary's employment, and the inability to produce evidence that it existed in Brazil during the time of the beneficiary's claimed employment, the AAO finds that the petitioner has not established that the beneficiary gained two years experience as a cook in Brazil. 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)). For these reasons, we find that the beneficiary did not have the requisite qualifications for the position as of the priority date.

Further, the immigrant visa petition may not be approved since issues relating to the petitioner's ability to pay have not been established. The appeal will be dismissed for this additional reason.

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 the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

As noted above, the petitioner filed the labor certification application (Form ETA 750) for the beneficiary with the DOL on April 19, 2001. The rate of pay or the proffered wage set forth by the DOL is $12.57 per hour or $22,877.40 per year (based on a 35-hour work per week).[5]

In response to the AAO's NDI/RFE, the petitioner submits copies of the following evidence to demonstrate that it has the ability to pay $12.57 per hour or $22,877.40 per year beginning on April 19, 2001:

- The beneficiary's Forms W-2 for 2001-2009 from the petitioner and Opus, Inc.

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

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[5] The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or 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, although the petitioner has established that it employed the beneficiary continuously from 2001, it has not established that it consistently paid the beneficiary the full proffered wage of $12.57 per hour or $22,877.40 per year during the qualifying period from 2001 to 2009. The W-2 forms submitted show that the beneficiary received the following wages from the petitioner between 2001 and 2009:[6]

- In 2001, the beneficiary received $11,277.75 ($11,599.65 less than the proffered wage).
- In 2002, the beneficiary received $17,663.25 ($5,214.15 less than the proffered wage).
- In 2003, the beneficiary received $23,281.25 (exceeds the proffered wage).
- In 2004, the beneficiary received $25,047 (exceeds the proffered wage).
- In 2005, the beneficiary received $26,712 (exceeds the proffered wage).
- In 2006, the beneficiary received $22,311.80 ($565.60 less than the proffered wage).
- In 2007, the beneficiary received $25,903.22 (exceeds the proffered wage).
- In 2008, the beneficiary received $20,278.72 ($2,598.68 less than the proffered wage).
- In 2009, the beneficiary received $21,829.50 ($1,047.90 less than the proffered wage).

The W-2s submitted are *prima facie* evidence of the petitioner's ability to pay the beneficiary's proffered wage of $22,877.40 per year for the years 2003 through 2005 and in 2007, but not for 2001, 2002, 2006, 2008, and 2009. In order for the petitioner to meet its burden of proving by a

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[6] In response to the AAO NDI/RFE, the petitioner submitted the beneficiary's social security statement indicating that the beneficiary earned income during the years prior to receiving his social security number, and evidence of payment of back taxes on income earned under an invalid social security number. The Forms W-2 submitted by the petitioner indicate that the beneficiary earned income from the petitioner under all three of his social security numbers. The AAO will consider, for purposes of this decision only, the petitioner's payment of wages to the beneficiary under all of the social security numbers.

preponderance of the evidence that it has the ability to pay the proffered wage in those years, the petitioner must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is $11,599.65 in 2001; $5,214.15 in 2002; $565.60 in 2006; $2,598.68 in 2008; and $1,047.90 in 2009. The petitioner can pay the difference between the two wages through its net income or net current assets.

If the petitioner chooses to pay the difference through its net income, USCIS will 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.
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> 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).

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.[7] 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 fails to submit copies of its federal tax returns, annual reports, or audited financial statements for any year during the qualifying period. Due to this lack of evidence, the AAO cannot find that the petitioner has the continuing ability to pay the proffered wage from the priority date.

Finally, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number

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[7] 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.

of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially in 2001, 2002, 2006, 2008, and 2009, had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* After a review of the relevant evidence, the AAO is not persuaded that the petitioner has that ability.

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. The director's previous approval of the petition is revoked.