



U.S. Citizenship
and Immigration
Services

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Date: **MAY 23 2011**

Office: TEXAS SERVICE CENTER

FILE:



IN RE:

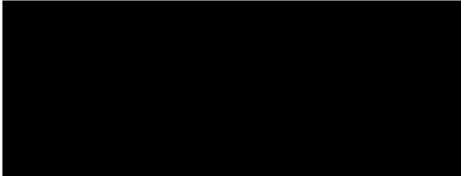
Petitioner:

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

The petitioner is a non-profit religious school. It seeks to employ the beneficiary permanently in the United States as a teacher. 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.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

As a threshold issue, and although not noted by the director in the Notice of Decision, the petition cannot be approved because the proffered salary of \$26,000.00 per year for the certified job of teacher as listed on the Form ETA 750 is substantially different from the salary of \$300.00 per week, or \$15,600.00 annually, for the offered job of teacher as listed at Part 6 of the Form I-140, Immigrant Petition for Alien Worker. The Form ETA 750 states a different proffered salary than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). As the petitioner clearly does not intend to employ the beneficiary in the offered job of teacher at a proffered salary of \$26,000.00 per year as listed on the Form ETA 750 and certified by the DOL, but instead intends to employ the beneficiary as a teacher at a salary of \$15,600.00 per year, a substantially different salary outside the terms of the Form ETA 750, the petition cannot be approved even if the appeal were to be sustained. Accordingly, the petition must be denied for this reason.

As set forth in the director's April 18, 2008 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants

who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 June 19, 2002. As previously discussed, the proffered wage as stated on the Form ETA 750 is \$26,000.00 per year. The Form ETA 750 states that the position requires two years experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The evidence in the record of proceeding shows that the petitioner is a not-for-profit corporation. The petitioner indicated on the Form I-140 petition at part 5, section 2 that the organization was established on January 1, 1962 and employs 22 workers. According to the tax returns in the record, the petitioner's fiscal year begins on September 1 of each respective year through August 31 of the subsequent year.

Relevant evidence in the record included the petitioner's Forms 990, Return of Organizations Exempt From Income Tax, for 2004 and 2005, and Forms W-2, Wage and Tax Statement reflecting wages paid by the petitioner, Federal Employer Identification Number (FEIN) [REDACTED], to the beneficiary in 2002, 2003, 2004, 2005, 2006, and 2007.

On appeal, counsel asserted that the director erred in not properly assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Specifically, counsel contended that the petitioner and its parent organization, [REDACTED], both possess current assets that far exceed the proffered wage. Counsel submitted the petitioner's balance sheets for 2002, 2003, and 2004, Form 990 tax returns of

██████████ for 2004 and 2005, and financial statements of ██████████ for 2005 to 2006 and 2006 to 2007, in support of the appeal.

On January 4, 2011, the AAO issued a Request For Evidence (RFE) to the petitioner which noted the following pertinent facts:

- The record contains the petitioner's Forms 990 tax returns for 2004 and 2005, as well as Form 990 tax returns for 2004 and 2005 for the ██████████. At part VI, number 80a of the petitioner's 2004 Form 990 tax return, the petitioner answered no when asked if it was related (other than by association with a statewide or nationwide organization) through common membership, governing bodies, trustees, officers, etc., to any other exempt organization. However, at part VI, number 80a of the petitioner's 2005 Form 990 tax return, the petitioner answered yes when asked if it was related (other than by association with a statewide or nationwide organization) through common membership, governing bodies, trustees, officers, etc., to any other exempt organization and indicated that it was related to the ██████████. Further, a review of the 2004 and 2005 Form 990 tax returns of the ██████████ reveals that that this organization indicated that it was related to the petitioner at part VI, number 80a of both these tax returns.
- The Form 990 tax returns for both organizations indicate on page 1 that the returns are not "group returns for affiliates."
- A review of the websites at <http://www2.guidestar.org/organizations/> and <http://www.irs.gov/app/pub-78/> reveals the existence of the non-profit organization, ██████████, but no information relating to ██████████
██████████

The fact that a search of these websites provides no information relating to a non-profit organization, ██████████ raises questions regarding the employer listed on the Form ETA 750 and its claim to be a non-profit organization. Further, the fact that the record contains conflicting information relating to the type and nature of affiliation that exists between the petitioner and the ██████████ causes question to arise regarding the petitioner's relationship with this organization. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Consequently, the AAO requested that the petitioner provide evidence to establish that ██████████ and the ██████████ ██████████ are one and the same non-profit organization since the Form ETA 750 was accepted on June 19, 2002. In addition, the AAO requested evidence demonstrating the nature of the relationship between the petitioner and the ██████████ the dates such relationship has existed, and an explanation for the discrepancies on the Form 990 tax returns described above. Furthermore, the AAO asked the petitioner to submit documentation to establish that the ██████████ has the legal capacity to assume and be responsible for the financial obligations of the petitioner.

Finally, the AAO requested that the petitioner submit the following additional evidence in order to meet its burden of proving by a preponderance of the evidence that it had the continuing ability to pay the proffered wage from the priority date:

- Documentation certifying that the employee compensation paid by the petitioner to the beneficiary in 2002, 2003, 2004, 2005, 2006, and 2007, as listed on the Form W-2 statements discussed above, was reported to the Internal Revenue Service (IRS) and the Social Security Administration (SSA);
- Copies of the beneficiary's federal tax returns for 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009;
- Copies of any Form 1099-MISC or Form W-2 statements issued by the petitioner to the beneficiary in 2008, 2009, and if available, 2010; and
- Copies of the petitioner's Form 990 tax returns or audited financial statements for 2002, 2003, 2006, 2007, 2008, and 2009.

In response, counsel declares that the [REDACTED] is the umbrella organization under which the petitioner, a bona fide non-profit tax exempt organization since 1973, operates. Counsel contends that the Form 990 tax returns for both the petitioner and [REDACTED] reflect the organizations' relationship. Counsel states that beginning in 2005, the petitioner's financial reporting and documentation was prepared and submitted in the form of combined financial statements, combined with those of the parent organization, [REDACTED]. Counsel notes that all wages paid by the petitioner to the beneficiary since 2002 have been reported to both the IRS and SSA. Counsel includes copies of the beneficiary's tax return transcripts for 2002, 2003, 2004, 2005, 2006, and 2007, a copy of the beneficiary's SSA Earning Statement dated February 23, 2010, a copy of the beneficiary's SSA computer printout of earnings dated February 16, 2011, a copy of a letter dated May 27, 1994 from the IRS verifying the petitioner's status as a tax exempt organization since January 1993, copies of [REDACTED] financial statements for 2001 to 2002, 2002 to 2003, 2003 to 2004, 2004 to 2005, 2005 to 2006, 2007 to 2008, and 2008 to 2009, copies of [REDACTED] Form 990 tax returns for 2001, 2002, 2004, 2005, 2006, 2007, and 2008, copies of the petitioner's Form 990 tax returns for 2001, 2002, 2005, 2006, 2007, and a copy of the petitioner's Form 990EZ, Short Form Return of Organization Exempt From Income Tax, for 2008, as well as previously submitted documentation.

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, 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).

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.

The record contains Form W-2 statements which reflect that the petitioner paid the beneficiary wages in the amount of \$12,000.00 (\$14,000.00 less than the proffered wage of \$26,000.00) in 2002 and wages in the amount of \$14,400.00 (\$11,600.00 less than the proffered wage of \$26,000.00) in 2003, 2004, 2005, 2006, and 2007. The record also contains a copy of the beneficiary's SSA computer printout of earnings dated February 16, 2011. This printout shows that the petitioner paid the beneficiary wages in the amount of \$3,600.00 (\$22,400.00 less than the proffered wage of \$26,000.00) in 2008. The petitioner did not submit any other Form W-2 statements reflecting wages paid by the petitioner to the beneficiary for 2008, 2009, and 2010 despite the AAO's specific request to provide these documents in the RFE issued on January 4, 2011. Consequently, the petitioner failed to establish that it paid the beneficiary the full proffered wage in 2002, 2003, 2004, 2005, 2006, 2007, and 2008. Further, the record is absent any evidence demonstrating that the petitioner paid the beneficiary any wages in 2009 and 2010. While it is noted that the petitioner must establish its ability to pay the full proffered wage of \$26,000.00 in 2009 and 2010, it is only obligated to show that it can pay the difference between the proffered wage and wages already paid from 2002 to 2008.

If, as in this case, 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, the petitioner showing that it 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).

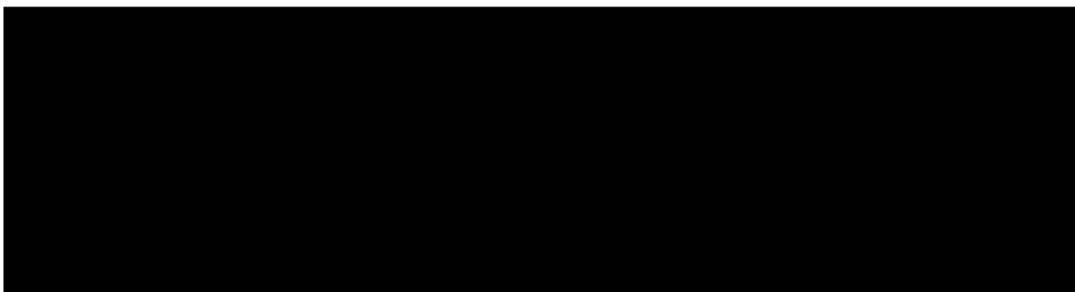
With respect to depreciation, the court in *River Street Donuts* noted:

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 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).

The record closed on February 18, 2011, with the receipt of the petitioner's response to the AAO's RFE. As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's tax return for fiscal year 2008-2009 is the most recent return available. The proffered wage is \$26,000.00. Line 18 of the petitioner's Form 990 tax returns for 2002, 2003, 2004, 2005, 2006, and 2007 and Form 990EZ tax return for 2008 demonstrate its excess (or deficit) as follows:



¹ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

² Although the petitioner failed to submit a copy of its Form 990 tax return for 2003 despite the AAO's direct request for such document in the RFE issued on January 4, 2011, a copy of the petitioner's Form 990 tax return for 2003 was obtained from [REDACTED] (accessed on April 28, 2011) and incorporated into the instant record of proceedings.

Therefore, for the fiscal years 2002, 2003, 2004, 2005, 2006, 2007, and 2008 the petitioner did not have sufficient net revenue to pay the difference between the proffered wage and wages actually paid to the beneficiary. In addition, it is not possible to determine the petitioner's net revenue in fiscal year 2009 as the petitioner failed to provide a copy of its federal tax return for fiscal year 2009-2010 despite the AAO's direct request for such document in the RFE issued on January 4, 2011.

As an alternative 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. It is noted that both the Form 990 tax return and Form 990EZ tax return do not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted audited balance sheets. While the petitioner provided balance sheets for 2002, 2003, and 2004, these balance sheets are unaudited and, therefore, cannot be considered as credible evidence demonstrating that the petitioner possessed sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2002, 2003, and 2004. Furthermore, the record does not contain either the audited balance sheets or the audited financial statements of the petitioner for the years 2005, 2006, 2007, 2008, 2009, and 2010. Consequently, it cannot be determined if the petitioner possessed sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2005, 2006, 2007, and 2008 or the full proffered salary in 2009 and 2010.

Counsel declares that the [REDACTED] is the umbrella organization under which the petitioner, a bona fide non-profit tax exempt organization since 1973, operates. Counsel contends that the Form 990 tax returns for both the petitioner and [REDACTED] reflect the organizations' relationship. Counsel states that beginning in 2005, the petitioner's financial reporting and documentation was prepared and submitted in the form of combined financial statements, combined with those of the parent organization, [REDACTED]. Although the petitioner's Form 990 tax returns for 2005, 2006, and 2007; the petitioner's Form 990EZ tax return for 2008; [REDACTED] Form 990 tax returns for 2004, 2005, 2006, 2006, 2007, and 2008; and, [REDACTED] financial statements for 2005 to 2006, 2007 to 2008, and 2008 to 2009, all reflect a relationship between the petitioner and the [REDACTED], the evidence in the record is unclear to the specific nature of this relationship. Furthermore, the FEIN of the petitioner is [REDACTED] while the FEIN of the [REDACTED] is [REDACTED]. The fact that the petitioner and NCFJEA do not possess the same FEIN reflects that the petitioner and [REDACTED] are separate and distinct entities and that the revenue and assets of [REDACTED] will not be considered in determining the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity, the assets of its trustees, board members, or officers 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. 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." Thus, the evidence in the record does not establish that the petitioner and [REDACTED] are one and the same organization for the purpose of establishing the petitioner's continuing ability to pay the proffered wage since the priority date in the instant case.

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

In this matter, no specific detail or documentation has been provided similar to *Sonogawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonogawa* are present in this matter. To the contrary, the petitioner appears to lose money every year, and the only evidence pertaining to its current assets is both unaudited and incomplete. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date.

The appeal will be dismissed 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.