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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. MS2090  
Washington, DC 20529-2090

## U.S. Citizenship and Immigration Services

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAR 10 2011**

IN RE:

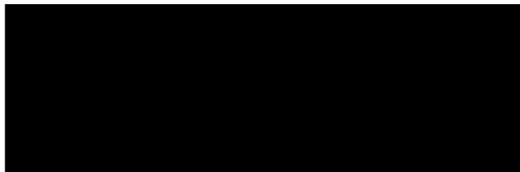
Petitioner:

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,

*Kerai S. Polos for*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition and a subsequent motion to reopen and reconsider were denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a special-needs pre-school facility. It seeks to employ the beneficiary permanently in the United States as an evaluator. 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 April 14, 2009 denial, and affirmed in his May 18, 2009 decision on the motion, the primary issue in this case is whether or not the petitioner has established its ability to pay the beneficiary 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.

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). 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 December 29, 2003. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, which equates to \$29,120 per year. The Form ETA 750 states that the position requires two years of 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.<sup>1</sup>

The record of proceeding reveals that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established [REDACTED] and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 15, 2003, the beneficiary claimed to have worked for the petitioner as an evaluator since April 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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, the beneficiary's Internal Revenue (IRS) Forms W-2, Wage and Tax Statements, and Forms 1099, Miscellaneous Income, for 2003 through 2007 show wages and compensation received from the petitioner as follows:

<u>Year</u>	<u>Wages and Compensation (\$)</u>
2003	1,308.00
2004	18,646.80
2005	29,120.03

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<sup>1</sup> 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).

2006	31,237.82 <sup>2</sup>
2007	13,453.65

Therefore, the petitioner has established that it paid the beneficiary at an amount equal to the proffered wage in 2005 and 2006. For the years 2003, 2004, and 2007, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$29,120.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$27,812, \$10,473.30, and \$15,666.35, in 2003, 2004, and 2007, respectively.

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 (1<sup>st</sup> 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 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

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<sup>2</sup> The director's decision states that the beneficiary received \$32,221.00 in wages in 2006. This error does not affect the ultimate outcome of the appeal.

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts*, 558 F.3d at 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*, 719 F.Supp. 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 19, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s Request for Evidence (RFE) dated February 6, 2009. Therefore, the petitioner’s tax return for 2008 was not yet due and the tax return for 2007 was the most recent return available.

The petitioner’s tax returns demonstrate its net income for 2003, 2004 and 2007 as follows:

<u>Year</u>	<u>Net Income/Loss (\$)</u>
2003	25,947.00
2004	-9,335.00
2007	10,665.18

Therefore, for the years 2003, 2004 and 2007, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and 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.<sup>3</sup> 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

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<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 2003, 2004 and 2007 as follows:

<u>Year</u>	<u>Net Current Assets/Liabilities (\$)</u>
2003	9,811.00
2004	-31,271.03
2007	-32,650.00

Therefore, for the years 2003, 2004 and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 9089 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 motion, counsel argued that additional material of ability to pay should be accepted in appropriate cases and that the director's outright denial of the petition rejected the use of the petitioner's bank statements to establish its ability to pay the proffered wage. Counsel also argued that the director's denial ignored the possibility that the petitioner may "draw upon equity of [its] assets in order to obtain funds for the continuation of the business without selling the property" and that, "in the coming months," the petitioner planned to sell its assets and begin renting property so that the business will continue its operations. On appeal, counsel argues that the petitioner's tax returns alone present an inaccurate view of the viability of the petitioning company to pay the proffered wage and that the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent case "Rancho Coletero" established that the "entire financial circumstances" of the employer should be considered and ruled that the petitioner in that case, despite reporting a loss, may nevertheless have the funds sufficient to cover the salary of the beneficiary.

As indicated by the director in his denial of the petition, counsel's reliance on balances in the petitioner's bank accounts 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. 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, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that certain entities regularly fail to show profits typically rely upon individual or family assets. Counsel does not state how BALCA's precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

With regard to counsel's assertions that the petitioner intended to sell assets in order to continue the operation of the business, no evidence of such sales has been submitted into the record of proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With regard to counsel's assertion that the petitioner may draw upon the equity of its assets to pay the proffered wage, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

The petitioner has not established that a line of credit was available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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. 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 *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, the petitioner has been in business since 1997 and claims to employ 13 workers. However, there is no evidence of the occurrence of any uncharacteristic business expenditures or losses, the historical growth of the petitioner's business since 1997, the petitioner's reputation within its industry, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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.

Further, although not raised in the director's denial, we note that there is an issue related to the position's minimum qualifications. 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 (9<sup>th</sup> 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). The petitioner has listed different educational requirements on Form ETA 750, and on Form I-129, Petition for Nonimmigrant Worker, for what appears to be the same position.

On August 5, 2005, the petitioner filed an Form I-129 on behalf of the beneficiary to perform services as an evaluator pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (H-1B petition). The H-1B petition (SRC 05 221 50833) was approved on September 14, 2005.<sup>4</sup> The Form I-129 supplement to the petition indicated that the proposed duties of the position required that the beneficiary "[R]eview records, observe behavior, administer tests

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<sup>4</sup> Subsequent petitions for continuation of previously approved employment without change with the same employer were approved valid through August 4, 2008.

and analyze reports to assess learning abilities and needs of children to determine type of special program required to meet educational needs.” Further, the petition indicated that a bachelor’s degree was required for the position. The pay rate offered was listed as \$30,030 per year.

The current Form ETA 750 was filed prior to the Form I-129 and listed a pay rate of \$14.00 per hour, which equates to \$29,120 per year. The position description is exactly the same as the position description for the Form I-129 position of evaluator. However, we note that the Form ETA 750 indicates that the position requires only two years of experience, with no educational requirements.

On November 17, 2010, the AAO issued a Notice of Derogatory Information (NDI) requesting the petitioner to explain the positions’ differing educational requirements. In response, the petitioner stated, in part, that in order to broaden the applicant pool, in its recruitment efforts it listed two years of experience on the Form ETA 750 as a means to advertise the position to as many potential U.S. workers as possible. The petitioner further stated that the Form I-140 category under which it filed the instant petition includes both professionals (requiring a bachelor’s degree) and skilled workers (for jobs requiring at least two years experience) and that since the beneficiary has both a bachelor’s degree and two years of experience, she would qualify for the position whether it had required a bachelor’s degree or two years of experience.

The regulation related to the H-1B nonimmigrant category at 8 C.F.R. § 214.2(h)(4)(ii) provides that a specialty occupation:

Means an occupation which requires theoretical and practical application of a body of highly specialized and practical knowledge of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which required the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

For the position to qualify as an H-1B position, under 8 C.F.R. § 214.2(H)(4)(iii)(A), the position must meet one of the following criteria:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The beneficiary must establish that he or she holds a U.S. baccalaureate degree or higher required by the specialty from an accredited college or university; holds a foreign degree equivalent to a U.S. baccalaureate or higher degree required by the specialty; holds an unrestricted state license, registration, or certification required by the specialty; or has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. 8 C.F.R. § 214.2(H)(4)(iii)(C).

If the position required a bachelor's degree, the petitioner should have listed the degree on the ETA 750. If the petitioner were willing to advertise and hire a qualified candidate without a bachelor's degree, then the position truly does not require one. The petitioner has failed to set forth any criteria to show that the evaluator position as listed on the Form I-129 requires a bachelor's degree, other than the assertion that the petitioner required a bachelor's degree when it filed the H-1B and not when it filed the ETA 750 "in order to expand the applicant pool." The petitioner has not distinguished the H-1B position from the position as listed on the ETA 750. We are satisfied that the position does not require a bachelor's degree. However, this leaves the beneficiary's H-1B status in question, which may be revoked.<sup>5</sup>

The petitioner has not overcome the issue regarding its ability to pay, the reason for the petition's initial denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> 8 C.F.R. § 214.2(h)(11)(B) provides that the director may revoke an H-1B petition at any time, even after the expiration of the petition.