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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

[Redacted]

DATE:

AUG 29 2012

OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE:

Petitioner:
Beneficiary:

[Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.¹

The petitioner is a meat processor. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, the petition is to be accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) (labor certification); however, the petitioner submitted only a copy of a labor certification. The director determined: (1) that the petitioner failed to submit an original labor certification; (2) 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; and, (3) that the petitioner had not established that the beneficiary possessed the minimum education, experience, and training required to perform the offered position by the priority date. 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 February 19, 2009 denial, the issues in this case are: (1) whether or not the petitioner submitted the original labor certification; (2) 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; and (3) whether or not the beneficiary possessed the minimum education, experience and training required to perform the offered position by the priority date.

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.

Labor Certification

The record lacks an original Form ETA 750. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification.

¹The 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).

The regulation at 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications*, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [USCIS].

(emphasis added).

The regulation at 8 C.F.R. § 204.5(g) provides: “In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.” (emphasis added). Counsel has not provided any authority permitting USCIS to accept a photocopy of the ETA 750. The regulation at 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the DOL only upon the written request of a consular or immigration officer.² The record contains no evidence that the petitioner has obtained an official duplicate labor certification or requested the director to do so.

On appeal, counsel asserts that the original labor certification accompanied his appellant brief; however, the record does not contain the original labor certification. 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Therefore, the record lacks the required original labor certification.

Continuing Ability to Pay the Proffered Wage

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

² The regulation at 20 C.F.R. § 656.30(e) provides:

(e) Certifying Officers shall issue duplicate labor certifications only upon the written request of a Consular or Immigration Officer. Certifying Officers shall issue such duplicate certifications only to the Consular or Immigration Officer who submitted the written request. An alien, employer, or an employer or alien's agent, therefore, may petition an Immigration or Consular Officer to request a duplicate from a Certifying Officer.

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the copy of the Form ETA 750 in the record indicates that it was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.64 per hour (\$24,211 per year). The Form ETA 750 states that the position requires six years of grade school education, six months of on-the-job training, and two years of experience as a butcher or three months of carpentry experience in a mill using nail guns, sanders, glue, and fabrication of cabinets. Additionally the beneficiary is required to efficiently use knives and cutlery implements.

The labor certification was filed by [REDACTED] and the DOL changed the name of the employer to [REDACTED] on July 5, 2007, the same day the DOL approved the labor certification. Therefore, sometime between the filing of the labor certification on April 27, 2001 and its approval on July 5, 2007, a successor-in-interest relationship occurred. However, the record does not contain information regarding the date that the petitioner became the successor-in-interest to [REDACTED]. The petitioner must establish that [REDACTED] had the ability to pay the proffered wage from April 27, 2001 until the date that the transfer of the business occurred, and must establish that the petitioner the ability to pay the proffered wage from the date of the transfer until the beneficiary obtains legal permanent residence.

The record contains a copy of the petitioner's Certificate of Incorporation indicating that petitioner was incorporated on August 15, 2005. The record also indicates the petitioner elected S corporation status effective January 1, 2006, thus from August 15, 2005 through December 31, 2005, the petitioner was operating as a C corporation.³ On the petition, the petitioner claimed to have been established in 1973 and to currently employ 48 workers.⁴ According to the tax returns in the record,

³This information is found on page 1 of the petitioner's tax returns.

⁴The information provided on the petition conflicts with the petitioner's Certificate of Incorporation and the information on page 1 of its tax returns. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such

the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 6, 2007, the beneficiary did not claim to have worked for the petitioner, but did claim to work for Long Hing from October 1999 until March 6, 2007, when she signed the labor certification.

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'l Comm'r 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'l Comm'r 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 petitioner has submitted copies of Internal Revenue Service (IRS) Forms W-2 it issued the beneficiary for 2006, 2007, and 2008,⁵ which reflect the wages paid to the beneficiary as shown in the table below:

- In 2006, Form W-2 reflects wages of \$8,757.⁶ Wage shortfall of \$15,454.⁷
- In 2007, Form W-2 reflects wages of \$10,205. Wage shortfall of \$14,006.
- In 2008, Form W-2 reflects wages of \$18,522. Wage shortfall of \$5,689.

inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not reconciled this inconsistency.

⁵The petitioner has also submitted copies of Forms W-2 issued to the beneficiary by [REDACTED] Corporation for 2004 and 2005; however, there is no evidence that [REDACTED] was a successor to [REDACTED] or a predecessor to the petitioner. It has a different federal employer identification number (EIN) than the petitioner. Therefore none of the wages shown on the Forms W-2 issued by [REDACTED] will be considered as evidence of the petitioner's ability to pay the proffered wage.

⁶ The wage for each year is the amount shown in Box 1.

⁷ The wage shortfall is the difference between the proffered wage and the paid wage.

Therefore, the petitioner has not established that it paid the full proffered wage to the beneficiary in 2006 through 2008, and it must establish that it can pay the wage shortfall in those years, and the full proffered wage in 2001 through 2005 and 2009 forward to the present time.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

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.⁸ 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 record before the director closed on July 31, 2007 with the receipt by the director of the petition. On appeal, the petitioner submitted only partial tax returns for itself for 2005, 2006, and 2007. The record contains no evidence of [redacted] ability to pay.

In 2005, the petitioner was operating as a C corporation. For a C corporation, USCIS considers net income to be the figure shown on Line 28 on page one of the Form 1120, U.S. Corporation Income Tax Return. The petitioner submitted only page 3 of its 2005 tax return, which does not contain the information needed to determine either its net income or its net current assets for 2005.

In 2006 and 2007, the petitioner was structured as an S corporation. Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 26, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

The petitioner submitted only pages 1 and 2 of both its 2006 and 2007 tax returns. Although page one contains line 21 and page 2 contains a portion of Schedule K, the first two pages of the petitioner’s tax return do not contain the information needed to determine the petitioner’s net income or net current assets for either 2006 or 2007.

⁸According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it or its predecessor 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, net income or net current assets.

On appeal, counsel asserts in his brief that the petitioner's tax returns were submitted with his brief. As discussed above, the petitioner submitted only partial returns for itself for 2005, 2006, and 2007. The record contains no evidence of [REDACTED] ability to pay.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 (Reg'l Comm'r 1967). 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 the instant case, there is no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced source. 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.

The evidence submitted does not establish that the petitioner and its predecessor had the continuing ability to pay the proffered wage beginning on the priority date.

Beneficiary Qualifications: Experience and Training

The petitioner has also not established that the beneficiary is qualified for the offered position. 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 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'r 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the copy of the labor certification in the record states that the offered position requires six years of grade school education, six months of on-the-job training, and two years of experience as a butcher or three months of carpentry experience in a mill using nail guns, sanders, glue, and fabrication of cabinets. Additionally the beneficiary is required to have the efficient use of knives and cutlery implements.

On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

1. With [REDACTED] from October 1999 until March 6, 2007 as a butcher.
2. With [REDACTED] from May 1999 to October 1999 as a butcher.
3. With [REDACTED] with no address given, from February 1999 until April 1999 as a carpenter.

The beneficiary's claimed qualifying experience and training must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one letter. It is from [REDACTED] who states that beneficiary worked for him for a three-year period chopping poultry utilizing tools (knives). The letter does not give the exact dates of employment, nor does it list whether the beneficiary's employment was full- or part-time. Additionally, this employment was not listed on the labor certification and is not supported by independent evidence substantiating the beneficiary was ever employed at [REDACTED]⁹ Therefore, as noted in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

⁹Such independent evidence includes an employment contract, payroll documents, IRS Forms W2 or 1099, and/or paystubs.

On appeal, counsel asserts that evidence of the beneficiary's experience was submitted with his brief. Only [REDACTED] letter was submitted with counsel's brief and as discussed above, [REDACTED] letter falls short of establishing the beneficiary possessed the required experience.

The evidence in the record does not establish that the beneficiary possessed the required experience and training set forth on the labor certification by the priority date.

Further, the record contains no evidence establishing that the beneficiary has the required six years of grade school education. The copy of the labor certification in the record does not list any education for the beneficiary. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Wrong Category

Beyond the decision of the director, the petitioner had not established that the petition requires at least two years of training or experience and, therefore, the beneficiary cannot be found qualified for classification as a skilled worker. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, in addition to the special requirements listed at Item 15 of the Form ETA 750, the labor certification requires six years of grade school education, six months of on-the-job training, and two years of experience as a butcher *or* three months of carpentry experience in a mill using nail guns, sanders, glue, and fabrication of cabinets. Therefore, an applicant may qualify for the position with less than two years of training or experience, as an applicant may qualify for the position with six years of grade school education, six months of on-the-job training, and three months of carpentry experience in a mill using nail guns, sanders, glue, and fabrication of cabinets. However, the petitioner requested the skilled worker classification on the Form I-140. The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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 (9th 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).

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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.