

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

Date:

DEC 13 2012

Office: TEXAS SERVICE CENTER

FILE:



IN RE:

Petitioner:

Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

Thank you,

Ron Rosenberg
Acting 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 petition will be remanded to the director in accordance with the following.

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 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.

The petitioner is a "training school headquarters" and seeks to employ the beneficiary permanently in the United States as a corporate administrative assistant. The petition was filed for classification of the beneficiary under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), which 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 petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The director determined that the petitioner failed to demonstrate that International Communication Solutions, Inc. is a successor-in-interest to Workforce Advantage.

Successor-In-Interest

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

¹ 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).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The director determined that the petitioner had not established that International Communication Solutions Inc. is the successor-in-interest to Workforce Advantage. The director noted that the Federal Tax Identification Number (FEIN) listed on the Form I-140 tied to the name Work Force Advantage is the same FEIN as listed on the tax returns for International Communication Solutions. On appeal, the petitioner submitted a Certificate of Trade Name for Union County, dated June 29, 2000 that states, "The name under which the business is now or is about to be conducted is Workforce Advantage." This Certificate of Trade Name does not list the name of the business that will be operating under the trade name of "Workforce Advantage." However, the record contains several years of audited financial statements which state that "Workforce Advantage" is the trade name of International Communication Solutions. Therefore, the AAO concludes that International Communication Solutions is doing business as Workforce Advantage. The portion of the director's decision stating that International Communication Solutions had not established a successor-in-interest relationship to Workforce Advantage is withdrawn. However, the petitioner has not established that International Communication Solutions, t/a Workforce Advantage, is a successor-in-interest to Universal Communication Enterprise, the original entity on the labor certification. As set forth below, however, that is not necessary in this matter.

The Form ETA 750 was initially filed by Universal Communication Enterprise with an address of 66 Elmora Avenue, Elizabeth, New Jersey 07202. A correction was made to the Form ETA 750, prior to certification, and the employer's name was changed to Workforce Advantage. The Form I-140 lists the petitioning employer as "Workforce Advantage" with an Internal Revenue Tax number

The regulation at 20 C.F.R. § 656.30(c)(2) provides as follows:

656.30 - Validity of and invalidation of labor certifications.

...

(c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

...

(2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form

ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

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.

When the present Form ETA 750 was filed and accepted by the U.S. Department of Labor, (DOL), the DOL would permit the substitution of a successor employer² if it occurred before a final determination where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.30(c)(2). See *Horizon Science Academy*, 06-INA-46 (BALCA Mar. 8, 2007) [when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages]; See also *American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991) [substitution made before final rebuttal to CO]; *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June 13, 1990). DOL would also allow a new employer to substitute where it is the same job opportunity in the same area of intended employment. See also *Law Offices of Jean-Pierre Karnos*, 03-INA- (BALCA May 20, 2004) [where there was a new employer who took over the law practice of Karnos on his death, a new labor certification does not have to be filed for an accountant applicant where it is the same job opportunity in the same area of intended employment including the same job duties and wages.]

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), a binding, legacy Immigration and Naturalization Service ("INS") decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary

² Substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although the regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." 20 C.F.R. § 656.11(b).

for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-83 (emphasis added).

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. The change in business was accepted by the DOL on July 30, 2007. Here, similar to a successor, the initial entity, Universal Communication Enterprise, must establish its ability to pay the proffered wage from April 30, 2001 until July 30, 2007, the date of amendment. Workforce Advantage, the trade name of International Communication Solutions, must establish its ability to pay the proffered wage from July 30, 2007 onward. As the petitioner has not had the opportunity to address this issue, the AAO will remand this to the director to give the petitioner such an opportunity.

Ability to Pay the Proffered Wage

The petitioner must establish that the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. As this petition involves the substitution of the labor certification employer which occurred in 2007, prior to certification, the petitioner must demonstrate that Universal Communication Enterprise had the ability to pay the proffered wage from the priority date on April 30, 2001 until July 30, 2007, and that Workforce Advantage can establish its ability to pay the proffered wage from July 30, 2007 onward. Therefore, until this is established, the petitioner has not demonstrated the 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 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.

Here, the Form ETA 750 was accepted on April 30, 2001, the priority date. The proffered wage as stated on the Form ETA 750 was \$1,016.40 per week (\$52,852.80 per year) based on a 40-hour work week.

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.³

On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of \$1,012,614.00, and to currently employ 50 workers. The petitioner submitted tax returns for International Communication Solutions, [REDACTED] C corporation. These tax returns are based on the calendar year for 2001 and 2002 and are based on the year ending June 30th for fiscal tax years 2003 through 2007. As stated above, the petitioner must provide evidence of Universal Communication Enterprise's ability to pay the proffered wage from April 30, 2001 until July 30, 2007, and that Workforce Advantage can establish its ability to pay the proffered wage from July 30, 2007 onward. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to have worked for Universal Communication Enterprise from 1991 until at least April 19, 2001, the date of signature.

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

³ 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).

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 not established that it employed and paid the beneficiary the full proffered wage from the priority date onward. The only evidence in the record regarding the wages paid to the beneficiary is a W-2 Form for 2008 from International Communication, which states the same FEIN as listed on the Form I-140 for Workforce Advantage, which demonstrates that the beneficiary was paid \$31,050.77, which is \$21,802.03 short of the proffered wage. The record does not contain any evidence of pay for the years 2001 to 2007 and the original entity listed on the labor certification must establish its ability to pay the full proffered wage in these years.

As stated above, evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *See* 8 C.F.R. § 204.5(g)(2). 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 or audited financial statements, 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 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.

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).

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 February 17, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.

The petitioner submitted tax returns for International Communication Solutions, [REDACTED]. As stated above, the initial entity that filed the labor certification is Universal Communication Enterprise. Therefore, Universal Communication Enterprise would need to establish its ability to pay the proffered wage from April 2001 until July 2007.

However, even if all the tax returns for International Communication Solutions were considered, which as set forth above, they would not be, they would demonstrate its net income for calendar years 2001 and 2002, and fiscal years 2003 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$229,401.00.
- In 2002, the Form 1120 stated net income of \$32,872.00.
- In 2003, the Form 1120 stated net income of \$23,569.00.
- In 2004, the Form 1120 stated net income of (\$138,359.00).
- In 2005, the Form 1120 stated net income of \$0.00.
- In 2006, the Form 1120 stated net income of (\$156,286.00).
- In 2007, the Form 1120 stated net income of \$29,671.00.

Therefore, the tax returns submitted would have shown sufficient net income to pay the proffered wage only for 2001 and insufficient net income for 2002, 2003, 2004, 2005, 2006, and 2007. However, as stated above, the record does not contain, as required, the original labor certification applicant's tax returns or evidence that it had the ability to pay the proffered wage for 2001 through 2007. Therefore, the petitioner has not demonstrated the ability to pay 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.⁴ 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 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 tax returns submitted demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$1,830.00.
- In 2002, the Form 1120 stated net current assets of (\$36,419.00).
- In 2003, the Form 1120 stated net current assets of \$42,180.
- In 2004, the Form 1120 stated net current assets of (\$21,481.00).
- In 2005, the Form 1120 stated net current assets of (\$112,749.00).
- In 2006, the Form 1120 stated net current assets of \$174,531.00.
- In 2007, the Form 1120 stated net current assets of \$308,079.00.

While the tax returns would show sufficient net current assets to pay the proffered wage for the 2006, and 2007 and insufficient net current assets for 2001, 2002, 2003, 2004, and 2005, the required evidence would be Universal Communication's ability to pay the proffered wage from 2001 through 2007. Therefore, the petitioner's ability to pay the proffered wage for these years cannot be established through the tax returns submitted with the exception of the period from July 2007 onward, as evidence of International Communication Solution's ability to pay the proffered wage would be required from July 2007 onward.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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, its net income or net current assets.

⁴According 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.

As the labor certification is based on the substitution of the employer, and not successorship as the director states, the petition will be remanded to allow the petitioner an opportunity to establish that the initial entity that filed the labor certification has the ability to pay the proffered wage from the priority date onward, until the date of substitution. Workforce Advantage must establish its ability to pay the proffered wage from July 2007 continuing onward.

Additionally, the AAO notes that the experience letter in the record, submitted in attempt to establish that the beneficiary qualifies for the position on the labor certification, from the director of CELATS did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The petitioner must address this discrepancy on remand.

Additionally, a Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on January 27, 1997. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, a letter from the principal tenant of the apartment the couple allegedly rented beginning October 15, 1996, the date of their marriage, and a copy of a marriage certificate between the beneficiary and the U.S. Citizen spouse.

In connection with the Form I-130, a decision was issued by the district director of the USCIS office located in Newark, New Jersey on August 11, 2005. The director denied the Form I-130 due to evidence from an internal investigation demonstrating that the beneficiary had divorced her prior spouse "on paper" to marry a U.S. Citizen for an immigration benefit and had returned to live with her ex-husband based, in part, on the following evidence:

- Following the beneficiary's Adjustment of Status interview with her U.S. Citizen spouse, the beneficiary filed an application to renew her employment authorization card and listed a 20 MacArthur Court street address; an internal investigation determined that her U.S. Citizen spouse had never lived there.
- Commercial databases stated that the beneficiary and her prior spouse had lived at the 1131B University Terrace street address during their marriage as early as 1993 and that her initial spouse lived at 1131B University Terrace address after his and the beneficiary's divorce as early as March 1997 (this was the alleged marital address of the beneficiary and her U.S. Citizen spouse as of their marriage on October 15, 1996).
- The beneficiary's ex-husband adjusted status on February 12, 1999 through a U.S. Citizen; the I-130 petition filed in that case also listed the 1131B University Terrace address as their residential address.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)⁵ no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

Section 204(c) would bar approval of an I-140 petition if “the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.” As the director did not raise this issue, the petition is remanded for consideration of this issue. The director may request evidence related to this issue and the other issues set forth above and allow the petitioner an opportunity to respond. Following consideration of the petitioner’s response, the director should issue a new decision.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision of February 27, 2009, is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

⁵ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.